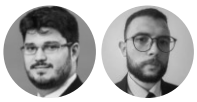
BRAZIL

Machado Associados



Gabriel Caldiron Rezende and Thales D'Iuca Magagnin

Brazilian Supreme Court defines tax on media advertising

Gabriel Caldiron Rezende and Thales D'Iuca Magagnin of Machado Associados discuss the highly anticipated Supreme Court decision on the taxation of advertising in some media.

On March 9 2022, the Brazilian Federal Supreme Court (STF) concluded the judgment of Direct Unconstitutionality Action (ADI) 6034, deciding that the insertion of advertising is a service subject to the municipal service tax (ISS), rather than a communication service, which would be subject to the state VAT (ICMS). In doing so, the Court settled a long-lasting controversy between the municipalities and the states, in which taxpayers were caught in the crossfire.

In the Brazilian tax system, ISS is generally levied on the provision of services by the municipalities, provided that the activity is listed as a taxable service in Supplementary Law 116/2003. On the other hand, communication services are subject to the ICMS; therefore, they are not subject to ISS.

According to the Brazilian tax system, the same activity cannot be simultaneously subject to ISS and ICMS. Therefore, the correct delineation of each economic activity and its respective taxation is of the utmost importance.

Background to the case

As previously discussed, the federal government issued Supplementary Law 157/2016, which introduced some activities in the list attached to Supplementary Law 116/2003, rendering them subject to the ISS.

Among these new taxable activities was item 17.25 of the service list, which stands for the insertion of texts, drawings, and other advertising materials in any media (except books, newspapers, periodicals, radio broadcasting, and broadcasting of sounds and images with free reception).

However, such activity was historically considered by the states as a communication service, subject to the ICMS. Therefore, as predicted, the matter needed to be taken into court for a resolution.

To this effect, the state of Rio de Janeiro filed ADI 6034 to challenge the constitutionality of item 17.25 of the Supplementary Law 116/2003 service list. The Direct Action of Unconstitutionality stated that such activity is equal to the broadcasting of advertising, which is a communication service subject to the ICMS, and could not be listed as subject to the ISS.

In the judgment, reporting Justice Dias Toffoli argued in his vote that, although such activity is essential for the operation of the media service, it is a preparatory service for communication, not to be confused with communication itself. For this reason, the Justice said that it should not be subject to the ICMS. Thus, since this activity is not a communication service and is indicated on the list of services in Supplementary Law 116/2003, the insertion of advertising is subject to the ISS.

Despite the relevance of this decision, it still lacks some definitions around the advertising service and its related activities. In this judgment, the moment at which the activity ceases to be preparatory to the advertising service, and becomes a communication service subject to the ICMS, was not defined.

In any case, it is a very important decision and it solves a highly controversial matter, granting legal certainty to taxpayers in the planning of their activities related to the insertion of advertising.

Gabriel Caldiron Rezende
Partner, Machado Associados
E: gcr@machadoassociados.com.br

Thales D'Iuca Magagnin
Associate, Machado Associados
E: tdm@machadoassociados.com.br

More articles from Machado Associados