

Indirect Tax Alert

News from EY Americas Tax

Brazilian Supreme Court holds software sales will not be subject to state VAT

EY Tax News Update: Global Edition

EY's Tax News Update: Global Edition is a free, personalized email subscription service that allows you to receive EY Global Tax Alerts, newsletters, events, and thought leadership published across all areas of tax. Access information about the tool and registration [here](#).

EY Americas Tax

EY Americas Tax brings together the experience and perspectives of over 10,000 tax professionals across the region to help clients address administrative, legislative and regulatory opportunities and challenges in the 33 countries that comprise the Americas region of the global EY organization. Access more information [here](#).

On 4 November 2020, the Brazilian Supreme Court (STF) held that the state value-added tax (VAT or ICMS) does not apply to the licensing of, or right to use, software. The STF found, however, that the municipal service tax (ISS) applies to the licensing of, or right to use, software because they are services.

Decision

The STF's holding was based on the ISS national guidelines (Supplementary Law 116/2003), which require software license agreements, as well as the right to use software, to be considered as the rendering of services. According to the decision, this treatment applies regardless of whether the transfer of use is via download or through cloud access.

The STF also found that licensing or the right to use software should be considered a service subject to ISS because:

- ▶ The development of software is a service resulting from human effort and intellectual creation, even for the mass standardized production and sale of software.
- ▶ Legal certainty is preserved by following the guidelines in Supplementary Law 116/2003 on software-sale transactions.
- ▶ Ownership is not transferred on the licensing of, or right to use, software.

Implications

Generally, transactions involving the rendering of services and sales of goods have caused disputes between taxpayers and the tax authorities. The digital economy is bringing these disputes to the spotlight, primarily because Brazil's tax legislation has not been updated to account for this new environment. Because different jurisdictions within Brazil impose the ISS and ICMS (municipalities and states, respectively), the municipal and state authorities have argued over which tax is triggered by a software sale. For this reason, the STF decision will offer some certainty for Brazilian taxpayers and tax authorities.

Although a majority of the STF agreed to this holding, the decision is not final. The decision, including a determination of whether it will apply retroactively or prospectively, still has to be published.

Technology companies with a presence in Brazil may want to consider reassessing their tax position in relation to software sales, reviewing how the decision affects the overall tax burden on their distribution chain, and revisiting pricing.

For additional information with respect to this Alert, please contact the following:

Ernst & Young Assessoria Empresarial Ltda, São Paulo

- ▶ Gustavo Carmona Sanches gustavo.carmona@br.ey.com
- ▶ Audrei Okada audrei.okada@br.ey.com
- ▶ Erica Perin erica.perin@br.ey.com
- ▶ Waine Peron waine.peron@br.ey.com
- ▶ Rodrigo Munhoz rodrigo.munhoz@br.ey.com

Ernst & Young LLP (United States), Latin American Business Center, New York

- ▶ Tiago Aguiar tiago.aguiar@ey.com
- ▶ Fernanda Salzedas fernanda.c.salzedas1@ey.com
- ▶ Pablo Wejcman pablo.wejcman@ey.com

Ernst & Young LLP (United Kingdom), Latin American Business Center, London

- ▶ Luciana Rodarte luciana.rodarte@uk.ey.com
- ▶ Lourdes Libreros lourdes.libreros@uk.ey.com

Ernst & Young Abogados, Latin America Business Center, Madrid

- ▶ Jaime Vargas jaime.vargas.c@es.ey.com

Ernst & Young Tax Co., Latin American Business Center, Japan & Asia Pacific

- ▶ Raul Moreno, *Tokyo* raul.moreno@jp.ey.com
- ▶ Luis Coronado, *Singapore* luis.coronado@sg.ey.com

About EY

EY is a global leader in assurance, tax, transaction and advisory services. The insights and quality services we deliver help build trust and confidence in the capital markets and in economies the world over. We develop outstanding leaders who team to deliver on our promises to all of our stakeholders. In so doing, we play a critical role in building a better working world for our people, for our clients and for our communities.

EY refers to the global organization, and may refer to one or more, of the member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. For more information about our organization, please visit ey.com.

Indirect Tax

© 2020 EYGM Limited.
All Rights Reserved.

EYG no. 007712-20Gbl

1508-1600216 NY
ED None

This material has been prepared for general informational purposes only and is not intended to be relied upon as accounting, tax, or other professional advice. Please refer to your advisors for specific advice.

ey.com