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STF pronounced two votes against the advance collection of ICMS in interstate transactions

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One of the most awaited matters in the tax area is the judgment by the STF of the issue that involves the advance collection of ICMS on the entry of goods acquired in another entity of the federation.

This is the following. In interstate transactions, the anticipated requirement of ICMS, even without tax substitution, is very common.

This happens mainly in transactions in which the merchant purchases goods in other states, without the ICMS advance withholding, as there is no interstate agreement or protocol that applies the condition of tax substitute to the sender. States generally oblige the taxpayer to collect ICMS on subsequent transactions, when the goods enter the territory of the state of the acquirer.

It so happens that the anticipated requirement must be provided for by law. This is because, when ICMS is demanded in advance, the taxable event, which is the circulation (sale) of goods, has not yet occurred. This demonstrates that the anticipation regime, even when there is no substitution, creates a new ICMS generating event, due to legal fiction, that is, it creates an assumed generating event.

Under the terms of the CF and CTN, only the law can establish the taxable event. However, most states, including SP, have instituted hypotheses for anticipating the ICMS through decrees instead of using law, which is the appropriate normative vehicle.

However, many states require collection on the basis of mere decrees. In this hypothesis, they defend themselves by claiming that it is only a matter of changing the tax due date and not changing the taxable event, which is why the requirement could be conveyed by decree. But the argument is not robust, as it is not possible to talk about the maturity of an obligation that has not yet been born and will only be born, if and when the sale of the merchandise occurs.

Well, Rio Grande do Sul, which also envisages an ICMS requirement by means of a decree, took the matter to the STF, which recognized the general repercussion of the constitutional issue, as shown in the following statement:

“FEATURES TAX LAW. ICMS. INTERSTATE OPERATIONS. EARLY PAYMENT SCHEME WITHOUT TAX REPLACEMENT. STATE DECREE. TAX GENERATING FACT. ADVANCE COLLECTION. EXISTENCE OF GENERAL REPERCUSSION ”. (RE 598677 RG, Rapporteur: Min. DIAS TOFFOLI, tried on 8/5/2011, DJe-162 DIVULG 8/23/2011 PUBLIC 8/24/2011 EMENT VOL-02572-03 PP-00389)

Although the appeal was filed by the state of Rio Grande do Sul, the state of São Paulo also asked to intervene as an “amicus curiae”, as in SP there is a decree very similar to that of Rio Grande do Sul, which provides for anticipation without any prediction in the law.

The good news is that in the appeal two votes have already been cast denying the extraordinary appeal of the State, by Minister Dias Toffoli (Rapporteur), who was accompanied by Minister Roberto Barroso.

The process would continue if judged on April 15, 2020, but was dropped from the agenda. We will hope that it will be ruled again soon.

Although the trial has not ended, the possibility of the STF moving the institution away from tax prepayment by decree is very large, and may free several taxpayers from having to collect the tax in advance in interstate transactions.



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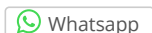
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