

Legal Advice No. 1 of July 29, 2011

DOU of 8.9.2011

The differences in the calculation of depreciation of the asset immobilized due to the provisions in the 3rd paragraph of art. 183 of the Law n° 6404, of 1976, with the alterations introduced by the [Law n° 11638, of 2007](#), and by the [Law n° 11941, of 2009](#), will not have effect for the determination of the real profit and the calculated basis of CSLL of the legal entity subject to RTT, and the accounting methods and criteria in force on December 31st, 2007 must be considered for tax purposes.

Doubts have been raised in the scope of Brazilian Secretariat of Federal Revenues (RFB) about the deductibility on depreciation of assets after the entry in force of the Transition Tax Regime (RTT), mentioned in art. 15 of [Law n° 11941, of May 27th, 2009](#).

2. The doubt arises, mainly, from changes in the criteria followed for purposes of calculating on depreciation of fixed assets, mainly, caused by the inclusion of § 3 of art. 183 of Law n° 6.404 of December 15, 1976 (Corporate Law), by [Law n° 11638, of December 28th, 2007](#), and by the [Law n° 11941, of 2009](#)..

3. There are people sustaining the idea that the alterations introduced in Law No. 6404, of 1976, abovementioned couldn't have tax effects, considering the provisions of art. 15 of Law n° 11941, of 2009, once RTT seeks for tax neutrality:

"Art. 15. The Transition Tax Regime – RTT is instituted to determination the actual profit, which handles the tax adjustments due the new accounting methods and criteria introduced by Law n° 11.638 of December 28, 2007, and the arts. 37 and 38 of this Law.

§ 1st. The RTT shall remain in force until the entry in effect of the law that disciplines the tax effects of new accounting methods and criteria, seeking tax neutrality (The emphases are not from the original)

4. On the other hand, there are those who defend that the review of criteria for determining the estimated useful life and for calculating on depreciation, exhaustion and amortization would not be possibility of following new accounting methods and criteria and therefore would not be applied the above mentioned neutrality.

5. It's initially clarified that for the purposes of determination of taxes over the income for the legal entities taxed based on the real profit, the tax legislation determines that the net profit of the exercise must be determined by observing the provisions of Law n° 6404, of 1976, according to those expressly foreseen in item XI of art. 67 of the Decree-Law n° 1598, of December 26th, 1977.

6. The net profit, on its turn, is defined by art. 248 of Decree n° 3000, of March 26th, 1999 – Income Tax Regulation (RIR/1999), which disposes:

"Art. 248. The net profit of the determination period is the mathematical sum of the operational profit (Chapter V), of the non operational results (Chapter VII) and of the participations, and it must be determined observing the precepts of the commercial law (Decree-Law n° 1598, of 1977, art. 6, first paragraph, Law n° 7450, of 1985, art. 18 and Law n° 9249, of 1995, art. 4)."

7. Once the net profit is determined by starting from the commercial law, the real profit is obtained after the adjustment of additions, exclusions or compensations, according to the foreseen in art. 247 of RIR/1999:

"Art. 247. Real profit is the net profit for the determination period adjusted by additions, exclusions or compensations prescribed or authorized by this Decree (Decree-Law n° 1.598, 1977, art. 6). (The emphases are not from the original.)"

§ 1st. The determination of real profit will be preceded by the determination of net profit of each determination period observing the provisions of the commercial laws (Law n° 8981, of 1995, art. 37, first paragraph)."

8. Regarding the deductibility of the depreciation of the assets, art. 305 of RIR/1999 clarifies that:

"Art. 305. It can be computed, as a cost or charge, in each determination period, the amount corresponding to the reduction value of the assets resulting from the wear due to the use, action of nature and normal obsolescence (Law n° 4.506 of 1964, art. 57)."

9. Art. 307 of RIR/1999 handles the assets likely to be object of depreciation, while art. 309 handles the depreciation quota:

"Art. 309. The depreciation quota recordable in bookkeeping as operational cost or expense will be determined upon the application of the annual depreciation rate over the acquisition cost of the depreciable goods (Law n° 4506, of 1964, art. 56, first paragraph)." (The emphases are not from the original.)

10. It should be noted that the RIR/1999 determines that the depreciation quota to be considered as a cost or expense must be recorded in the books.

11. The annual depreciation rate should be determined by the term during which it can be expected the economic life time of the asset by the taxpayer in the production of the income, as provided in Art. 310 of RIR/1999.

"Art. 310. The annual depreciation rate will be fixed due to the term during which the asset is expected the economic life time by the taxpayer in the production of income (Law n° 4.506, of 1964, art. 57, second paragraph).

§ 1º The Secretariat of Federal Revenues will publish periodically the term of useful life fiscal time, under normal or average conditions, for each kind of asset, being assured to the taxpayer the right to compute the quota permanently suitable to the conditions on depreciation of its assets, provided that it proves the suitability, when a different rate is followed. (Law nº 4506, 1964, art. 57, § 3º)."

12. Normative Instruction SFR nº 162 of December 31, 1998, defined the fiscal quota of depreciation to be applied in the books of the legal entity, as a cost or operating expense, from the application of depreciation rates for different kinds of assets listed in its Annex I.

13. According to § 1º of Art. 310 of RIR/1999, if the taxpayer uses depreciation rate different from that one provided in The Normative Instruction SFR nº 162, 1998 shall prove its suitability. Therefore, as a general rule, the taxpayer used for the calculation of depreciation charges the taxes specified by the RFB.

14. However, the Brazilian Accounting Standards suffered numerous changes from the beginning of 2008. The Law nº 6.404, 1976, basic parameter for Brazilian Accounting Standards, in the process of bringing the Brazilian accounting records to the rules defined in the international accounting harmonization, was deeply amended by Law nº 11.638, 2007 and by Law nº 11.941 of 2009

15. Among the abovementioned alterations, the inclusion of the third paragraph to art. 183 of Law nº 6404, Of 1976, occurred in the following terms:

"Art. 183. In the balance sheet, the asset elements will be evaluated according to the following criteria:

(...)

§ 3rd The company shall effectuate, periodically, analysis of the recoverability of amounts recorded in fixed assets and intangible, in order to be:

(...)

II – reviewed and adjusted the criteria used for determination of the estimated economic useful life and for calculating on depreciation, exhaustion and amortization. "

16. By December 2007, the depreciation register rule was limited to the provisions on § 2º of art. 183, which established that the decrease in value of the elements of fixed assets would be recorded periodically in the accounts for depreciation, when the value corresponds to the loss of rights that focus on tangible assets subject to wear and tear or loss of utility per use, nature action or obsolescence.

17. With the introduction of § 3º of art. 183 of Law nº 6.404 of 1976 the accounting established a new treatment for depreciation based on its "estimated economic useful life time." The Technical Pronouncement nº 27 issued by the Accounting

Pronouncements Committee (CPC), which deals with fixed asset, defines the useful life time for accounting purposes as "the period of time during which the entity expects to use the asset, or the number of units production or similar units that the entity expects to obtain from the use of the asset."

18. According to the new accounting rule, the company must evaluate the period of time in which it intends to keep the good and estimate its residual value to obtain the depreciation rate.

19. Despite the tax norm defines that the depreciation rate should be evaluated by the term during which it can be expected the "economic useful life time of the asset", this assessment is essentially related to the wear and tear of the asset. But the new criteria used by the accounting is based on the time that the asset will generate economic benefits for the company.

20. Another verified difference refers to the assets value, which will be subject to the application of the depreciation rate. In the tax rule, according to art. 309 of RIR/1999, the expense must be calculated upon the application of the depreciation rate over the acquisition cost of depreciable assets; thus, the depreciable value is equal to the asset value. The accounting rule required for the attribution of residual value to the asset, consequently, is its depreciable value determined after the deduction of its residual value.

21. Note that the RTT, optional for the years 2008 and 2009, became mandatory in 2010 (at least until it isn't published norm that disciplines the tax effects resulting from the changes of the new accounting methods and criteria introduced in Law nº 6.404, 1976, by Law nº 11.638, 2007 and by Law nº 11.941, 2009).

22. Subjection to the RTT represents a sort of "anchor" in the tax legislation in effect on December 31, 2007, according to the provisions on art. 16 of Law nº 11.941, 2009, transcribed below:

"Art. 16. The alterations introduced by Law nº 11638, of December 28th, 2007, and by arts. 37 and 38 of this Law, which modify the recognizing criterion of revenues, costs and expenses computed in the determination of the net profit of the exercise defined in art. 191 of Law nº 6404, of December 15th, 1976, will not have effect for the purposes of determination of the real profit of the legal entity subject to RTT, and the accounting methods and criteria in force on December 31st, 2007, must be considered for tax purposes." (The emphases are not from the original.)

23. It's highlighted that the provisions in art. 16 of Law nº 11941, of 2009 corroborated the understanding that the tax neutrality during the period of subjection to RTT must be pursued, being optional or mandatory. Thus, the adjustments in the calculation of depreciation of goods of the immobilized asset determined by the third paragraph of art. 183 of Law nº 6404, of 1976, must not generate effects for the purposes of determination of the real profit of the legal entity subject to RTT.

24. And how can these effects can be neutralized?

25. The first idea that arises is to make an exclusion adjustment in the Determination Book of the Real Profit (Lalur). However, according to art. 247 of RIR/1999 previously quoted, the exclusions must be prescribed or authorized in the tax legislation, which is not the case of the situation in analysis.

26. The answer is found through the Normative Instruction RFB No. 949, of June 16th, 2009, which regulates the RTT and institutes the Transition Accounting Tax Control (Fcont). It's important to highlight the provisions in art. 3:

"Art. 3. The legal entity subject to the RTT, to reverse the effect of the use of accounting methods and different criteria from those under the tax law, based on accounting principles in force on December 31, 2007, under the terms of art. 2, it shall:

I – use the methods and criteria of the corporate legislation to determine, in its accounting bookkeeping, the result of the period before the Tax over the Income, deducted from the participations;

II– use the accounting methods and criteria applicable to the tax legislation, to which the art. 2 refers, to determine the result of the period, for tax purposes;

III – determine the difference between the values calculated in the items I and II; and

IV – adjust, exclusively in the Determination Book of Real Profit (LALUR), the result of the period, determined in the terms of item I, by the difference verified in item III.

§ 1st For the realization of the specific adjustment, which is handled by item IV of the caput, the control defined in the arts. 7 to 9 must be maintained.

§ 2nd The specific adjustment in LALUR, referred to in item IV, does not dismiss the realization of the other adjustments of addition and exclusion, prescribed or authorized by the tax legislation in force, for the determination of the tax calculus basis.

§ 3rd The other adjustments referred to in § 2^o shall be accomplished based on values kept in records of the control established in arts. 7^o to 9^o. (The emphases are not from the original.)

27. The taxpayer subject to RTT, thus, primarily must use Law No. 6404, of 1976, already considering the methods and criteria introduced by Law n^o 11638, of 2007, to reach the corporate result.

28. In a second step, shall make specific adjustments to the net profit obtained as described in item 26 in order to reverse the effect of the use of new accounting methods and criteria, finding itself the "tax result", in other words, result considering Law No. 6.404, 1976, in force on December 31, 2007

29. In these specific adjustments, in order that the tax neutrality is obtained, the taxpayer may consider the deductibility provided in Normative Instruction SFR nº 162, 1998, during its subjection to the RTT.

30. It's important to notice that the difference of the depreciation charge to be adjusted via FCont will have as its base the value of the asset calculated based on the accounting criteria in force in 2007. For example, let's analyze the case of a machine acquired by the company whose value registered in accounting statements is twenty-two thousand reais (R\$ 22,000.00), and its value in the FCont is twenty-five thousand reais (R\$ 25,000.00). The company considered in its commercial bookkeeping a depreciation rate in the period of six percent (6%) and residual value of two thousand reais (R\$ 2,000.00), and, according to Normative Instruction SRF No. 162, of 1998, the depreciation rate established is ten percent (10%). The depreciation expense registered in the accounting statements in the period is 1,200.00 (20,000.00 x 6%), while, for tax purposes, the depreciation expense would be R\$ 25,000.00 (25,000.00 x 10%). Thus, the adjustment to be done is thirteen thousand reais (R\$ 13,000.00).

31. By force of art. 21 of Law nº 11941, of 2009, the same reasoning must be applied in the determination of the calculation basis in the Social Contribution over the Net Profit (CSLL), and for the effect of calculation of the credits in the regime of non-cumulative determination of the PIS/Pasep Contribution and of the Social Security Financing Contribution (Cofins).

32. Of all the exposed, it's concluded that:

32.1. The differences in the calculation of depreciation of the immobilized asset due to the provisions in the third paragraph of art. 183 of Law nº 6404, of 1976, with the alterations introduced by Law nº 11638, of 2007, and by Law nº 11941, of 2009, will not have effect for the purposes of determination of the real profit and the calculation basis of CSLL of the legal entity subject to RTT, being considered, for tax purposes, the accounting methods and criteria in force on December 31st, 2007.

32.2. The taxpayer must effectuate the adjustment of these differences in Fcont and, consequently, proceed to the specific adjustment in Lalur, to consider the value of the depreciation charge corresponding to the difference between the depreciation charges determined considering tax legislation and the value of the depreciation charge registered in its accounting statements.

To superior consideration

PAULO ALEXANDRE CORREIA RIBEIRO
Tax-Auditor for the Brazil Federal Revenue

In agreement. To the consideration of the Tax Coordination Coordinator on Income, Patrimony and Financial Operations (Cotir) and the Tax Coordination on Production and Exterior Commerce Coordinator (Cotex).

RICARDO SILVA DA CRUZ
Dirpj Chief

In agreement. Forward to the Taxation General Coordinator.

CLAUDIA LUCIA PIMENTEL M. SILVA
Cotir Coordinator

JOÃO HAMILTON RECH
Cotex Coordinator

I approve. Forward to the Brazil Federal Revenue Secretary for approval.

FERNANDO MOMBELLI
Taxation General Coordinator
Taxation Sub secretary and Contentious-Substitute

I approve.

CARLOS ALBERTO FREITAS BARRETO
Brazil Federal Revenue Secretary