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Services tax on streaming may be challenged

Complimentary Law No. 157, published on November 30, 2016, has amended the Federal rules governing the Municipal Services Tax (ISS), as provided for by Complimentary Law No. 116, of July 31, 2003 (LC 116/03). Among other changes, it has inserted item 1.09 in the list of taxable services attached to LC 116/03 so as to include the "*online provision, without definitive assignment, of audio, video, image and text content, provided that the immunity of books, newspapers and periodicals is respected (except for the distribution of contents by conditional access service (pay TV) providers regulated under Law No. 12,485, dated September 12, 2011, subject to ICMS)".*

The new provision aims at exploring the tax revenue potential envisaged on the offering of online content, including via streaming, as such businesses are widely popular.

We will focus on the provision of audiovisual content via streaming by means of i) *simulcasting*, which is the simultaneous retransmission, through the internet, of television or radio content (broadcasting); ii) *webcasting*, that differ from simulcasting and from broadcasting (transmission) due to the interactivity that can be offered to the customers, who are able to access the content at anytime; and iii) *offline streaming*, by which the customer may download certain content to be watched offline.

The language of the new item 1.09 comprises the modalities of webcasting and offline streaming. Simulcasting, as the mere retransmission of content originally exhibited by broadcasting of audio (radio) or audio and image (television), would be out of the scope of the law. The simulcasting provided to the subscribers of SeAC (pay TV) is also excluded, since it is already burdened by ICMS (value-added tax on sales and certain services).

Before the enactment of Complimentary Law No. 157, there was uncertainty on whether streaming activities fall under any item of the services list attached to Complimentary Law No. 116/03. Some municipalities classified streaming as licensing of software (item 1.05 of the service list) – even though the software is only a means to access the content and is typically free of charge – or even as intermediation of artistic and literary property rights (item 10.03 of the service list) – which is likewise incorrect, because in the provision of content via streaming there is no transfer of any such property rights.

The insertion of item 1.09 in the taxable services list dispels the doubt and leads to the conclusion that prior to the enactment of Complimentary Law No. 157/16 there were no legal grounds for levying ISS on the provision of audio, video, image and text content via internet.
This last conclusion prompts us to focus on a broader analysis, i.e., whether streaming activities may be considered "service" under the Brazilian Constitution.

Considering the nature and the legal aspects of the activities indicated in item 1.09, the answer is negative, because such activities are limited to the temporary assignment of use, which constitutes an "obligation to give" instead of an "obligation to do" (in the sense of performing an activity).

The Federal Supreme Court (STF) defined "service" for the purpose of ISS when it declared the unconstitutionality of ISS on the rental of movable goods, on the grounds that there was no "obligation to do" in the rental relationship. This case resulted in Binding Precedent No. 31/2010, and has been guiding the ruling of similar cases, such as of licensing off-the-shelf software, on the grounds that it constitutes an "obligation to give" instead of an "obligation to do", and therefore not a service.

The same reasoning applies to the temporary provision of audio, video, image or text content via internet. Here again, there is no "obligation to do". In the context of streaming, software is commonly used as a mean to access the available content; however, it is the

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core activity of offering content that must be taken into account. Nevertheless, the licensing of neither software nor content can be subject to ISS for the above mentioned reasons.

Another controversial aspect of the intended taxation of online provision of audio, video, image and text content is the offering of content by foreign providers (i.e. non-established in Brazil), which constitutes an importation of services. Such aspect could have its own legal analysis, but the conclusions would be the same as above.

Unconstitutionality apart, the taxation of ISS on temporary assignment of content via internet depends on the enactment of local laws by the municipalities and the Federal District. The taxation is also subject to the constitutional anteriority rule, under which no new taxation can be imposed in the same calendar year it is created, and to the 90-day grace period. Therefore, ISS on streaming, despite being unconstitutional, should not be charged before January 1, 2018, provided that local laws are enacted until September 30, 2017[1].

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[1] The municipality of Porto Alegre published Complimentary Law No. 809, of December 29, 2016, even before the publication of Federal Complimentary Law No. 157/16 so as to levy ISS on the activities described in item 1.09 from April 2017 on. Taxpayers may question the constitutionality of Complimentary Law No. 809/16 based on the lack of previous authorization by a federal complimentary law, which is required by article 156, III of the Brazilian Constitution.