

JOSÉ MAURÍCIO MACHADO
CARLOS AUGUSTO DA CRUZ
MAURI BÓRNA
RENATA ALMEIDA PISANESCHI
ROBERTO FLEURY A. CAMARGO
RENATO SILVEIRA
ROCHELLE RICCI
EDUARDO AMIRABILE DE MELO
LORENA MORAIS XIMENES CAMPOS
ANDRÉ T. JUNQUEIRA AMARANTE
RAPHAEL OKANO P. DE OLIVEIRA
MILTON DORTA NETO
RAFAELA SCORZA DE A. CASTRO
LÚCIO BRENO PRAVATTA ARGENTINO
LEONARDO URQUIZA F. PORTELADA
RENATA ÁBBUD DE OLIVEIRA
IVA MARIA SOUZA BUENO
MANUELA CURTO DUARTE SILVA
GUSTAVO GOMES BASILIO
CASSIO M. GUALBERTO NEVES
EMANOIL CONSTANTINO SAMIOTIS
ISABELA RIBEIRO FERRARI
GIOVANNA HOFF DOMINGUES
MARIA ALMEIDA SANCHES

ISABEL A. BERTOLETTI
EDMILSO GOMES DA SILVA
LISIANE B. H. MENOSSI PACE
FABIO MEDEIROS
LUCIANA FELISBINO
SORAIA MONTEIRO DA MATTA
LANA PATRÍCIA PEREIRA BAPTISTA
GABRIEL CALDIRON REZENDE
FERNANDO FARINELLI
STEPHANIE JANE MAKIN
GABRIELA PIZANI GONÇALVES
PALOMA YUMI DE OLIVEIRA
GUILHERME LANZELLOTTI MEDEIROS
NATÁLIA MAZIERO DE OLIVEIRA
AMANDA DE OLIVEIRA GOMIDE
MABEL DE ÁVILA SANTOS
MARILIA LUIZA DA COSTA RAMOS
BEATRIZ DE CARVALHO EDINALDO
RODRIGO GONZAGA DE OLIVEIRA
KAROLINA DE MELLO PEREIRA
LETÍCIA MARTENA ANDRADE
ALISSON GUILHERME S. DOMINGOS
PATRIK MATOS GONÇALVES

LUÍS ROGÉRIO G. FARINELLI
CRISTIANE M. S. MAGALHÃES
RICARDO M. DEBATTIN DA SILVEIRA
ERIKA YUMI TUKIAMA
GUSTAVO DE FREITAS LEITE
CAROLINA ROMANINI MIGUEL
MARCEL AUGUSTO SATOMI
MIRELLA ANDREOLA DE ALMEIDA
ELAINE ALVES FERREIRA
ANDRÉ BLOTTA LAZA
DANIELA CATTUCCI CARONE
LILIAN R. B. MALATEAUX
RAPHAEL GOUVEIA BELLO
ROGÉRIO GASPARI COELHO
RENATA DALLA TORRE AMATUCCI
ROBERTO MAGNO RIBEIRO NETO
AMANDA REGIANI ZELI
ANNA RIZZO MICELI
RENATO CARVALHO DE CASTRO
INGRID CRISTINA SILVA DE SOUZA
GABRIELLA OLINTO DOS ANGELOS
VICTOR ANTONIO BRUNO MOREIRA
JOSÉ MARIA QUEIROZ JUNIOR

JÚLIO M. DE OLIVEIRA
ROSIENE SOARES NUNES
DANIEL LACASA MAYER
PAULO ROGÉRIO GARCIA RIBEIRO
MAURO TAKAHASHI MORI
JULIANA MARI TANAKA
SUZANA CAMARÃO CENCIN
FERNANDA HENNEBERG BENEMOND
PEDRO CAVALCANTI BOTELHO
AMANDA ALVES BRANDÃO
FERNANDO V. A. TELES DA SILVA
NATHÁLIA DE A. MARQUES FRAGA
LOUISE SIQUEIRA CUBA
CAIO FINK FERNANDES
DANIELLE RAMOS DA SILVA
MARTHINA GASQUES TEIXEIRA
VICTOR BULCÃO MARTINELLI PINTO

CONSULTOR
NELIO B. WEISS



SÃO PAULO
AV. BRIGADEIRO FARIA LIMA, 1656
11º ANDAR (01451-918)
SÃO PAULO - SP - BRASIL
T. + 55 11 3819 4855
BRASÍLIA
COMPLEXO BRASIL XXI - BLOCO A
SHS QUADRA 06 CONJ. 6 SALA 808
ASA SUL (70316-100)
BRASÍLIA - DF - BRASIL
T. + 55 61 3039 8081
RIO DE JANEIRO
PRAÇA FLORIANO, 19 - 4º ANDAR
CENTRO (20031-050)
RIO DE JANEIRO - RJ - BRASIL
T. + 55 21 3550-3000
www.machadoassociados.com.br

LEGAL LETTER / JANUARY 2017

EFFECTS OF THE SUSPENSION OF THE OIL & GAS SPECIAL CUSTOMS REGIME IN THE STATE OF RIO DE JANEIRO ¹

Júlio M. de Oliveira and Fernando Telles da Silva ²

The state of Rio de Janeiro has suspended the REPETRO, an essential special customs tax regime for companies of the Oil & Gas industry. Nevertheless, some negative effects of the measure may be mitigated.

1. The REPETRO is a special customs regime that aims to foster the development of the oil & gas industry in Brazil. It is governed by the Brazilian Federal Revenue Service (FRS) Normative Instruction 1415/13 and State VAT (ICMS) Agreement 130/07. The main benefits of REPETRO are:

- The full suspension of federal taxes on the temporary import of goods, ICMS exemption or its levy at an effective tax rate of 1.5% if goods are to be employed during Research Phase, or ICMS levy at an effective tax rate of 3% (not recoverable) or 7.5% (recoverable) if the use occurs during production phase.
- The ‘pro-forma export’ that, for tax purposes, deems the sales to foreign entities as an effective export, even if the goods never leave Brazil, meaning that the ownership is transferred to an entity abroad but the final goods remain in Brazil to be employed by a REPETRO beneficiary. Exports in Brazil are exempt from federal and state taxes.
- The possibility to import under the drawback special regime and to terminate it with a pro-forma export. Under such regime, a Brazilian company may acquire raw materials with suspension of the taxes levied on the manufacturing of products to be exported, and the tax suspension is converted into tax exemption upon the export of the manufactured products (actual export or pro-forma).

¹ This article was first published by **International Tax Review** in January 2017 on www.internationaltaxreview.com

² Júlio M. de Oliveira and Fernando Telles da Silva are members of the Indirect Tax and Customs area of **Machado Associados**



2. In 2008, the state of Rio de Janeiro passed ICMS Agreement 130/07 by the enactment of State Decree 41142, thus granting, at state level, the following benefits:

- Reduction of the ICMS taxable basis for goods that will be imported under the REPETRO temporary admission regime, and used during the production phase, comprising an effective tax rate of 3% (not recoverable) or 7.5% (recoverable).
- ICMS exemption for goods imported under the REPETRO temporary admission regime to be used in the research phase (alternatively, the state could charge a 1.5% rate, not entitling the company to credits).
- ICMS exemption regarding previous transactions with goods that will be subject to a pro-forma export and, subsequently, imported under the REPETRO temporary admission regime.

3. Amid the severe economic crisis that is affecting the State of Rio de Janeiro, the State Legislative Assembly decided to suspend the effects of State Decree 41142 by enacting Legislative Decree 2/2016. Hence, since its publication on December 15 2016, the above benefits have ceased to be valid in the state of Rio de Janeiro.

4. However, from a practical standpoint, the suspension of the REPETRO benefits will most likely disrupt Brazilian manufacturers, who use pro-forma exports to terminate their Drawback licenses, but might not affect service providers, who usually import vessels or other equipment under the REPETRO temporary admission regime for the local rendering of services.

5. This is because, as we mentioned in a [previous article](#), the Brazilian Federal Supreme Court (STF) issued a ruling (Extraordinary Appeal #540.829) in September 2014, asserting that the triggering event of the ICMS levied on imports will only occur if the goods' ownership is transferred to the Brazilian party and, even though such ruling regards the import of aeronautic equipment under a leasing agreement, it has an *erga omnes* effect (that is, general repercussion), meaning that such STF ruling is a leading case binding similar decisions of the lower courts going forward.

6. Hence, based on such ruling, most companies performing temporary imports with no transfer of ownership have filed lawsuits and obtained a preliminary injunction to stay the ICMS collection on temporary imports under the REPETRO. Consequently, service providers should continue to benefit from the ICMS exemption, as it will remain valid after the suspension brought by State Decree 41142.

7. Conversely, local manufacturers will be targeted, as they use the pro-forma export to sell to foreign companies with ICMS exemption – which might be questioned as the goods never actually physically leave Brazil – and duly terminate their drawback concessions.



8. Furthermore, henceforth, if the goods imported under the REPETRO temporary admission regime are subject to interstate transactions that involve the state of Rio de Janeiro, the companies may also be questioned by the state of Rio de Janeiro's tax authorities. This is because paragraph 3 of clause 7 of ICMS Agreement 130/07 establishes that goods benefited by REPETRO will be subject to the ICMS only once (on the import), even if the goods are subject to interstate transactions. Hence, with the suspension brought by State Decree 41142, the applicability of the rules of the ICMS Agreement 130/07 may be put into question by Rio de Janeiro.

9. In conclusion, although the intention of the Rio de Janeiro Legislative Assembly is to increase its tax collection, the decision to suspend the REPETRO benefits may have the opposite result, as manufacturers located in the State of Rio de Janeiro might consider the possibility of moving to other states that respect the validity of the REPETRO benefits, thus leading to higher unemployment rates and worsening the effects of the crisis in Rio de Janeiro.

São Paulo, January 2017

MACHADO ASSOCIADOS INFORMS:

- On February 21 and 22, Luís Rogério G. Farinelli, partner of the Indirect Taxes, Transfer Pricing and International Taxation areas, will participate in the TP Minds Americas Conference, in Miami. The event will be attended by tax directors of firms and international corporations and will discuss topics and case studies, relevant in the area of Transfer Pricing.

This legal letter contains information and general comments on the matter. In specific cases, it is advisable to rely on proper legal assistance before adopting any concrete actions relating to the matters dealt with herein.