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# The tax challenges in donating goods

26.06.2020 5 min read


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It bears repeating – and no amount of repetition is an exaggeration – that philanthropy has a vital role in fighting the crisis brought on by the covid-19 pandemic. Faced with a bleak, sometimes heartbreaking, situation, Brazilians and Brazilian businesses have mobilized to collaborate in the fight, to the extent of their abilities and with an inspiring show of innovation. The attention given to corporate philanthropy, and the public recognition it has earned in the mass media, which has reported on the various kinds of charitable giving by Brazilian businesses, is very welcome. In the spirit of using the means at hand to help others, many individuals and businesses have donated money, but donations of goods are also common. Ambulances and medical and personal protective equipment (PPE), like masks, surgical gloves and alcohol-based hand sanitizer, are just some examples of the type of goods that have been donated. And, as usual, what is new can present challenges. Brazil's tax laws, and especially the laws on the state value-added tax, ICMS (Imposto sobre a Circulação de Mercadorias e Serviços), traditionally tend to stifle donations of goods and other property. Now is a good time to change that.

The ICMS is our typical value-added tax. It was designed to attach to commercial transactions or, in other words, transactions that involve a sale of goods – transfer of ownership of the goods in exchange for payment of a price. It is this that differentiates the simple movement of goods, which should not be subject to taxation, from a value-added mercantile transaction, which should be taxed, since it makes goods become "merchandise".

Our legislation, however, is shortsighted, and presumes that any transaction resulting in the movement of goods should be subject to ICMS, including donations. Here we can make two criticisms. The first is that companies have to pay tax of up to 33% of the value of merchandise if they donate it. The second is worse. In the absence of a price, the tax authorities can use the goods' market value, which normally exceeds acquisition or production cost. The result? An even higher tax burden for the donor.

Levying ICMS in these circumstances seems to us to be unconstitutional and questionable. Even so, donors usually do not want to get into a fight with the taxman. In the current crisis, it seems obvious to think that Brazilian states would want to encourage support from the private sector by exempting donations of goods by manufacturers and commercial businesses. This, although obvious, has not been done. In reality, there are currently very few initiatives by the states to exclude philanthropic gifts of goods from ICMS.

An additional challenge is that it is not enough for the individual state to want to exempt donations from ICMS. Brazil has an official process that must be followed in order to grant ICMS tax benefits in general, including

exemptions for donations: the states and the federal
district must obtain authorization from the National Council on Tax Policy, Confaz (Conselho Nacional de Política Fazendária), which is composed of representatives of the various states (including the federal district) and the federal government, who together decide on measures to harmonize taxation in the country.

Since 1975, Confaz has granted ICMS exemptions for donations to government entities and to accredited social assistance entities to assist victims in declared public emergencies, as in the current pandemic. Still, the exemption is limited to specific situations and recipients. Just the fact that donations from outside Brazil, donations made to the population in general, and donations to not-for-profit assistance entities that have not been accredited do not benefit from the exemption is enough show how challenging the situation is, and how it can be made more difficult by the complexity and bureaucracy of the process. In São Paulo, for example, accreditation of social assistance entities must be granted by the Legislative Assembly, which adds a political component to the process. If the recipient of donations does not have accreditation, the donor's cost is not only the cost of the goods donated, but also the ICMS on the transaction. In short, donations become unreasonably expensive, and effectively discouraged.

The illogic of taxing donations leads to strange situations. When the pandemic arrived in Brazil, in March the Federal District sent a proposal to Confaz, suggesting that domestic purchases and imports of PPE intended for use in preventing and fighting the spread of covid-19 should be exempted from ICMS or least taxed at a lower rate, so as to make PPE more accessible to the population in general. Despite the urgency of the matter, Confaz failed to respond, and the Federal District had to apply to the courts for a preliminary order authorizing it to grant the exemption until the end of the year. The Federal District's initiative is praiseworthy, but it does reveal the absurdities of our reality. At the time this article was written, more than 90 days after the proposal was submitted, Confaz still had not approved the proposal.

This is just one more example that demonstrates the urgency of the long-promised national tax reform. Looking at the two reform proposals now before the Chamber of Deputies and the Senate, at least the first would provide a solution, because it expressly excludes donations from the goods and services tax that would replace the ICMS.

But the pressing need is now. Philanthropy is not a taxable activity. None of Brazil's states will get rich taxing solidarity. This is true in the pandemic, but will still be true in the future, when the storm passes. By attaching to donations, the ICMS operates counter to the spirit of public-minded initiatives, assuming the features of a prohibitive tax that discourages the generosity that make a significant contribution to the wellbeing of all. To donors, we recommend close attention to how they make their donations; of governments, we ask reasonability and a sense of urgency.

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