

UNCERTAINTIES IN VOD TAXATION IN BRAZIL

The rise of Video on Demand (VoD) has stormed the audiovisual playing field throughout the world. In Brazil, the situation is no different and consequences of VoD expansion, such as “cord-cutting” (cancelling subscriptions to multichannel subscription services) and the shrinkage of more traditional home video options (for example DVD and Blu-Ray) are evident.

In addition to stirring competition, VoD expansion in Brazil exposed deficiencies and uncertainties in the local taxation of audiovisual services in general. Challenges are greater to companies offering VoD, however, due to an obsolete model of government intervention in the audiovisual market through taxation, to which VoD providers may not be adapted. There are also significant differences in taxation of the various audiovisual services that compete for the same customers, which may result in unlevel playing field.

For instance, communication services like pay TV are subject to the Brazilian Value-Added Tax (ICMS), a state tax, while other related services, such as the provision of audiovisual content via streaming, are subject to the Brazilian Services Tax (ISS), collected by municipalities, at different tax rates.

The first challenge was therefore to define whether VoD is subject to ICMS or ISS. This problem was partially solved by an amendment to the Complementary Law that regulates ISS passed in Congress in December 2016. As a result, the law now lists online streaming of audiovisual content as a service taxable by ISS. Some states such as São Paulo, on the other hand, have enacted regulations providing that downloaded audiovisual content is taxable by ICMS.

However, we believe that licensing the use (consumption) of audiovisual content is not a “service” under the definition given by the Federal Supreme Court (STF) for purposes of ISS taxation. Likewise, it is our view that ICMS can only be charged on the provision of audiovisual content (via download or other means) if it entails a definitive transfer of the content to the customer or if it constitutes a communication service, such as VoD offered by pay TV operators through their own infrastructure.

A tax reform that unifies ISS and ICMS in a single VAT with a broader scope of taxable activities could solve this problem and level the playing field for audiovisual content provision. Reform propositions in this sense are currently being discussed in the Brazilian Congress, but their outcome is still unpredictable.

Uncertainties in VoD taxation escalate when it comes to charging the Contribution for Development of the National Film Industry (Condecine), a tax levied on the commercial broadcasting, production, licensing, and distribution of audiovisual titles (Condecine-Título). Similar tax (Condecine-Remessa) is applied on payments to producers, distributors or intermediaries located out of Brazil for the exploitation of audiovisual titles or for their acquisition or importation at a fixed price.

While Condecine-Remessa is charged at a rate of 11% on the revenues, Condecine-Título is charged per title at fixed monetary rates, meaning that the greater the amount of titles made available, the higher the Condecine due. Rates also vary according to the type of title (feature or short film, series or soap opera episode, for example) and market segment in which the audiovisual titles are provided (movie theaters, home video on any media, free TV, pay TV and “other markets”). Condecine-Título is due once every five years.

The agency in charge of managing the Condecine-Título collection (ANCINE) considers that VoD falls under the “other markets” segment. Taxpayers say otherwise. Some defend that the inclusion of VoD in the “other markets” segment is illegal and therefore no Condecine-Título is due. Others believe that VoD is simply another form of home video, thus falling under the “home video on any media” segment, in which titles are taxed at rates lower than those applicable to the “other markets” segment. This matter remains unresolved and there is no record of judicial decisions addressing it yet.

Collecting Condecine from foreign VoD providers is also a challenge, because in many cases audiovisual content is offered directly to local consumers by foreign companies without physical presence in Brazil. As it stands, Condecine-Título is due only by holders of commercial exploitation or

licensing rights located in Brazil. Unclear rules also make way for allegations that payments made by consumers to foreign VoD providers are not subject to Condecine-Remessa, because they are not paying to commercially exploit the titles. Regardless of that, charging Condecine individually from millions of consumers seems unachievable and is certainly undesirable.

The Condecine legislation was originally enacted in 2001, when VoD was still incipient. Amendments to it could solve this and other relevant matters, such as the unequal taxation among different market segments.

The Federal Government uses funds from Condecine to intervene in the audiovisual market and foster the national film industry. Therefore, Condecine should be as neutral as possible among different market segments and should not inhibit the development of new products such as VoD or the entry of new players.

The title-based taxation is particularly prejudicial for VoD, because its attractiveness relies heavily on the size and variety of the catalogue of titles. Under the current regime, new entrants have to pay Condecine-Título upfront, regardless of actual revenues, and thus VoD providers may be prompted to reduce their catalogues. As a result, independent or less popular titles tend to become unavailable to users. The bureaucracy involved in the registration of titles with ANCINE could also be avoided or reduced in case Condecine were no longer charged on a title-basis.

ANCINE is well aware of these problems and has suggested alternatives to the current taxation. Taxing revenues (including advertisement) is one of the options and seems like the easiest to be put in place. It may however face resistance from some VoD providers, as they fear that any benefits stemming from a more isonomic and less bureaucratic regime may be neutralized by a possibly higher tax burden.

A hybrid system in which taxpayers would be able to choose between title-based or revenue-based payments is also being considered and could be a good middle ground solution.

In the case of collecting Condecine from foreign VoD providers with no physical presence in Brazil that offer audiovisual content directly to consumers, one of the options under discussion is taxing the financial operations related to payment of VoD, which would mean transferring the tax liability to the financial institutions involved. This would however require cooperation from the Brazilian Central Bank and careful integration of electronic systems.

Although not exclusive to VoD provision, uncertainties and deficiencies in Brazilian taxation negatively impact such a dynamic and highly competitive market, perhaps more than traditional markets which are better adapted to the Brazilian taxation muddle. Therefore, understanding the complexity of the Brazilian tax system is not only necessary, but may as well represent an important advantage to players willing to remain relevant in and/or enter the Brazilian audiovisual market while a more balanced tax environment is still lacking.

Authors:

Isabela Schenberg Frascino
ifrascino@levysalomao.com.br

Pedro Araújo Chimelli
pchimelli@levysalomao.com.br