

memorandum to clients

01.03.2017

Publication of Complementary Law No. 157, dated December 29, 2016, which amends the Complementary Law of the ISS.

On Dec. 30, 2016, Complementary Law no. 157/2016 was published in the Federal Official Gazette, which, among other provisions, brings relevant changes to Complementary Law 116, dated July 31, 2003 ("LC no. 116 / 2003"), which establishes the rules to be complied by the Municipalities in the creation of the Tax on Services of any Nature ("ISSQN").

For better visualization, we point out the main changes in the topics below:

Tax Benefits

Article 8-A and §§ were added to LC no. 116/2003, defining that the minimum tax rate of the ISS will be of 2%, and also that the tax may not be object of any type of benefit (exemptions, reduction of the tax basis, etc.) which directly or indirectly results in the reduction of this tax rate, except for the services for the execution of engineering works (subitem 7.02), building repairs (subitem 7.05), and municipal transport services (subitem 16.01).

Furthermore, it provides for the nullity of the municipal legislation or of the Federal District that violates the application of the minimum tax rate, in the event the service is rendered to a service acquirer domiciled in a another municipality, thus generating to the service provider the right to the refund of the tax paid to the Municipality that issued the invalid rule.

We point out that this amendment seeks to prevent the practice of the so-termed "tax competition" among Municipalities, considering that some of them adopt legislations that grant tax benefits to Taxpayers, so that, indirectly, the "effective" tax rate levied on the service is lower than 2%.

Municipality with jurisdiction to collect the tax

In the Final Draft of the Amendment of the House of Representatives no. 15, of 2015, to the Bill of Complementary Law of the Senate no. 386, of 2012, the following changes to the Municipality with jurisdiction to collect the tax were provided for:

- Item XIX - municipal transport services (item 16): place of transport.

¹ "Art. 8-A. The minimum tax rate of the Tax on Services of Any Nature is 2% (two percent).

§ 1. The tax will not be subject to exemptions, incentives or tax or financial benefits, including of the reduction of the tax basis of presumed or granted credit, or in any other way that results, directly or indirectly, in a lower tax burden than the one resulting tax from the application of the minimum rate established in the heading, except for the services referred to in subitems 7.02, 7.05 and 16.01 of the list attached to this Complementary Law.

§ 2. The law or act of the Municipality or of the Federal District that does not respect the provisions related to the minimum tax rate set forth in this article in the case of services rendered to a service acquirer or intermediary located in a Municipality other than that in which the service provider is located is null and void.

§ 3. The nullity referred to in § 2 of this article generates to the service provider before the Municipality or the Federal District that does not comply with the provisions of this article the right to the refund of the amount actually as to Service Tax of Any Nature calculated under the null law."

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- Item XXIII – Health plans and the like (subitems 4.22 and 4.23) and veterinary medicine (subitem 5.09): municipality of the service acquirer.
- Item XXIV – Management of credit card, of any funds, client portfolios (subitem 15.01): municipality of the service acquirer. In case of credit and debit card companies, the electronic terminals and the machines are to be registered at the place of domicile of the service acquirer.
- Item XXV - Leasing of any assets (subitem 15.09) and leasing agency, factoring and franchising (subitem 10.04): municipality of the service acquirer, meaning the municipality declared as the domicile by the service acquirer.

Of the above changes, only the amendment to item XIX, of article 3, of LC no. 116/2003¹, was sanctioned, and the main change refers to municipal transport services (item 16), whose Municipality with jurisdiction to charge the ISS is now the place of transportation.

On the other hand, the inclusions of items XXII to XXV were vetoed, which provided that the Municipality with jurisdiction to collect the ISS would be that of the service acquirer for the following services **(i)** health plans and the like (subitems 4.22 and 4.23) and veterinary medicine (subitem 5.09); **(ii)** management of credit cards, of any funds, client portfolios (subitem 15.01); and **(iii)** leasing of any assets (subitem 15.09) and the agency of leasing, factoring and franchises (subitem 10.04)².

Inclusions of activities in the List of Services

The following activities were included in the List of Services charged by the ISS:

- Storage in the cloud and the like: 1.03 – Processing, storage or hosting of data, texts, images, videos, web pages, applications and information systems, among other formats, and the like.
- Inclusion of software for any media: 1.04 - Development of computer programs, including electronic games, regardless of the constructive architecture of the machine on which the software will run, including tablets, smartphones and the like.
- Streaming and similar services: 1.09 - Availability, without definitive assignment, of audio, video, image, and text contents through the Internet, subject to the immunity of books, newspapers and journals (except for the distribution of contents by providers of Conditional Access, referred to in Law no. 12,485, dated September 12, 2011, subject to the ICMS)³.
- Graphic composition: 13.05 - Graphic composition, including the design of printed graphics, photocomposition, cliché prints, zincography, lithography, and photolithography, except if intended for a subsequent trade or manufacture operation, even if incorporated in any way, to another merchandise to be object of later circulation, such as package inserts, labels, cartons, cartridges,

² We point out that the inclusion of item XXV would be contrary to the case law of the STJ on the matter, since the Court had defined that, for such services, the tax was due to the place of operational control of the Company.

³ We believe that the said requirement must be analyzed with due care as to the constitutional concept of services that requires the framing of the activity when creating, making, or performing, that is, an activity that is different from the mere access to content.

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packaging, and technical and instruction manuals, when they will be subject to the ICMS⁴.

- Insertion of advertising material in any media: 17.25 - Insertion of texts, drawings, and other advertising and publicity materials, in any media (except in books, newspapers, journals, and in the types of sound broadcasting services, as well as sounds and images of free reception)⁵.

Lastly, we point out that Complementary Law no. 157/2016 does not generate immediate effects, since its amendments will only come into force after the insertions into the municipal laws.

Schneider, Pugliese Team is at your disposal should you need any further clarification.

⁴ We highlight that the inclusion represents the consolidation of the position, rendered within an injunction, by the STF on the matter, defining that if the packaging returns to the productive process, the ICMS will be charged.

⁵ The circulation of advertising on websites may be classified in this subitem.

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