

BRAZIL

Machado Associados



Mauri Bornia and Gabriel Caldiron Rezende

São Paulo defines new ICMS model for electricity transactions in the free market

Mauri Bornia and Gabriel Caldiron Rezende of Machado Associados discuss the legislative changes made by the state of São Paulo to the State VAT (ICMS) on transactions with electricity in the free market.

As previously reported, in 2020 the Brazilian Federal Supreme Court (STF) concluded the judgment of Unconstitutional Declaratory Action (ADI) 4281. In this ruling, the Court deemed the ICMS tax liability of the distribution network operator (DNO) on free market transactions with electricity unconstitutional.

This is because only a party that has a relationship with the tax-triggering event can be liable for paying the corresponding tax.

As a result of the discussion, the state of São Paulo published Decree 66.373/2021, amending the provisions of the state tax laws related to transactions with electricity. This adapted the ICMS taxation model applied to the DNO sector to correspond to the STF decision, rendering the electricity seller liable for paying the tax.

Under these rules, transactions within the state of São Paulo are subject to the postponement of the ICMS payment, according to which the tax levied on the successive transaction with electricity is paid by the free market seller on its sales to the end consumer. As a result, the ICMS tax liability previously applied to the distributor is no longer in force, and the tax is payable by a party involved in the commercial transaction (in other words, the seller), in line with the STF decision.

The sales transaction taxable basis must correspond to the amount due, charged, or paid for the electricity consumed on a monthly basis. As for the charges related to the connection and use of the energy distribution or transmission network, to which the receiver is connected, the liability for the assessment and collection of the ICMS on such amounts will depend on the way the electricity receiver is connected:

- If the receiver is connected to the electric power distribution network, the distributor, as the taxpayer, will be liable for the assessment and payment of the ICMS on such charges; or
- If the receiver is connected to the basic electric power transmission network, the receiver itself will be responsible for paying the ICMS on the referred charges.

In inter-state transactions from the state of São Paulo, the electricity outflow to the DNO or retailers located in another state is not subject to ICMS payable to the state of origin, as established by the Brazilian Federal Constitution.

On the other hand, in inter-state transactions to the state of São Paulo, provided that the electricity will not be used in subsequent manufacturing or commercialisation transactions in the São Paulo territory (being therefore intended for consumption), the ICMS will be paid to the state of destination. In this case, the receiver of the electricity will be liable for the assessment and payment of the tax. These new rules will become effective from April 1 2022.

Machado Associados

E: mb@machadoassociados.com.br;
gcr@machadoassociados.com.br