



memorandum to clients

03.15.2016

ICMS - Electricity - Distribution and Transmission System Usage Charges - TUSD and TUST - Exclusion of the ICMS tax calculation basis

The subject regarding the invalidity of the inclusion of the Distribution and Transmission System Usage Charges - TUSD and TUST in the ICMS tax calculation basis - over the supply of electricity - is being discussed, given that its payment does not represent the consideration for energy consumption, due to the absence of a triggering event for the state tax.

Thus, in order for the TUSD inclusion on the ICMS enforceable basis to prevail, the tax would be applied without the existence of legal provisions (due to the absence of the triggering event), with clear offense to the arts. 150, I and 155, II, of the CF/88, arts. 9 and 97 of the National Tax Code (CTN), and arts. 12, I, and 13, I, of Complementary Law n°. 87/96.

The subject was discussed by both Public Law Parties of the Superior Court of Justice (STJ) in Brazil, which consolidated the understanding for the exclusion of the TUSD and TUST from the ICMS tax calculation basis on power supply operations, as well as the possibility for the end consumer (taxpayer) to claim for the refund of amounts unduly paid. This understanding has been followed by the Courts of Justice of the States of São Paulo (TJSP), Rio de Janeiro (TJRJ), Ceará (TJCE), Goiás (TJGO), Mato Grosso (TJMT), Mato Grosso do Sul (TJMS), Pará (TJPA), Rio Grande do Sul (TJRS), Santa Catarina (TJSC), Sergipe (TJSE), Tocantins (TJTO), which feature a largely favorable jurisprudence to taxpayers.

Therefore, due to the favorable jurisprudential signaling by the state courts to taxpayers, the **Souza, Schneider, Pugliese & Sztokfisz Advogados** recommends a lawsuit filing, in order to rule out the inclusion of the TUSD and TUST from the ICMS calculation basis on the electricity supply, and to demand the restitution/compensation of amounts unduly paid during the last five (5) years and related to increased rate of ICMS taxes in each of the States of the Federation.

We remain available in order to provide any further information on the subject.





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