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LEGAL LETTER / DECEMBER 2016

NEW SOLUTIONS TO THE OLD ICMS CREDIT BALANCE PROBLEM

Mauri Bórnia / Carolina Romanini Miguel¹

The State of São Paulo Treasury Secretariat (SEFAZ/SP) establishes new cases when the special ICMS regime can be requested to reduce companies' tax credit balances and preserve their competitiveness.

On December 17, 2016, Decree 62311 was published in the Official Gazette of the State of São Paulo – DOE/SP, introducing article 327-J into the ICMS (State Value-Added Tax) Regulation (“RICMS/SP”). The article brings new provisions regarding the granting of special regime to suspend or defer the levy of the state tax on the acquisitions of goods to the establishment whose transactions (i) result in continuing and high ICMS credit balances or (ii) are losing competitiveness.

At first, the main section of the regulation only reiterates the provisions already established by CAT Ordinance 108/13, and there is no innovation regarding the permission for the establishment located in the State of São Paulo (whose transactions result in continuing and high ICMS balances arising from the application of a 4 percent rate in interstate transactions with goods imported from abroad or with import content exceeding 40 percent, as provided for in Federal Senate Resolution 13/12) to request the special regime so that the tax levied on import transactions be suspended, fully or partially, to the moment when the imported goods or products resulting from manufacturing are shipped.

The news brought by the Decree, found in paragraph 1 of article 327-J of the RICMS/SP, is the possibility of obtaining the special regime when transactions with car parts and perfumery or personal care products result in continuing and high ICMS credit balance, or the loss of competitiveness due to (a) the application of the 4 percent rate on interstate transactions, as per SF Resolution 13/12, or (b) tax burden variation on successive inputs and outputs of goods.

The special regime can be granted so that the recording of the ICMS levied:

¹ *Mauri Bórnia and Carolina Romanini Miguel are, respectively, partner and lowers of the Indirect Taxes area of Machado Associados.*

- a) on import transactions carried out by the applicant be suspended or deferred, in full or in part, to the moment when there is a later output of the imported goods or of the product resulting from its manufacturing;
- b) on the shipment of goods carried out inside the State by the applicant be suspended or deferred, in full or in part, to the moment when there is a later output of the imported goods or of the product resulting from its manufacturing; or
- c) on the shipment of goods carried out by an establishment located in this State to an establishment of the applicant of the special regime be deferred, in full or in part, to the moment when there is a later output of the imported goods or of the product resulting from its manufacturing, case in which the manufacturing establishment must expressly adhere to the taxpayers' special regime.

In summary, Decree 62311/16 establishes:

- a) the cases in which the São Paulo State taxpayer can request the special ICMS regime (existence of continuing and high ICMS credit balance or loss of competitiveness);
- b) the causes of the problems faced by taxpayers that authorize the request of special regime (implementation of the 4 percent interstate rate or tax burden variation at inputs and outputs); and
- c) the establishments that can require the special regime mentioned (in some cases, only establishments located in the State of São Paulo that carry out transactions with auto parts, perfumery, and personal care products).

In addition, article 327-J of the RICMS/SP, brought by the Decree, governs the administrative procedure to be complied with by the taxpayer to request the special regime.

Finally, we should further point out that it is only possible to request the special regime if the interested party complies with certain conditions, such as: **(a)** evidencing that the ICMS suspension or deferral percentages claimed are sufficient to prevent the formation of continuing and high tax credit balance or to restore the competitiveness of its transactions; **(b)** promoting the landing and customs clearance of imported goods in the territory of the State of São Paulo; and **(c)** being in good standing with the Tax Authorities.

Although the Decree mentioned extends the chances to request the special regime only to certain sectors of the economy, this is a positive measure adopted by the Government of the State of São Paulo to reduce the growing and discouraging ICMS credits accumulation by establishments in São Paulo and, above all, to prevent that the charging and collection of ICMS by the State of São Paulo result in disturbances to the free competition.

This legal letter contains information and general comments on the matter. In specific cases, it is advisable to rely on proper legal assistance before adopting any concrete actions relating to the matters dealt with herein.