

TMT Bulletin

Extraordinary Edition

PINHEIRONETO
ADVOGADOS

*Pinheiro Neto's bulletin on technology, media,
telecommunications and internet*

October 2015

Tax aspects related to the download of off-the-shelf software – Recent changes in the São Paulo rules

Until now, the State of São Paulo charged the ICMS at an 18% rate only on the sale of off-the-shelf software that had physical support.

The calculation basis of the ICMS on the sale of software was spelled out to be twice the total value of the physical support of the software. As a result, the State of São Paulo did not charge ICMS on software transactions without physical support, such as the download of software.

On 9.30.2015, a new Decree was issued revoking this specific provision related to the calculation basis.

In this sense, and based on previous positioning issued by the State Authorities on the matter, it is possible that the São Paulo State tax authorities will now try to collect the ICMS at an 18% rate over the full amount of the transaction (and not only over the price of the physical support), in all transactions that involve the sale of software (physically or not).

We believe that, even with this change in the legislation, it is possible to argue that the download of off-the shelf software should not be considered as the sale of a merchandise for purposes of ICMS levy.

It is worth mentioning that the matter regarding whether ICMS can be levied on the download of off-the-shelf software is still to be analyzed by the Supreme Court. The result of this case will determine the constitutionality (or not) of the ICMS levy on such transactions.

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This is a monthly publication of Pinheiro Neto Advogados issued with the intention of providing our clients with news on developments in the legal field that may affect their businesses or personal affairs. For your convenience, this newsletter is also published on our web page.

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