

MEMORANDUM TO CLIENTS

03.20.2015

Brazilian Federal Supreme Court (STF) – Electric Power and Telecommunications – Selectivity by reason of Essentiality – Unconstitutionality of 25% tax rate - Imposition of 18% tax rate - Possibility of refund of undue payment by Consumer

On March 03, 2015, Federal Attorney General Rodrigo Janot Monteiro de Barros presented a favorable opinion to the taxpayers in Leading Case RE no. 714.139/SC in favor of the unconstitutionality of a Santa Catarina State Law that increased rates for the ICMS [State tax-added value] which are higher than those generally applicable to electric power and telecommunications services.

In his opinion, the Federal Attorney General considers that such increase is undue because it is inconsistent with such constitutional principles of selectivity/essentiality as provided in Article 155, paragraph 2, of the Brazilian Federal Constitution of 1988. Additionally, he expressed his opinion in favor of transferring the effects of the court decision to a future moment for the purpose of ensuring a period of time for legislative adaptation by the States, in view of a “manifest risk to legal certainty”.

It should be noted that the 2nd Panel of the Brazilian Federal Supreme Court (STF), in August 2014, when reviewing a case with similar controversy, presented an opinion in favor of the unconstitutionality of a Rio de Janeiro State Law which also set forth an increased ICMS rate from 18% to 25% with respect to electric power and telecommunications services, then such tax rate had to decrease to 18%, which significantly reduced the tax amount included in the price for electric power and telecommunications services.

In view of the initial position adopted by the STF and the Opinion presented by the Federal Attorney General in Leading Case RE No. 714.319/SC about the unconstitutionality of such increased ICMS rate for electric power and telecommunications services, the Office recommends the filing of a lawsuit for the purpose of reducing such increased tax rates imposed on the purchase of electric power and telecommunications services, as well as claiming a refund/compensation of any undue payments in the last five (5) years with respect to increased ICMS rate in each State of Brazil.

We remain at your disposal for any further clarifications.

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