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ICMS on interstate transactions leads to controversy in Brazil

Gabriel Caldiron Rezende and Juliana Mari Tanaka of Machado Associados discuss the new controversies over the ICMS on interstate transactions.

As previously discussed, Constitutional Amendment 87 (CA 87/15) brought significant changes to the collection of state VAT (ICMS) on interstate transactions to end consumers.

According to CA 87/15, in all interstate transactions to end consumers, the ICMS levied should be split between the state of origin and state of destination as follows: (a) to the state of origin, the ICMS calculated at the interstate rate (4%, 7% or 12%); and (b) to the state of destination, the ICMS calculated based on the difference between the interstate rates used in the transaction and the rate applicable to internal transactions in the state of destination (usually from 17% to 19%).

However, these new proceedings required regulation by a supplementary law, as determined by the Brazilian Federal Constitution.

Despite the lack of regulation by a supplementary law, the states entered into ICMS Agreement 93/2015 to regulate this matter. Based on this agreement, the states enacted local laws to charge the revenue split when they were the destination.

In parallel, the matter was taken to court, leading to the Brazilian Federal Court (STF) decision in Extraordinary Appeal 1.287.019 in February 2021. This decision deemed the charge of the ICMS revenue split without a supplementary law to be unconstitutional.

Controversies continue

However, the controversies over the ICMS on interstate transactions were far from over. The STF decision that found the ICMS revenue split under the ICMS Agreement unconstitutional defined January 2022 as the initial term for the decision to take effect (*modulação de efeitos*).

This meant that the states could continue to charge the revenue split until the end of 2021 (except from taxpayers who filed lawsuits in advance) but could only resume the charge after 2021 if a supplementary law was enacted.

In this context, in late 2021 the National Congress approved Bill 32/2021, to establish the required rules. However, the president only approved this bill in January 2022, resulting in the enactment of Supplementary Law 190/2022, which determines that it will become effective 90 days after its publication.

New controversies then arose considering the constitutional principle of non-retroactivity, under which a tax cannot be charged in the same fiscal year of its establishment or increase, and not before 90 days from its issuance. Several taxpayers went to the courts to avoid the revenue split charge in the state of destination until 2023 because, technically, its regular imposition was carried out only in 2022.

Also, the Brazilian Association of Machinery and Equipment Industry (ABIMAQ) filed Unconstitutionality Declaratory Action (ADI) 7066 before the STF, requesting that Supplementary Law 190/2022 and the revenue split charge only produce effects as of January 1 2023.

States take action

Although some states have already issued official statements declaring that the revenue split charge will only be enforced 90 days after the publication of the supplementary law, 23 states jointly filed a petition in ADI 7066. They sought to participate in the lawsuit as amicus curiae, and requested that the STF declare the imposition of the 90-day vacancy period of the supplementary law to be unconstitutional.

Furthermore, the state of Alagoas filed ADI 7070 specifically to challenge the provisions regarding the beginning of the effects of Supplementary Law 190/2022 and the levy of the revenue split.

Although the enactment of Supplementary Law 190/2022 was necessary, its timing could not be worse. If its legislative approval was given in mid-2021 or, at least, if the presidential approval was given in 2021, the discussions above would probably have been significantly reduced or would not even exist, as the levy of the revenue split in 2021 was allowed by the STF.

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