memorandum to clients

01.29.2016

ICMS Convention no. 181/2015 and State Decrees (SP) no. 61.522/2015 and 61.791/2016 – Invalidity of assessment of ICMS (State Sales and Services Tax) on operations involving software, programs, electronic games, applications, electronic files and similar.

On 12/29/2015, ICMS Convention no. 181/2015 was published on the Federal Official Gazette (D.O.U.) providing that the National Revenue Policy Council (CONFAZ) has authorized several Federation Units to reduce the basis of calculation of ICMS corresponding to 5% (five per cent), as a minimum, of the amount of operations involving software, programs, electronic games, applications, electronic files and similar, standardized, even if adapted or able to be adapted, provided by any means, including operations performed by means of electronic data transfer (download or streaming), and that the assessment of ICMS regarding these operations will be effective for tax triggering events occurred after 1/1/2016 .

In practical terms, the institution of the Convention allows said States to charge ICMS based on the total amount of operations involving software, as opposed to was has been occurring in most States, which only required ICMS being charged based on the amount corresponding to the physical media, not the software per se.

The State of São Paulo, in particular, had already anticipated CONFAZ by enacting State Decree (SP) no. 61,522 in September 29th, 2015, eliminating the assessment of ICMS based on (the double of) the amount of the media and also provided that, as from 1/1/2016, ICMS for operations involving sales of software shall be assessed based on the total amount of the operation .

However, on January 11th, 2016, State Decree no. 61,791/2016 was published providing that (i) the assessment of ICMS is suspended for operations involving software and similar when these items are made available by means of electronic data transfer (download or streaming), until a definition is established regarding where the tax triggering event occurred; and (ii) the legislation of the State of São Paulo (State Decree no. 45,490/2000 – RICMS/SP) reduced the basis of calculation established in ICMS Convention no. 181/15.

Notwithstanding, even if in the future a definition is established regarding where the tax triggering event occurred, we note that law amendments that allow the assessment of ICMS on operations involving software and similar contain legal and constitutional defects.

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[1] Acre, Alagoas, Amapá, Amazonas, Bahia, Ceará, Goiás, Maranhão, Mato Grosso do Sul, Paraná, Paraíba, Pernambuco, Piauí, Rio de Janeiro, Rio Grande do Norte, Rio Grande do Sul, Santa Catarina, São Paulo and Tocantins.

[2] The Convention authorizes the States to not demand, totally or partially, ICMS fiscal debts, whether registered or not, including interest and fines, related to the operations provided, performed before this convention entering into effect. This option prevents refund or compensation of amounts already paid and shall observe the conditions set forth in state legislation.

[3] Note that said "benefit" is optional, contrary to the normal taxation systematics, and prevents the appropriation of any other credits or fiscal benefits by taxpayer in case the benefit is used.

[4] List of services attached to Complementary Law no. 116 of July 31, 2003. (...)
1.04 - Performance of computer programs, including electronic games.
1.05 - Licensing or assignment of rights for the use of computer programs.

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First, as implied from items “1.04” and “1.05” of the list attached to Supplementary Law no. 116/2003 , operations involving software, whether customized or not, are subject to ISSQN (Tax on Services of Any Kind), and according to article 2, subparagraph V of Complementary Law no. 87/96, ICMS can only be assessed when (i) goods are supplied (by means of media – physical unit) with provision of services; and (ii) particularly, when there is express provision in the complementary law applicable to the municipal tax (Complementary Law no. 116/2003); such situation is not observed in the complementary legislation regarding ISSQN related to items “1.04” and “1.05”.

Moreover, regarding the hypothesis of assessing tax for operations involving “software” by means of “download” or “streaming”, we verify that this is a new hypothesis of assessment of tax that is not provided in article 155, subparagraph II of the Federal Constitution of 1988 (CF/88), therefore, enacting a specific Supplementary Law is necessary, as provided in article 146 of CF/88.

Actually, operations involving “software” by means of “download” or “streaming are not similar to the hypothesis of assessment of ICMS provided in article 155, II of CF/88, because: (i) neither “download” nor “streaming” characterize, in fiscal terms, effective circulation of merchandise (ownership transfer); and (ii) the software per se is an intangible asset, not being possible to identify it, in an objective manner, as a concrete merchandise. The Federal Supreme Court (STF) ratifies this position, as it may be inferred from precedents issued on Extraordinary Appeals (RE) no. 176.626/SP and 199.464/SP.

Finally, note that the assessment of ICMS is illegal on operations involving software and similar performed by means of “download” or “streaming” on the international level, as “ICMS-Import” can only be assessed at the moment when the customs clear through occurs (article 12, subparagraph IX of Complementary Law no. 87/96), which is not the case in the situation concerned.

Considering the foregoing, we recommend that taxpayers affected by the legislative measures discussed herein to promptly file an action against the illegality and unconstitutionality of the rules that have enforced the assessment of tax on software, programs, electronic games, applications, electronic files and similar.

Without further considerations, we are at your disposal for any additional clarification that may seem necessary.

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