

Recent Developments on “Digital Services” Taxation



Until recently, streaming and other Internet-related activities were not regulated from a tax perspective.

As usual in Brazil, “new” activities are subject to “fiscal wars” – disputes on which Federal entity (States or Municipalities) will be entitled to tax them.

Regarding streaming services, Brazilian Federal Supplementary Law No. 116/2003 (LC 116/03), which addresses the Services Tax (ISS), was amended in December 2016 (by Federal Supplementary Law No. 157/2016) to include the following services among those taxable by ISS:

“making available, without a definitive assignment, audio, video, image and text content through the internet, with due regard to the immunity of books, newspapers and periodicals” (List of Services attached to LC 116/03, Item 1.09).

According to the Brazilian tax system, each Municipality has to enact its own regulation, as the Municipalities are the collectors and payees of the ISS. The Municipalities also have the right to determine the ISS rate to be charged, provided they observe the minimum of 2% and maximum of 5% (on the price of the service) set forth in LC 116/03.

On November 15, 2017, the Municipality of São Paulo enacted Law No. 16,757 to tax streaming services, as well as advertisement services on Internet. The applicable rate is 2.9%. Law No. 16,757 also establishes that services of web hosting and storage of data on the Internet trigger ISS at the rate of 2.9%.

As general rule, service provider is liable for paying the ISS; however, in case of services rendered from abroad, the service purchaser or intermediary, as determined by each city, will be

responsible for paying ISS.

Other Municipalities followed the Municipality of São Paulo and enacted similar laws.

The States counterattacked some months later. On September 29, 2017, ICMS State Agreement No. 106 was executed to regulate the procedures for collection of ICMS on transactions involving “digital services” as software, computer programs, electronic games, apps, electronic files and similar products distributed by means of electronic transfer of data – download or streaming.

ICMS will be due by the entity holding the relevant website or platform to the State where the end-user is domiciled, thus generally requiring the entity to enroll with each State where end-users are located (subject to certain possible exceptions). ICMS State Agreement No. 106 is effective as from April 1, 2018.

As occurs with Municipality regulations, each State has to create its own rules to charge ICMS on digital services, including streaming services. Based on that, the State of São Paulo has enacted Decree No. 63,099, dated December 22, 2017. Such Decree also considers as digital goods those made available against periodic payments (e.g. subscriptions).

On March 24, 2018, however, the State of São Paulo enacted an internal rule (Portaria CAT 24/2018) to exclude streaming services from ICMS taxation and to acknowledge that Brazilian Federal Constitution guarantees the exemption of e-books, electronic journals and magazines. Portaria CAT 24/2018 maintained ICMS on other “digital goods”, such as software and games transferred by download or cloud computing, as well as audio, video and image content acquired by download.

The abovementioned exclusion of streaming from ICMS applies only for transactions involving end-customers in the State of São Paulo. Each State is entitled to decide whether the streaming services will trigger ICMS or not.

Briefly, both Municipalities and States claim to have jurisdiction to tax digital goods, which creates an overlap resulting in illegal and unconstitutional double taxation. Legal practitioners will challenge, among others, the constitutional jurisdiction of each tax authority, and will certainly see further developments.

We have identified some decisions from lower Courts suspending the ICMS on digital services, based on the understanding that a Supplementary Law is required in such case to avoid double taxation. A definitive decision, however, will have to come from the Superior Court of Justice (STJ) and the Supreme Court (STF), as the digital services taxation involves national and constitutional rules.

Based on that, streaming services and other Internet-related services/products should be carefully examined by companies to minimize tax exposures.



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