

In the troubled waters of service tax

Delinquent payers or delinquent collectors?
This is the great deadlock in the payment of
Service Tax on offshore services.

“He who pays badly, pays twice”, this old proverb was never as fitting as it is for today’s Brazilian tax scenario. Our tax legislation, complex and often out-of-date, does not always can keep up with the economic relationships in a world of a dynamic and global market.


The oil industry is no exception: this economic segment has so many specificities that taxable events generate more doubt than certainty. As if things were not complicated enough, our tax authorities many times exaggerate the legal premise “*in dubio pro Fisco*” (in case of doubt, the law favors Tax Administration); although, in some cases, there is an entrepreneurial and collaborative attitude on the part of these authorities, who act to help industry players by assisting them in the development of their activities.

An example of this approach can be observed in the way some municipalities have been collecting Brazilian Service Tax on offshore services – a matter of paramount importance for companies with E&P activities.

Collected by the local governments (municipalities), the Service Tax is a tax that has always been surrounded by controversy, especially regarding which municipality should receive payment. The controversies arise when service providers, despite operating onsite in their respective territories, ended up paying the service tax from their respective headquarters or branches, located in another municipality.

This is due to the fact that, historically, the legislation has established that Service Tax should be paid to the municipality where the service-provider’s business was located (general rule), without defining the concept of “establishment”, which at that time was considered to be the place formally registered (as headquarters, branch, office, etc.).

This situation remained apparently undefined until the Superior Court of Justice had consolidated the understanding that Service Tax would be due at the place where services were rendered, regardless of where the business’ headquarters were located. When the discus-



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sion seemed to have been resolved by our jurisprudence, the Complementary Law no. 116/2003 was enacted, as result of almost two decades of parliamentary discussion (its bill is dated of 1989), which, despite representing an improvement in some respect, made other provisions outdated due to the fact that our time-consuming legislative process fell behind industry.

One of these provisions dealt with the place of payment of Service Tax, reiterating the idea that the tax should be paid to the municipality where the service-provider business is located. However, seeking to correct the distortion from the past, the new rule defined the concept of establishment, even without putting an end to the discussion.

The Complementary Law no. 116/03 regulates that "establishment" shall be *the place where the taxpayer renders services activities, whether permanently or temporarily, and represents an economic and professional unit, regardless of the location of its headquarters, branch, service unit, representa-*

tion office, contact or any other denomination that may be used.

Therefore, the business came to be defined as the place where services are effectively provided, according the understanding of the Superior Court of Justice. However, the Law improperly regulates the exception to the rule created by the case of Service Tax collection for offshore services: since there is no way to define in which municipality the service is actually provided. However, if one reads carefully, in a literary interpretation, that there should not be any exception to the general rule, since the tax should equally be paid to the service-providing municipality, which, as mentioned above, is the service-providing location.

In this respect, considering a systematic analysis of the legislation in effect and its objectives, we understand that the legislator intended to allow Service Tax due to the municipality of the service provider's headquarters, because there is no provision in the Brazilian legislation for the municipali-

ties' jurisdiction over the "facing" maritime waters – especially considering the fact that territorial sea belongs to Federal Government. According to our Constitution, the municipalities do not have any jurisdiction over this area.

Furthermore, there is no legal provision to apply the assumptions employed in the calculation of government takes (i.e. use of orthogonal and parallel lines from coastal boundaries) to limit the municipal tax jurisdiction, as some municipalities have been advocating, deeming themselves as collectors of Service Tax due on operations provided at platforms or vessels "facing" their coastal lines.

It is important to note how these municipalities use the term "facing" (when they mention the maritime region facing the coastal line of their territories), as if this word had a sense in itself. It does not. Thus, the attitude of local governments is surrounded by irregularities, including those constitutional in nature.

Meanwhile, whether a service provider of offshore services or an oilfield concessionaire, the taxpayer remains in a situation of legal exposure and uncertainty, insofar as Service Tax collection is concerned, since the municipality where the service provider's headquarters is located will not be enough to avoid future tax assessments and contingencies, due to a "facing" municipality that may charge taxes over these operations.

Several municipalities have already been assessing the E&P industry for Service Tax payment in their respective territories, assuming the platform/ vessel projection is on its coastal region.

To reinforce the understanding that there is no legal grounds for this municipal decision, a complementary bill of law (PLC 437/2008) is being considered by the National Congress to amend the

current Service Tax legislation especially regarding to services in "facing" maritime waters.

This bill intends to impose, as the Service Tax's local of payment in case of E&P services, the municipalities where the service is actually provided, although the bill does not establish any assumptions for the "allotment" of maritime areas to municipalities. At any rate, such "allotment" would not be constitutional; no amendment to the Complementary Bill no. 116/2003 would uphold the concept of "facing" municipalities.

In the judicial sphere, what we have seen that tax collection from the business' headquarters has been upheld in few decisions, since municipal territorial projections, for the purposes of government takes, have not been granted.

Therefore, it may be concluded that tax levied on services provided in maritime waters is due to the municipality where the service provider's headquarters is located, and cannot be legitimately levied by municipalities projecting themselves over its coastal region to reach platforms and vessels.

However, considering the unfounded behavior of some municipalities, the E&P industry has some alternative recourse in order not to negotiate agreements with the municipalities illicitly levying service tax. Filing for injunctions to protect companies from illicit charges, mitigating the risk of increase of tax burden on their activities, is one.

As we tried to demonstrate, "paying twice" is not a consequence of incorrect tax payment. There are no "delinquent payers". The risk of double taxation comes from these municipalities' outrageous understanding, as "delinquent collectors", whose frenzy to collect taxes may cause enormous losses and disturbance to taxpayers. ■

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