



ICMS Agreement No. 106 and Transactions with Digital Goods and Merchandise

ICMS Agreement No. 106 was published on the Official Gazette of October 5, 2017, to provide for the procedures for levying of ICMS on transactions with standardized digital goods and merchandise (software, programs, electronic games, applications, electronic files, and similar products), even if they have been or may be adapted, sold by electronic data transfer.

In summary, the Agreement defines the parties of the legal/tax relationship resulting from the commercial transaction of standardized digital goods and merchandise carried out electronically.

The tax jurisdiction entitled to charge the ICMS levied on this transaction was defined as the state where the consumer of the digital goods or merchandise is located. According to clause three of the Agreement, on internal sales and imports of these digital goods and merchandise, the tax will be paid to the state in which the purchaser is domiciled or established, even if by means of periodic payment.

It should be noted that, by transferring the tax jurisdiction to the state where the digital goods or merchandise will be consumed, ICMS Agreement No. 106/17 grants ICMS exemption for transactions carried out before the sale intended to the end consumer. Apparently, it was intended to give to transactions with these digital items the same treatment applied by the Federal Constitution and Supplementary Law 87/96 to transactions with energy, oil and fuels.

In turn, taxpayers are defined by the Agreement as holders of websites or electronic platforms, that sell or supply digital goods or merchandise, even if by means of periodic payment. These legal entities or individuals must be enrolled in the state from which they supply or import digital goods or merchandise intended to end consumers.

Alternatively, the state entitled to charge the ICMS levied on the transactions at issue can change the taxpayer of the tax/legal relation, assigning the responsibility to pay the tax to **(I)** whomever offers, sells or delivers the digital goods or merchandise to the consumer; **(II)** the financial broker, including the credit card or payment card company; **(III)** the acquirer of the digital items, if the taxpayer or responsible is not enrolled with the state; and **(IV)** credit or debit card company or financial broker responsible for the exchange in case of import.

The provisions brought by this Agreement will come into force only as from April 1, 2018. In any case, each state should adjust the legislation in force in their respective territories, to define not only the taxpayer of the ICMS levied on transactions with digital goods or merchandise sold by means of wire transfer, but also other taxation criteria, including the corresponding ancillary obligations.

This warning contains information and general comments on legal matters that may interest our clients and friends. It does not represent the legal opinion of our firm on the subjects addressed herein. In specific cases, readers should rely on proper legal assistance before adopting any concrete action relating to the matters addressed herein.

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