TAX

CONTROVERSIES IN THE FORMATION OF THE ICMS TAX BASIS BY TAX SUBSTITUTION

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AUTHORS

FERNANDA SÁ FREIRE FIGLIOULO
PARTNER / SÃO PAULO

VIRGÍNIA PILLEKAMP
PARTNER / SÃO PAULO

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Covenant No. 52/2017, recently issued by Confaz (National Finance Policy Council), followed the understanding of the Second Panel of the STJ (Superior Court of Justice) in the sense that the ICMS due under the withholding regime (ICMS-ST) is embedded in its own calculation basis. This means that the ICMS-ST should also be assessed on a gross-up basis, as is the regular ICMS' case (Special Appeal No. 1.454.184/MG). The rationale for such understanding is that the ICMS-ST is not different from the regular ICMS.

The ICMS-ST is a regime of tax collection, by means of which a given taxpayer is responsible for the payment of the ICMS due by itself and the ICMS to be paid in any future resale of goods within the same state (e.g., State of São Paulo). This procedure is used by the states to collect taxes from sectors such as beverages, cigarettes, fuels, electricity, and medicines, among others.

The debate regarding its calculation basis is far from being settled, contrary to what is the case with the debate regarding the need to gross up the regular ICMS calculation basis. It is noteworthy that the gross-up calculation basis of the regular ICMS has already been ruled as a constitutional measure by the Federal Supreme Court (STF).

However, there is great concern that the formation of the ICMS-ST calculation basis will be understood as equivalent to that of the regular ICMS, a trend that seems to be strengthening and with which it is not possible to agree, since it violates the principle of non-cumulativity, which is in turn rooted in the Constitution Federal.

In fact, as understood by the Second Panel of the STJ in Special Appeal No. 1.454.184/MG, the ICMS and ICMS-ST are one and the same tax. In addition, it is also clear that the ICMS-ST is only a technique that aims at allowing tax authorities to collect tax and perform audit procedures in an easier way. However, there is no way to agree with the proposition that a technique of collection should ultimately increase tax revenues. This was not what the STJ sought to do, but it was what it, in a roundabout manner, and perhaps without realizing the scale of the effects of its understanding, eventually validated.

It is important to remember that the calculation of the ICMS-ST for a large part of the products subject to tax substitution is done by applying a value-added margin (MVA) over the selling price of the substituted taxpayer (which pays the ICMS due on the entire chain). This margin is established "on the basis of prices usually agreed upon in the market concerned, obtained by survey, even if by sampling or by means of information and other elements provided by entities representing the respective sectors, adopting the weighted average of the prices collected, and these criteria are to be set by law" (Complementary Law No. 87/1996, article 8, paragraph 4).

On top of that, one must bear in mind that in October of last year, the STF ruled out that the ICMS-ST is not a definitive tax. Therefore, if the "price actually agreed upon" (effective basis) is lower than the "usual price agreed upon in the market" (estimated basis), it is possible to recover the ICMS-ST paid in excess to the state.

Of course, when the "weighted average" of the "price usually agreed upon in the market" is established to stipulate the MVA of a product that will be taxed in the system of tax substitution thereafter, this price does not include the ICMS calculated inside of the ICMS-ST, simply because the ICMS-ST is not yet due in transactions with these products.

Thus, applying the MVA on a gross-up calculation basis will mathematically generate a higher value than the one used in the survey. This reasoning shows that, although the ICMS and ICMS-ST are the same tax, embedding the regular ICMS within the ICMS-ST calculation basis causes a distortion in the price and increases collection.

More serious than this increase, the grossed-up calculation basis of the ICMS-ST also breaches the principle of non-cumulativity. This is because, in the same case cited above, in which the ICMS-ST is to be demanded of a given product, it is intuitive that the weighted average of the price usually agreed upon in the market considers the system of ICMS debits and credits.

However, we know that within the ICMS-ST system, ICMS credits may end up being disallowed. Along these lines, the grossed-up calculation basis of the ICMS-ST is a procedure that does not give rise to the correct effects of the credits mechanism in the marketing chain of the product. It is, therefore, an eminently unconstitutional practice, due to its violating the non-cumulativity principle.

Therefore, we understand that Special Appeal REsp No. 1.454.184/MG, in addition to endorsing a practice not provided for in the Federal Constitution and in Complementary Law No. 87/1996 (the only instrument constitutionally authorized to provide a calculation basis for the ICMS and ICMS-ST), goes in a direction opposite to the STF, since its understanding virtually results in a situation where the "effective price agreed upon" (effective basis) is less than the estimated basis due to the mathematical distortion of the latter value.