Deutsch-Brasilianische Industrie- und Handelskammer • vol.4 • 2021

RECHT & STEUERN

NEWSLETTER

Deutsch-Brasilianische Industrie- und Handelskammer
Câmara de Comércio e Indústria Brasil-Alemanha

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A Current Overview of ICMS Tax Benefits

I. Context of ICMS Benefits in Brazil

ICMS is a Value Added Tax charged by the Brazilian States on goods trading, interstate transport services, and communication services. It is a noncumulative tax, meaning that taxpayers can offset ICMS credits related to acquired inputs and products to be resold against the tax levied on sales.

The Brazilian Federal Constitution rules that States must deliberate if and how exemptions, incentives, and tax benefits will be granted and revoked. ICMS benefits can only be conceded if all States agree.

However, some States often used unauthorized ICMS benefits, without the consent of the others, mainly related to imports, seeking to attract companies and investments to their territories, resulting in a raging Fiscal War.

This tax competition had a negative impact on the States' revenues, especially for those distant from ports and other customs entry points, and for companies that frequently had their benefits challenged by other States.

In 2017, Complementary Law n. 160 was enacted, authorizing States to deliberate **(i)** the remission of companies' ICMS debts stemmed from using unapproved ICMS benefits and **(ii)** the possibility of validating such tax advantages for a certain period of time.

That was an attempt to stop the Fiscal War by validating and allowing the States to replicate benefits from others in the same region. In addition, the new law has ensured greater legal certainty for taxpayers during the tax benefit exploitation.

Provided that specific requirements are fulfilled, those unauthorized ICMS benefits can be validated and will be in force until:

i. **December 31, 2032**, for those destined to the development of agricultural and industrial activities, including agro-industrial, and investments in highway, waterway, railway, port, airport, and urban transport infrastructure;

ii. **December 31, 2025**, for those destined to the maintenance or increase of port and airport activities linked to international trade, including the operation after importation;

iii. **December 31, 2022**, for those destined to trading activities maintenance or increase, as long as the beneficiary is the actual sender of the goods;

iv. **December 31, 2020**, as to those destined to interstate operations with agriculture and cattle and vegetal extractive products in natura;

v. **December 31, 2018**, for the others.

Recently, an **extension until December 31, 2032** was authorized by Complementary Law n. 186, of all tax incentives covered by Complementary Law n. 160, benefiting the wholesale trade sector and companies dedicated to port and airport activities, as well as interstate operations with agricultural products.

Additionally, many essential ICMS incentives regularly approved were also extended by States in 2020 and 2021.

Given this scenario, companies need to evaluate the tax benefits currently in force that comply with all the legal requirements to plan and restructure their businesses, having both legal certainty and economic gains in mind.

Below, an overview of the main benefits currently in force is presented.

II. Overview of ICMS Benefits

II.1 Imports

States with appropriated port infrastructures have authorized importers to defer the ICMS payment to the moment of sale, resulting in significant cash flow gain. Furthermore, presumed credits must be granted to companies that meet specific requirements, such as investments in their territory and contributions to special funds.

The concession of these benefits for trading companies has also made indirect imports very attractive to companies that do not have the interest or even structure to invest in a new establishment. The trading companies enjoy the benefits and split the economic gain derived from them with the orderer, making operations cheaper even with an import intermediate.

II.2 Wholesale and Retail

Similar to import benefits, States located in strategic parts of the Brazilian territory also allow the deferral of the ICMS payment to the moment of sale and grant presumed credits on trades with specific products. Usually, the companies need to invest in their region and contribute to special funds.

II.3 Ecommerce

Applicable to companies that import or acquire products internally and sell directly to consumers through electronic commerce or telemarketing. States allow the deferral of the ICMS payment on import to the moment of sale and grant presumed credits on sales. Some of them additionally dismiss the ICMS substitution regime application (ICMS-ST).

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II.4 Agricultural Inputs

This benefit is regularly approved and authorizes States to exempt internal operations with agricultural inputs and to reduce the ICMS tax base on interstate operations. Some benefit companies by allowing the maintenance of the ICMS credit from purchases, even if the outputs are not taxed.

III. Conclusion

Those benefits can offer significant economic advantages for those who can correctly apply them. Still, the company's legal counsels need to carefully analyze its implementation in light of its specific activity, market, and structure in Brazil.