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REGULATION OF RATE DIFFERENTIATION OF ICMS (TAX RELATED TO OPERATIONS RELATING TO THE CIRCULATION OF PRODUCTS)

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INTRODUCTION

The tax related to operations relating to the circulation of products and interstate transport and communication services (ICMS) is one of the most important taxes in force in Brazil. It is the responsibility of the States and the Federal District to collect it, which is why these entities have a fundamental role in how the tax will occur within their territorial limits.

The ICMS derives from more than one hypothesis in which its incidence will occur, the main one being that which operates on operations relating to the circulation of products. It turns out that, given the diffusion of the media in the last decade, the negotiation situations in which the ICMS is operational, especially from one State of the Federation to another, have undergone a substantial increase in relation to the past, largely due to the *internet*.

In this aspect, ICMS taxation could not be set aside, so the national legislator, aware of this, introduced a new form of collection and distribution of ICMS levied on interstate operations that destined merchandise to a recipient located in a State different from the origin of the good, having received the name ICMS Tax Rate Differential (DIFAL). DIFAL was inserted into the legal system by Constitutional Amendment Number: 87 of 2015, which provided for the collection of the difference between the internal and interstate tax rates of the State of destination of the merchandise when it was destined for a person who is not a tax payer, with a view to making the distribution of the proceeds from ICMS collection.

This forecast sought, in essence, to balance the collection of Member States and the Federal District, since, in the old legislation, the ICMS due on interstate operations was intended only for the State of origin of the merchandise based on its internal tax rate.

It turns out that in order to enable the collection of ICMS-DIFAL, due to its institution by the constitutional text, the Member States and the Federal District issued an agreement, within the scope of the National Council for Financial Policy (CONFAZ), which provided for the characteristics of the tax obligation, such as the calculation basis, rate, form of compensation, etc. Meanwhile, a discussion has arisen in the legal world regarding the validity of such an agreement, since, ordinarily, tax matters describing taxes must be the subject of complementary law, under the terms of article 146 of the Federal Constitution.

Faced with such non-conformity, Direct Unconstitutionality Action 5,469/DF was filed to question the clauses contained in the aforementioned agreement. This action was judged in February 2021 together with Extraordinary Appeal 1,287,019/DF, with recognized General Repercussion, by the Federal Supreme Court. At the time, the following thesis was established: "The collection of the tax rate differential referring to ICMS, as introduced by Constitutional Amendment Number: 87/2015, presupposes the publication of a complementary law conveying general rules."

In view of the assumptions established by the Supreme Court, Complementary Law number 190 of 2022 was enacted, which regulated the collection related to ICMS-DIFAL within the scope of the States and the Federal District. It turns out that, under the aegis of the principles that govern constitutional and tax law, the production of effects of said law encountered obstacles to its occurrence, in view of the apparent violation of the principle of tax precedence, as well as legal certainty, by the provisions of article 3 of the law.

This is, therefore, the question that will be the subject of this study, consisting of the

analysis of the (in)validity of the ICMS-DIFAL charge in the current year 2022, considering, moreover, that the issue is pending judgment by the Federal Supreme Court to resolve the problem.

TAX RELATED TO OPERATIONS RELATING TO THE CIRCULATION OF PRODUCTS AND INTERSTATE TRANSPORTATION AND COMMUNICATION SERVICES (ICMS)

CONSTITUTIONAL ASPECTS OF ICMS

The themes of the Tax Law branch originate, primarily, from the constitutional provisions provided for by the Constituent Power. This is because the constitutional text not only took care to introduce taxes and their respective collection powers, but also defined how the competent federated entities must act towards taxpayers, in order to avoid abuse of the power to tax.

The ICMS is not excluded from this premise, as it is provided for in article 155, item II, of the Federal Constitution, which gives the States and the Federal District the authority to impose the tax.

Article 155: It is up to the States and the Federal District to impose taxes on:

II – operations relating to the circulation of products and the provision of interstate and intercity transport and communication services, even if the operations and services begin abroad. (BRAZIL, 1988).

From this device derive at least five hypotheses of ICMS incidence, which reflect different scenarios thought up by the Constituent Power when preparing the larger text. Professor Roque Antônio Carraza (2012, p. 30-31) teaches:

The acronym “ICMS” encompasses at least five different taxes, namely: a) the tax on commercial operations (operations relating to the circulation of products), which, in some way, comprises what arises from the entry, into the Federated Unit, of products imported from abroad; b) tax on interstate and intercity transport services; c) the tax on communication services; d) tax on production, import, circulation, distribution or consumption of liquid and gaseous lubricants and fuels and electrical energy; and e) tax on the extraction, circulation, distribution or consumption of minerals.

Without prejudice to the different hypotheses in which ICMS is levied, it is important to highlight that some characteristics relating to it persist regardless of the hypothesis verified, that is, a circumstance that prevails in all its incidence hypotheses, such as the fact that it is a non-cumulative tax and the competence of the States and the Federal District.

However, item XII of § 2 of article 155 of the Federal Constitution established that it would be up to the complementary law to decide on the other characteristics of the ICMS, such as its taxable subject and compensation regime. For this purpose, Complementary Law number 87, of September 13, 1996 (Kandir Law) was drawn up).

Despite this, it is worth emphasizing that the object of this study consists of analyzing the incidence of ICMS on “operations related to the circulation of products”, and, more specifically, when they occur in interstate shipments whose final consumer is not a tax payer, as per Item VII of paragraph 2 of article 155 of the Federal Constitution prescribes:

VII - in operations and services that deliver products and services to final consumers, whether tax payers or not, located in another State, the interstate rate will be adopted and the State where the recipient is located will be responsible for the tax corresponding to the difference between the rate of the receiving State and the interstate rate. (BRAZIL, 1988).

Finally, it is worth clarifying that this device authorizes the collection of ICMS-DIFAL, which will be further explored in the course of this study.

TAX RELATED TO PRODUCTS MOVEMENT OPERATIONS

The incidence of ICMS on merchandise circulation operations is, inescapably, the one that has the greatest economic relevance for the States and the Federal District, since it is present on a vast portion of products circulating in society. It is noted that the descriptive nomenclatures of the tax, such as “operations”, “circulation” and “products”, cannot be interpreted in their pure etymology, making a theoretical and legal-economic analysis necessary for a better understanding.

Considering the incidence hypothesis under analysis, it is first necessary that it is a merchandise, which, in short, is a movable asset whose purpose is sale, resale or even donation, and which is being offered to the consumer in full economic circulation. At this point, Roque Antonio Carraza (2005, p. 40) clarifies:

[...] it is not only the purchase and sale of products that gives rise to this tax, but also exchange, donation, payment in payment, etc. All these ‘operations’ provide the legal circulation of products and, in theory, are subject to ICMS taxation.

That said, we have that the circulation of merchandise must be legal, to the point that it generates relevance for the law, that is, taxation by ICMS will take place when the circulation, whose merchandise is the object, intends an effective transfer of ownership of the good, changing your property. Without prejudice to this understanding, it is still necessary to understand that the operation precedes the circulation of the merchandise, so that the latter means a true corollary of the operation on which the tax will be levied. In the words of

Sacha Calmon Navarro Coelho (2005, p. 562):

The word *operation*, used in the constitutional text, thus guarantees that the *circulation of merchandise* is an adjective, a consequence. Only those commercial operations that involve the circulation of merchandise as a means and form of transferring ownership will have legal relevance. Therefore, the constitutional emphasis on the expression operations of circulation of products. The tax does not apply to the mere exit or physical circulation that does not constitute a real change of ownership of the domain.

Thus, the perfect situation of the aforementioned hypothesis of incidence is that the operation carried out causes the circulation of the products, not the other way around. This is because, generally, the operation begins in the first production stage of the merchandise, which will often be the circulation of raw materials. At the end, the merchandise is made available in the square so that it can be consumed.

It is important to conclude, therefore, that not all products will be considered merchandise, since such classification requires the existence of a movable good intended to constitute a legal relationship, especially sale or resale, that represents the necessary economic circulation and denotes relevance to the world of law.

Despite the alignment of concepts that promotes the understanding of the structure of the tax generating event, now the legal relationship of the tax, the national legislator attributed characteristics whose identification criteria are explored by the doctrine under the aegis of the incidence matrix rule, which describes five criteria constituting the tax. They are the material, spatial, temporal, personal and quantitative, so that the material criterion is what was addressed in this topic.

PASSIVE SUBJECTION OF ICMS

In compliance with the personal criteria of the ICMS, the taxpayer of the tax obligation is identified, who is the person who practices the hypothetical situation provided for in the legislation as a tax-generating event. In this sense, for the purposes of classifying the ICMS taxable person, it must be noted that not every person will be considered a taxpayer for the mere sale, resale or other business act of movable assets.

This is because, in order to see the ICMS contribution, it is necessary for the taxpayer, among other specificities, to promote the circulation of products not only with commercial intentions, but also to do so regularly. In this sense, Carlos da Rocha Guimarães (1978, p. 133) clarifies that “habituality is the criterion that guides us in differentiating the objective from the subjective, and that transforms objective from subjective, and that transforms the simple legal circulation of products into legal circulation of products”.

The provisions of the national legislator in article 4 of Complementary Law number 87/1996, which regulates the ICMS, do not contradict:

Article 4: Taxpayer is any person, natural or legal, who carries out, regularly or in a volume that characterizes commercial purposes, operations involving the circulation of merchandise or the provision of interstate and intercity transport and communication services, even if the operations and services start abroad. (BRAZIL, 1996).

This way, ICMS taxation is not only linked to the fact that the natural or legal person practices the tax-generating event (circulation of merchandise), but rather whether such practice (or person) has the intention of obtaining profit (merchandise) and occurs habitually, in which case the taxpayer will be subject to the tax obligation. Therefore,

when there is a taxpayer able to contribute to the ICMS, he must pay the amount related to the tax to the State where the merchandise was shipped, even if the recipient of the merchandise is located in another State of the Federation, a scenario that meets the spatial criterion.

THE DEFINITION OF RATES AND THE ICMS CALCULATION BASIS

The rate is an element that, alongside the calculation base, makes up the amount owed by the taxpayer as a consequence of the tax-generating event, in satisfaction of the quantitative criterion. It is subject to the legal reserve regime and must be strictly established by law.

The calculation base, just as essential, is the amount to which the tax rate will be applied in order to determine the amount due. In the event of ICMS being levied on operations relating to the circulation of products, the calculation basis will consist of the value of the operation carried out, which, once approved, will be applied at the respective rate.

Furthermore, it must be noted that the rate must comply with the principle of contributory capacity, set out in § 1 of article 145 of the Federal Constitution, so that its setting will take into consideration, the varying levels of contribution of the taxpayer based on the economic dimension of the fact. In terms of ICMS, it is up to the States and the Federal District to define, through local law, their internal rates, which will be applicable to all operations occurring in their territory.

Notwithstanding the competence attributed to the States and the Federal District, the setting of ICMS rates has a variable introduced by the Federal Constitution itself, provided for in its article 155, § 2, item V:

V - the Federal Senate is entitled to:

a) establish minimum rates for internal operations, through a resolution initiated by one third and approved by the absolute majority of its members;

b) establish maximum rates on the same operations to resolve specific conflicts involving the interests of States, through a resolution initiated by an absolute majority and approved by two-thirds of its members; (BRAZIL, 1988).

It is therefore inferred that the Federal Senate was given the power to intervene in the process of setting ICMS rates by establishing minimum and maximum rates for internal operations occurring in the States and the Federal District. In fact, this device aims at nothing more than preventing any unfair economic imbalance between the federated entities when setting their tax rates, so that in this case, the Senate's action will be to define a minimum and a maximum that must be respected, in order to resolve the problem.

In this sense, it must also be noted that if an act of the Federal Senate is in force that establishes a minimum and a maximum limit for setting internal rates, local law that disregards such delimitations will be ineffective.

Without prejudice to the specificities relating to the internal rate, the Federal Senate was also responsible for establishing, by means of a Resolution, the rates applicable to interstate operations involving the circulation of products, in accordance with item IV of § 2 of article 155 of the Federal Constitution. In effect, section VI of the same provision imposes a delimitation of a protective-economic nature, providing that internal rates cannot be lower than interstate rates.

This forecast seeks, in essence, to promote an economic balance in the country and an escape from financial inequality between States, since in the event that a

State with heightened industrial/mercantile development establishes a low internal tax rate, States in the opposite situation would suffer profoundly. economic impacts. This is all because the better developed States would concentrate their operations internally in order to reduce the cost of their products and, consequently, the cost of taxation, thus discouraging the occurrence of interstate operations destined for other less privileged States of the Federation.

It is worth listing the legal provisions relating to interstate rates, which were established through Resolution Number: 22 of 1989:

Article 1: The rate of Tax on Operations Relating to the Circulation of Products and on the Provision of Interstate and Intermunicipal Transport and Communication Services, in interstate operations and services, will be twelve percent.

Single paragraph. In operations and services carried out in the South and Southeast Regions, destined for the North, Northeast and Central-West Regions and the State of Espírito Santo, the rates will be:

- In 1989, eight percent;
- from 1990, seven percent.

Article 2: The tax rate referred to in article 1st, in export operations abroad, it will be thirteen percent. (BRAZIL, 1989)

This way, the interstate rate will generally be 12%, with the exception of operations carried out in the South and Southeast regions that send products to the North, Northeast, Central-West regions and the State of Espírito Santo, in which case the rate will be of 7%, and those for exports abroad, whose rate will be 13%. Despite countless discussions about the (un) constitutionality of such a device, the fact is that the promotion of equality between the States of

the Federation constitutes its reason for being, in order to mitigate the discrepancy in revenues.

Therefore, the internal ICMS rate will be set by the respective State or Federal District, taking into consideration, any minimum and maximum limits established by the Federal Senate. And, for the interstate tax rate, the provisions of Resolution Number: 22 of 1989 must be observed.

THE ACTIVITY OF THE NATIONAL FARM POLICY COUNCIL (CONFAZ)

In parallel to the constitutional provisions and general regulations brought by the Kandir Law, the ICMS has guidelines that, according to the constitutional mandate, are the subject of complementary laws scattered throughout the system.

In this sense, Complementary Law number 24/1975 took care of the creation of agreements for the granting or revocation of ICMS tax exemptions, incentives and benefits. Under article 2 of the law, agreements originate from meetings to which representatives from all Member States and the Federal District have been summoned, as well as a representative of the Federal Government, who will preside over the occasion. Here is the device:

Article 2: The agreements referred to in article 1st, they will be held in meetings to which representatives from all States and the Federal District have been summoned, under the presidency of representatives of the Federal Government. (BRAZIL, 1975).

Based on this, the ICM Agreement 08/1975 was signed by the States and the Federal District, which provided that the collegial department provided for by Complementary Law number 24/1975 would be called the Finance Policy Council (CONFAZ). At the time, CONFAZ was linked to a department of the Ministry of Economy, a provision that was maintained with the Federal Constitution of 1988.

Among its various responsibilities, the CONFAZ board seeks, through consensus between the States and the Federal District, the harmonization of the country's tax policies with a view to improving Tax Administration, developing mechanisms that simplify relations between the Tax Authorities and the taxpayer.

It turns out that, despite the clear powers attributed to CONFAZ by legislation, at times, exceeded the limits of its activities by issuing agreements that, to the detriment of constitutional commandments, regulated tax obligations.

This is, therefore, what happened with the drafting of ICMS Agreement 93/2015, which provided for the procedures to be adopted in interstate operations and services that intended products and services for end consumers who are not ICMS taxpayers, a scenario that constitutes the figure of ICMS rate differential.

After having made these considerations, it is important to clarify that CONFAZ played a crucial role in the dispute that is the subject of this study regarding the unconstitutionality of charging the ICMS-DIFAL, since the department sought to regulate the tax by issuing its agreements. This fact, as will be seen, violates the legislative process and the hierarchy of norms.

THE ICMS RATE DIFFERENTIAL

HISTORICAL CONTEXT

As mentioned in a previous topic, ICMS collection constitutes one of the largest sources of state revenue in the country, as it is present in a huge range of products and services that circulate in society. It turns out that this huge collection would not be possible only in the economic scenario of consumption in physical stores that not only Brazil, but also the world, was accustomed to. For this, the rise of electronic commerce was decisive.

It is clear that *internet* consumption has only grown in the last decade. Thus, aspects of taxation had to adapt to the new existing social relations, in order to safeguard the State's participation in the wealth of its subjects.

In terms of ICMS, electronic commerce provides the constant circulation of products on a large scale throughout the national territory, often involving more than two States of the Federation in the same production chain.

It is in this scenario, then, that the tax obligation to collect the ICMS rate differential arises in operations involving the circulation of products in interstate shipments destined for final consumers, whether tax-paying or not. The ICMS-DIFAL thus sought to make the collection of Member States and the Federal District equitable in the face of the new consumption scenario, since in the old tax forms only the State of origin of the merchandise took advantage of the respective collection.

Thus, considering that all taxes must have a constitutional provision, Constitutional Amendment Number: 87, dated April 16, 2015, was published, which introduced ICMS-DIFAL into the national tax system.

CONSTITUTIONAL AMENDMENT NUMBER: 87/2015

As mentioned, Constitutional Amendment Number: 87/2015 took care to introduce into the constitutional text the tax obligation consisting of the collection of the amount related to the difference in the internal and interstate ICMS rates of the respective State of destination in interstate operations involving the circulation of products, as per the amendment brought to item VII of § 2 of article 155 of the Federal Constitution:

VII - in operations and services that deliver products and services to final consumers, whether tax payers or not, located in another

State, the interstate rate will be adopted and the State where the recipient is located will be responsible for the tax corresponding to the difference between the rate of the receiving State and the interstate rate. (BRAZIL, 2015).

Furthermore, the amendment provided for who would be responsible for collecting the ICMS-DIFAL. He therefore attributed it to the recipient of the transaction when he is a tax payer and to the sender when he is not, in accordance with item VIII, paragraphs a and b, of § 2 of article 155 of the Federal Constitution:

VIII - the responsibility for collecting the tax corresponding to the difference between the internal and interstate rates referred to in item VII will be attributed:

a) to the recipient, when the recipient is a tax payer;

b) to the sender, when the recipient is not a tax payer. (BRAZIL, 2015).

Therefore, it must be noted that the institution of ICMS-DIFAL by Constitutional Amendment number: 87/2015 meant a real increase in the ICMS tax burden on interstate operations involving the circulation of products, considering that, before its creation, only the State of origin of the merchandise took advantage of the value of the tax levied on the operation based on the internal rate, leaving the State of destination in economic disrepute.

It turns out that precisely because the charge relating to ICMS-DIFAL was introduced by amendment to the constitution, its other characteristics and guidelines were reserved for complementary law, as occurred with the Kandir Law, in accordance with the provisions of article 146, paragraphs II and III, paragraphs a and b, and item XII of § 2 of article 155, both of the Federal Constitution:

Article 146: The complementary law is responsible for:

[...]

II - regulate constitutional limitations on the power to tax;

III - establish general rules on tax legislation, especially on:

a) definition of taxes and their types, as well as, in relation to the taxes detailed in this Constitution, the respective triggering events, calculation bases and taxpayers;

b) tax obligation, assessment, credit, prescription and expiry; (BRAZIL, 1988).

XII - the complementary law is responsible for:

a) define your contributors;

b) provide for tax substitution;

c) regulate the tax compensation regime. (BRAZIL, 1988).

However, this is not the scenario that was created with the publication of Constitutional Amendment n° 87/2015, so that the competent federated entities, with a view to taking immediate advantage of the new ICMS collection method, promoted their own regulations through of farm agreements, directly violating the constitutional principle of legal reserve and tax legality.

THE ICMS AGREEMENT: 93/2015

CONFAZ's ICMS Agreement 93/2015 resulted from the promulgation of Constitutional Amendment Number: 87/2015 and was responsible for providing the procedures to be adopted for the collection of ICMS-DIFAL in the respective interstate remittance operations intended for non-tax payers, having been published in September 2015. This is what its first clause predicted:

First clause: In operations and services that allocate products and services to end consumers who are not ICMS taxpayers, located in another federated unit, the provisions set out in this agreement must be observed. (BRAZIL, 2015).

As it was already mentioned, the Member States and the Federal District were in a hurry to make the collection of the new tax feasible, so they judged the issuance of a finance agreement to be sufficient for its respective implementation. The agreement provided, among other characteristics, the taxpayers and the form of tax substitution and ICMS-DIFAL compensation, elements that are exactly those reserved to the institution by complementary law by item XII, paragraphs a, b and c, of § 2 of the article 155 of the Federal Constitution.

Thus, considering the legal requirements for charging ICMS-DIFAL supposedly satisfied, ICMS Agreement 93/2015 began to take effect from January 1, 2016, subjecting taxpayers to the new collection of amounts relating to the difference in ICMS rates for the State where the recipient of the products is located. What was achieved, therefore, with the aforementioned agreement, was a regulation of tax matters through an administrative act (agreement) that invades the competence of the complementary law. The fact evidenced a summary attempt to make the collection of the tax efficient under the false pretext of promoting an economic balance between the States of the Federation. Along these lines, José Eduardo Soares de Melo (2016, p. 669-685) teaches us:

The Agreements configure administrative compositions, without the necessary legal support to provide for the status of the tax norm (material, quantitative, temporal or spatial aspect), accepting the exclusive constitutional reservation, for the purposes of exempting ICMS (article 155, § 2nd, XII, g).

Therefore, it did not take long for taxpayers to protest against the (un)constitutionality of charging ICMS-DIFAL based on a CONFAZ interstate agreement when it was necessary to issue complementary legislation. To this end, Direct Unconstitutionality Action 5,469/DF (ADI 5469) was filed before the Federal Supreme Court (STF).

THE ARRIVAL OF THE TOPIC AT THE FEDERAL SUPREME COURT THROUGH ADI 5,469/DF IN CONJUNCTION WITH RE 1,287,019/DF

As already anticipated, the discussion about the validity of the ICMS-DIFAL charge based on the provisions of ICMS Agreement 93/2015 soon took hold in the STF's offices, which occurred through the filing of ADI 5.469/DF by the Brazilian Association of Electronic Commerce (ABCOMM) and Extraordinary Appeal 1,287,019/DF by a company in the e-commerce sector. The ADI was filed in the month following the start of the ICMS Agreement 93/2015, in February 2016. Since then, several legal entities in the electronic commerce sector have demonstrated their common interest in filing.

The procedural means sought, synthetically, the declaration of the unconstitutionality of clauses contained in the ICMS Agreement 93/2015, drawn up within the scope of CONFAZ, under the argument that such provisions dealt with matters that were reserved to the complementary law and that, consequently, did not enable the collection of ICMS-DIFAL on that occasion.

In February 2021, the ADI was judged together with RE 1.287.019/DF, and the requests for declaration of the unconstitutionality of the clauses of the ICMS Agreement 93/2015 were granted, in such a way that the Supreme Court established the understanding that the agreement interstate

does not have the power to make up for the absence of a complementary law that provides for tax guidelines. Check out the final excerpt from the vote by reporting minister Dias Toffoli, which was followed by the majority of the Plenary:

[...] In view of the above, I consider ADI Number: 5,469/DF to be valid, declaring the formal unconstitutionality of the first, second, third, sixth and ninth clauses of ICMS Agreement Number: 93, of September 17, 2015, of the National Council of Finance Policy (CONFAZ), due to invasion of the specific field of federal complementary law. (ADI 5469, Rapporteur: DIAS TOFFOLI, Full Court, judged on 02/24/2021, ELECTRONIC PROCESS DJe-099 DISCLOSED 05-24-2021 PUBLIC 05-25-2021).

It is inferred that the minister correctly understood that the scope of the rules contained in ICMS Agreement 93/2015 was exceeded, since the matter dealt with there must be regulated by the relevant complementary law. In the same way, he understood the majority of the Plenary, therefore, the unconstitutionality of the clauses contained in the aforementioned agreement was established.

At the same time, the ministers also gave judgment on the RE files together, an opportunity in which the reporting minister Marco Aurélio, whose vote was followed by the majority, recognized the impropriety of the ICMS Agreement 93/2015 to provide for essential elements of the ICMS-DIFAL. The following thesis was established: "The collection of the tax rate differential referring to the ICMS, as introduced by Constitutional Amendment n° 87/2015, presupposes the publication of a complementary law conveying general rules."

RESTRICTION OF THE EFFECTS OF THE DECLARATION OF UNCONSTITUTIONALITY

The decision taken by the STF (Federal Supreme Court) in a Direct Unconstitutionality Action regarding the (in)validity of the ICMS-DIFAL charge had a real impact on the way the States and the Federal District had been acting since 2016.

This is because, once the need for a complementary law dealing with the subject was recognized, which invalidated the collection of the exaction that occurred in recent years, taxpayers would have the legitimate right to re-discuss debts paid in the past unduly. So that this scenario would not be conceived, the STF (Federal Supreme Court) operated what we know as modulation of the effects of its decision to declare unconstitutionality, a tool provided for in article 27 of Law number 9,868/1999, which says:

Article 27: When declaring the unconstitutionality of a law or normative act, and taking into consideration, reasons of legal security or exceptional social interest, the Federal Supreme Court, by a majority of two thirds of its members, may restrict the effects of that declaration or decide that it will only be effective from its final and unappealable decision or from another time that may be determined. (BRAZIL, 1999).

In this reasoning, the Supreme Court, after consensus among its members, modulated the effects of the decision that declared the unconstitutionality of the clauses of the ICMS Agreement 93/2015 so that they would only occur from January 1st of the exercise subsequent to the trial, that is, the current year 2022, except for ongoing legal actions.

Such modulation, in line with what is authorized by law, aimed to protect the States and the Federal District from the negative economic impacts that would affect them in the event of an impetuous judicialization of

the issue, in which taxpayers would resort to the Judiciary to question the undue collection due to of ICMS-DIFAL in the years prior to the declaration of unconstitutionality. In fact, the restriction of the effects of the decision made by the STF (Federal Supreme Court) has a political bias, considering that, essentially, it gave the Federal Government a deadline to prepare the necessary complementary law that would regulate the ICMS-DIFAL, while allowing the maintenance of the charge considered unconstitutional until the last day of the 2021 financial year.

It was exactly this, therefore, that the Federal Government took care to accelerate through the Legislative Branch, aiming to satisfy the assumption considered necessary by the Supreme Court to make the charge referring to ICMS-DIFAL valid. As a consequence, Project, number 32 of 2021, which would give birth to the then Complementary Law number 190/2022, had its rapid progress until the end of the 2021 financial year.

COMPLEMENTARY LAW NUMBER 190/2022 AND VIOLATION OF CONSTITUTIONAL PRINCIPLES

PROJECT, NUMBER 32 OF 2021

Project, number 32/2021, initiated by the Senate, began processing in March 2021, on an urgent basis. Immediately, it reached the Chamber of Deputies for review and processing, having been approved in August 2021. As it underwent changes, it was sent back to the Senate in December. Duly approved, it was forwarded to the Presidency of the Republic for sanction.

In its content, Project, number 32/2021 presented the introduction of three new articles to the wording of Complementary Law number 87/1996. He justified them as necessary to satisfy the assumptions made

by the STF (Federal Supreme Court) to, consequently, enable the collection of ICMS-DIFAL in interstate operations involving the circulation of products destined for non-payers of the tax.

It turns out that, contrary to what the National Congress planned, the Bill did not receive presidential sanction within the desired deadline, which must occur in 2021, so that the exaction could be charged as early as 2022. Therefore, Project, number 32/2021 only became Complementary Law number 190 in 2022, since the President of the Republic only expressed his agreement on January 4, 2022.

ARTICLE 3 OF COMPLEMENTARY LAW NUMBER 190/2022

Despite the publication of Complementary Law number 190 on January 5, 2022, it is up to us, finally, to deal with what its article 3 foresees with regard to the production of effects. It was written in the following terms:

Article 3: This Complementary Law comes into force on the date of its publication, subject to, regarding the production of effects, the provisions of paragraph "c" of item III of the caput of article 150 of the Federal Constitution. (BRAZIL, 2022).

It is inferred that the legislator conditioned the production of effects of the law to what is determined in paragraph c of item III of the caput of article 150 of the Federal Constitution. It is worth collecting:

Article 150: Without prejudice to other guarantees guaranteed to the taxpayer, the Union, the States, the Federal District and the Municipalities are prohibited from:

[...]

- collect taxes:

I in relation to triggering events that occurred before the entry into force of the law that established or increased them;

II in the same financial year in which the law that instituted or increased them was published;

III before ninety days have elapsed from the date on which the law that instituted or increased them was published, subject to the provisions of paragraph b. (BRAZIL, 1988).

It must be noted that this constitutional commandment is contained, not surprisingly, in the chapter on limitations of the power to tax. And, in this context, paragraph c indicated in article 3 of Complementary Law number 190/2022 refers to the established principle of nineagesimal precedence of the tax.

The principle of ninety precedence, which will be detailed below, determines nothing more than that no tax may be charged until ninety days have elapsed since the publication of the law that instituted or increased it. This principle aims to protect the taxpayer from any surprise effects in relation to the tax burden that he will bear.

However, it is necessary to emphasize that the provision contained in article 3 of Complementary Law number 190/2022, which obeys only the principle of nineagesimal anteriority, does not prove to be sufficient, from a strictly legal point of view, to produce effects of the law as intended by the legislator when issuing the device. In view of this, the collection of ICMS-DIFAL, even if Complementary Law number: 190/2022 is enacted, must not occur in the current year 2022, since the determination of the production of its effects as foreseen is incompatible with the text constitutional.

This is because, one must adopt the conception that the principle of tax precedence in the ninagesimal modality is inseparable from the general or annual one, to the extent that, as the reforming Constituent Power itself intended in the final part of paragraph c of item III of article 150 of the Federal Constitution, compliance with the ninety-

day period counted from the publication of the law establishing or increasing the tax for the production of its effects is the minimum that must occur in the hypothesis in which it applies. Not surprisingly, the provision contained in article 3 of Complementary Law number 190/2022 underwent substantial changes during its legislative process.

According to what can be extracted from the processing of Project, number 32/2021, which gave rise to Complementary Law number 190/2022, the original text of the law included article 4, the wording of which established that the complementary law would be in force “on the date of its publication, taking effect ninety days after publication”. (BRAZIL, 2021).

The mentioned provision was subject to amendment by Amendment Number: 4 – PLEN under the exact justification that “it is prohibited to charge taxes in the same financial year in which the law that instituted or increased them was published and before ninety days have elapsed from the date on which there is this burdensome law has been published” (BRAZIL, 2021), in accordance with the provisions of paragraphs b and c of item III of article 150 of the Federal Constitution. Thus, the new wording of article 4 conferred by the amendment provided as follows:

Article 4: This Complementary Law comes into force on the date of its publication, taking effect from the first day of the year following its publication and after ninety days have passed. (BRAZIL, 2021).

It can be noted, inevitably, that the legislator overly expressed his concern with the subsumption of Complementary Law number 190/2022 to the dictates of tax precedence in both its modalities, taking into consideration, all the care externalized through repeated modifications to the device that dealt with the production of effects of the law.

Notwithstanding the amendment to the deleted article 4, Project, number 32/2021 was once again modified with the inclusion of the current article 3, reaffirming, once again, the legislator’s zeal in ensuring that Complementary Law number 190/2022 could produce effects without the impediments that now exist.

Based on this context and without prejudice to the relevant legal meanings, the tax-instituting nature of Complementary Law and ninagesimal tax precedence. This is because, as very well observed by Minister Dias Toffoli in the judgment of ADI 5.469/DF, with Constitutional Amendment number: 87/2015 the sender of the products now has another tax obligation, now with the state of destination as the active subject of the relationship legal.

It must also be noted that the legislator himself, during the legislative process of Complementary Law number: 190/2022, incorporated into the legal text the observance of the principle of anteriority, in both its forms, for the respective production of effects of the law. And, inevitably, this was not the premise adopted by the Legislative Branch, with only the subordination to the dictates of ninagesimal anteriority remaining in the original published text.

However, it is worth clarifying that the express reference contained in paragraph c of item III of article 150 of the Federal Constitution to paragraph b of the same provision does not allow the two types of tax precedence to be dissociated. Therefore, there is no way to conceive that the ninagesimal anteriority operates uncoupled from the general one, since the derived Constituent Power expressly determined the need to observe one another. This was also understood by the Federal Public Ministry, through the Attorney General’s Office, in the statement recorded in the files of ADI 7.066/DF:

Despite article 3 of Complementary law: 190/2022 refer only to subparagraph “c” of item III of article 150 of the Federal Constitution, there is no way to deviate from the observance of the previous exercise. This is because the aforementioned constitutional command makes express reference to paragraph “b” of section III of article 150 of the constitutional text [...]. (ADI 7.066/DF, Controller, Minister: Alexandre de Moraes).

Therefore, it is undoubted that the legislative process of Complementary Law number 190/2022 was considerably turbulent, especially regarding the production of effects, the understanding of which was established by article 3 of the law. However, there is no way to ignore the relevant questions that arose in light of what the legal text predicted.

VIOLATION OF THE PRINCIPLE OF GENERAL AND NINAGESIMAL TAX PREVIORITY

The constitutional text is full of what we call general constitutional principles, which radiate their effectiveness throughout the national legal system. In this sense, Paulo de Barros Carvalho (2014, p. 156) teaches us:

This axiological component, invariably present in normative communication, experiences variations in intensity from norm to norm, such that there are precepts strongly loaded with value and which, depending on their syntactic role as a whole, end up exerting significant influence on large portions of the order., informing the understanding vector of multiple segments.

Nevertheless, the original Constituent Power took care to go further in protecting Tax Law themes, while creating constitutional tax principles with a view to redoubling the provisions affecting the sector. First, let us address the constitutional tax principle of general tax precedence, explained in article 150, item III, paragraph b, of the Federal Constitution, which, in the words of Paulo de Barros Carvalho (2014, p. 170):

According to the principle of anteriority, the validity of the law that instituted or increased taxes must be postponed to the year following its publication, when the act is inserted in the communicational context of the law.

Thus, it can be seen that, in Brazil, an increase in the tax burden, whether through the creation of a new tax or an increase in an existing one, cannot have a surprise effect that substantially alters the taxpayer’s budget and day-to-day life. To this end, the principle of general tax precedence complements the principle of legal certainty and protection of trust, which guide the actions of the Tax Administration.

This is because, the foundation on which legal security is conceived, from the perspective of Tax Law, is constituted by the predictability of the actions emanated by the Administration within the exercise of its power to regulate legal-social relations. In this reasoning, it is necessary that the taxpayer be given the opportunity to plan, safely and without causing surprise, for the propagation of the legal effects intended by the administrator, since, as taught by Paulo de Barros Carvalho, “such feeling reassures citizens, opening spaces for planning future actions, whose legal discipline they know, confident that they are in the way in which the rules of law are applied” (2014, p. 162).

Not enough, the derived Constituent Power added, through Constitutional Amendment Number: 42/2003, the figure of ninety-year-old or nineteen-year-old anteriority, which is stated in paragraph c of item III of article 150 of the Federal Constitution. According to its commandment, and in addition to the general precedent, administrators can only collect the tax when ninety days have passed from the date on which the law that created or increased it was published.

In the same sense, there are the lessons of Paulo de Barros Carvalho (2014, p. 170) about

the nature of the principle of ninagesimal anteriority:

This is a new requirement that is in addition to the already existing principle of precedence. A newly instituted or increased tax is only payable in the following financial year and after ninety days have passed since its institution or increase [...].

It is important to conclude, therefore, that, except for the situations expressly indicated in the constitutional text, the rule applicable to the institution or increase of taxes is that of the principles of general and ninagesimal tax precedence, which, it must be noted, are combined in their claims before the its inseparability and need for joint observance.

These are, therefore, the main principles on which Complementary Law number 190/2022 is flagrantly unconstitutional, as the legislator's intention that the law be published in the 2021 financial year to satisfy the general anteriority, remaining observance only of the ninagesimal anteriority, did not materialize, given the publication on January 5, 2022.

In this sense, Complementary Law number 190/2022, if it produces the effects in the year 2022, will incur an outrageous violation of the exposed constitutional tax principles, constituting a true legal aberration that will proliferate its effects riddled with unconstitutionality. However, the possibility of configuring this scenario in these circumstances is already the subject of discussion in the STF (Federal Supreme Court) in the files of ADI 7.066/DF, which was filed with a view to preventing the charge relating to ICMS-DIFAL from taking place in the 2022 financial year, and which is, until the development of this work, pending judgment.

Based on the exordial of said action, it is worth adding the perspective placed on the Supreme Court's assessment by taxpayers, which is based on the reasons addressed in this topic regarding the interpretation that

must be given to article 3 of Complementary Law number 190/2022 in accordance with the Constitution and under the auspices of the principle of tax precedence:

[...] Complementary law: 190/22, by determining in its own legal text compliance with article 150, III, "c", does so in order to provide tax legal certainty to the taxpayer, but article 150, III, "c" must be read with "eyes to see", that is, in the aforementioned constitutional provision there is also, in addition to the need to observe ninagesimal anteriority, there is also the need to obey the provisions of paragraph "b" of the same constitutional diploma, that is, the so-called general or "annual" anteriority, when it is prohibited to charge taxes in the same financial year as the law that instituted or increased them was published, as is the case with Complementary Law number 190/22. (ADI 7.066/DF, Minister; Controller: Alexandre de Moraes).

At the same time, and this must be true, the insecurity generated by the effects of Complementary Law number 190/2022 causes taxpayers spread across the federated units to demand, within the scope of each State in which they allocate products, legal actions that aim to prevent the charge relating to ICMS-DIFAL in the 2022 financial year. This is because, despite the filing of the respective ADI, the Member States and the Federal District enacted their local laws for the internal regulation of ICMS-DIFAL in their territorial dependencies, legislation that uses as legal support the provisions of article 3 of the law.

It turns out that, in clear reaffirmation of the relevant divergence in the validity or not of the collection of amounts related to ICMS-DIFAL in the year 2022, the States disagree with their positions regarding the time frame in which they consider the possibility of carrying out the collection possible of exaction, which is why the Supreme Court's judgment will be extremely decisive in resolving the controversy.

CONCLUSION

In view of all the confusion created by the provision contained in article 3 of Complementary Law number 190/2022, which dealt with the production of effects that imply the possibility of charging ICMS-DIFAL in the 2022 financial year, there remains serious legal uncertainty in the national tax system both for the Tax Authorities and for taxpayers.

This is because Constitutional Amendment Number: 87/2015, by changing the active subjection of ICMS due in interstate operations involving the circulation of products destined for individuals who do not pay the tax, created a new legal-tax relationship between the sender and the state of destination of the products, which clearly attracted the need for a complementary law to regulate the matter. In view of this, Complementary Law number 190/2022 sought to define the characteristics relating to ICMS-DIFAL, such as its calculation basis, its taxpayers, its form of compensation, among other guidelines that, under the terms of article 146, item III, of the Federal Constitution, must be provided for in complementary legislation drawn up for this purpose.

As a logical consequence, and with support from what was defined by the majority of the STF (Federal Supreme Court) Plenary in establishing Theme 1,093, the conclusion reached is that, given the institution of ICMS-DIFAL by Complementary Law number 190/2022, the principle of anteriority tax, in both its modalities, these provided for in subparagraphs b and c of item III of article 150 of the Federal Constitution, must be strictly respected with regard to the production of effects of the law, under penalty of non-observance implying flagrant unconstitutionality of the exaction of the tax in question.

In this reasoning, the fact is that the publication of Complementary Law number

190 only on January 5, 2022 leads to the submission of the production of its effects to the principle of tax precedence, in such a way that the collection referring to ICMS-DIFAL will only occur from January 1, 2023, since, as discussed in the present study, there is no way to dissociate the general anteriority from the ninagesimal, as they are principled guidelines concatenated in the constitutional text and which, for this reason, require joint application.

Furthermore, the persistence of this scenario of uncertainty regarding the (in)possibility of charging ICMS-DIFAL in the 2022 financial year takes away the fundamental rights and guarantees arising from the conception of the principle of legal certainty, which, ineluctably, seeks to reassure citizens through the future planning of actions coming from the Public Power.

Given these notes, the discussion object of the present study, which resides in the relevant question about the effectiveness of Complementary Law number 190 in the year 2022, considering the content of its article 3, whose wording only subjected the law to the dictates of nineagesimal anteriority, is of significant interest to competent political entities and taxpayers. The syllogism linked to this will lead the Federal Supreme Court to define, within the framework of ADI 7,066/DF, whether Complementary Law number 190/2022 will produce its full effects in the current fiscal year 2022, in order to authorize the collection of amounts related to ICMS-DIFAL in interstate operations that send products to individuals who do not pay tax.

Therefore, the Supreme Court will issue a decision that will compare the incidence of paragraphs b and c of item III of article 150 of the Federal Constitution on Complementary Law number 190/2022, commands that explain the principle of tax precedence in the constitutional text. If the Court decides

to submit the complementary law to the aforementioned rule, especially in its general form, the problem will end in favor of taxpayers, who, in exercise of their full right to tax avoidance, will be able to abstain. payment of ICMS-DIFAL in operations carried out during the 2022 financial year. On the other hand, if the decision is made to authorize the exaction during the current fiscal year, taxpayers who have or have not judicialized the issue will suffer the negative effects of the position.

However, it is up to us to conclude that it is impossible to require ICMS-DIFAL in the current fiscal year 2022, in view of the need to submit Complementary Law number 190/2022 to the rule relating to the principle of tax precedence, in both its modalities, of so that the exaction will only take place from January 1, 2023, under penalty of flagrant violation of the principles established in the Federal Constitution of 1988.

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