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POLITICAL SANCTION AS A WAY TO COMBAT CORRUPTION IN TAX LAW

A SANÇÃO POLÍTICA COMO FORMA DE COMBATER A CORRUPÇÃO NO DIREITO TRIBUTÁRIO

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RESUMO

O presente artigo pretende estudar a validade acerca da aplicação das Sanções Políticas, vistas como restrições ou proibições impostas ao contribuinte, a fim de compeli-lo ao pagamento do tributo devido. Tais sanções foram consideradas inconstitucionais pelo Supremo Tribunal Federal; todavia, a citada Corte Suprema considerou válida a restrição do estabelecimento em um caso específico, ao verificar o histórico de inadimplência por parte de determinada empresa. A partir de então, surge a presunção de que o Supremo Tribunal Federal estaria alterando a sua histórica e consolidada decisão. Desse modo, a fim de responder a tal questionamento, foram apresentados, neste artigo, vários julgados da Suprema Corte no tocante ao tema exposto, restando comprovado que o entendimento quanto à inconstitucionalidade da aplicação das sanções políticas não mudou ao

permitir a interdição do estabelecimento, mas conferiu uma interpretação específica ao caso concreto.

Palavras-Chave: Impostos. Sonegação Fiscal. Sanção. Interdição de Estabelecimento.

ABSTRACT

This article aims to study the validity on applying sanction policies, which is seen as a restriction or prohibition imposed on the taxpayer in order to compel him to pay tribute. Such penalties were considered unconstitutional by the Supreme Court. However, the Supreme Court considered valid the restriction of establishment in a specific case. From then on, the Supreme Court reply would be to changing its consolidated decision. Thus, in order to respond such questions, it was presented in this article, several judged cases by the Supreme Court regarding the exposed subject, showing evidences that the understanding of unconstitutionality on applying sanction policies has not been changed in order to allow prohibition of establishment, but only gave a specific interpretation to the case.

KEYWORDS: Tax. Withholding Tax. Sancions. Proibition of Establishment.

1 INTRODUCTION

The present study aims to approach the validity of the application of the so-called "Political Sanctions", seen by most of the doctrine as a restriction or prohibition imposed on the taxpayer, as an indirect way to force him to pay the tax due.

These political sanctions were considered unconstitutional by the Federal Supreme Court, responsible for the creation of three precedents[1]. These were created with the intention of restraining the use of political sanctions as a means of ensuring compliance with the tax liability by the taxpayer.

For some legal scholars, the use of political sanctions would represent a considerable abuse of power by the Public Treasury, as the mere fact of being in default would not be a sufficient reason to apply strong restrictive measures. Another strong argument is the principle of free enterprise, which ensures that everyone is free to exercise any work, trade or profession. As a result, any

[1] BRASIL. Supremo Tribunal Federal. Súmulas 70, 323, 547.

restriction that implied curtailment of the freedom to carry out lawful activities would be unconstitutional, as it goes against the aforementioned provision.

However, this "theoretically" pacified understanding has undergone recent innovations, as can be seen in the case of the América Virginia Tabacos cigarette company, whose establishment was interdicted through cancellation of its manufacturer's registration due to repeated fiscal default.

The Supreme Court considered the restriction of the establishment valid when it verified the history of default on the part of the aforementioned company, which had a debt of more than 1.42 billion in unpaid taxes.

In light of this fact, the following question arises: Would the Federal Supreme Court be changing its historical and consolidated understanding in considering unconstitutional any state act with the purpose of compelling the taxpayer to pay the tax due?

In order to answer this question, several judgments of the Federal Supreme Court will be presented regarding the exposed theme, even those after the judgment of the “America Virginia Tabacos” cigarette company.

2 THE SANCTIONS

2.1 Concept and finality of sanctions.

Before going into the subject, "Political Sanctions," it is necessary to highlight the meaning, finality, and classification of sanctions in the Brazilian legal system.

Beccaria (1985, p. 25) supports the thesis that no person makes the sacrifice for the sake of protecting the public interest. The need for the application of punishment is seen by him as the only skillful means to control human passions, which go against social stability. Thus, those who would not respect the law for the virtues of their character would do so for fear of punishment. The application of the sanction is seen by the author as a necessary evil, and should be used to the extent of its necessity, in order to five aggression against the law.

In this sense, the sanction comes to be seen as a consequence to the violation of a prescriptive norm implicit in the entire legal system, serving as a safeguard of the laws against conducts contrary to its commands, having the finality of reinforcing the eficacy of the legal system, as well as to prevent or inhibit the occurrence of violation of the norms (BOBBIO, 1999, p. 189).

Sanctions perform various functions in the legal world, such as, for example, the preventive, repressive, reparatory, didactic, and rewarding functions.

The purpose of sanctions is to discourage the violation of the legal order by intimidating potential violators into submitting to its undesirable effects. In this way, sanctions act preventively in order to strengthen the effectiveness of legal rules, with the aim of avoiding or discouraging their violation. As far as the repressive function is concerned, this is where the punishment imposed on the offender is found, in other words, the sanction applied establishes a punishment as a solution to the criminal conduct. Some sanctions also aim at compensating the damage caused to the victim of the illicit act, imposing on the violator the duty to repair it, such as, for example, civil sanctions, which aim at compensating a certain material good, by means of compensation in money for the evaluation of the extent of the damage caused. The sanctions also have a didactic function, as this should contribute to the education and correction of the perpetrator (SILVA, 2010, p. 69). However, as already noted by Kelsen (2003), the sanction has not only a punitive function, but also an incentive function, because it may arise as a consequence of acts and facts that are convenient to the country's legal system.

From this point on, it can be concluded that sanctions can consist of both a State response to the transgression of a legal rule, in order to repress, prevent, repair or educate, and also have an incentive function, in order to induce behavior or compliance with a specific legal rule. Thus, when the occurrence of a certain fact, whether unlawful or not, is ascertained, a certain sanction must be applied, with a view to ensuring the effectiveness of the legal system, as well as maintaining social stability.

For Paulo Roberto Coimbra Silva (2010, p. 88), sanctions can be divided into: civil, commercial, labor, criminal, administrative or tax. What will definition the type of sanction applied will be the legal rule that has been breached, whether civil, commercial, administrative, etc. The great proof of this, according to the author, consists in the sanction applied to the debtor of food in Brazil, that is, to the one who does not comply with the duty to provide food, it is applied as a sanction: prison. However, in this case, it will not be a criminal arrest, but a civil arrest, since the legal rule broken was the one contained in the Civil Code.

Regarding tax sanctions, the State imposes on society the obligation to give money, in order to provide the necessary resources for its maintenance. This

obligation, which is called tax, is compulsory, and to be fulfilled requires the provision of a penalty to be applied in case of noncompliance.

The tax sanctions imposed are based on the assumption that an action or omission typificated by fiscal legislation as a tax infraction has been performed. It is therefore a case of non-compliance with a principal or accessory tax obligation (SILVA, 2010, p. 111).

As such, the sanction under tax law has been used as an intimidating element capable of compelling the taxpayer to comply with a certain fiscal obligation, such as paying a tax. As a result, taxpayers that fail to pay their taxes due will suffer the consequent penalties.

2.2 Fiscal Illicit x Judicial Nature

As is well known, the commission of an illicit act can occur in any branch of law, thus existing illicit acts in the civil, administrative, commercial, electoral, tax, etc. spheres, generating, as a consequence, the incidence of a sanction.

Based on this premise, the illicit act is seen as every commissive or omissive act that violates a legal duty. The illicit tax offense, which does not differ ontologically from the others, but only due to the degree or its normative structure, will arise from a breach of a certain tax obligation, which will generate consequences before the State.

At the same time, a great doctrinal discussion arises in relation to the legal nature of this illicit act, that is, does this illicit act have an administrative or a criminal nature?

There are authors who sustain the administrative nature of fi tax offenses, as is the case of the German doctrinaire Goldschmidt, who strongly distances tax infractions from the criminal scope, and does so for the following arguments: (i) that it would not be possible to apply a criminal sanction except by the Judiciary; (ii) that criminal penalties are incommunicable, but administrative or tax penalties admit, in certain cases, the possibility of their demands to the offender's successors; (iii) that in criminal law reformatio in pejus is not admissible, susceptible to review by the administration; among others (SILVA, 2010, p. 135) .

However, there are authors who argue i) that tax violations would be merged to Criminal Law, since the legal goods protected by the tax administration would also be protected by Criminal Law; ii) that the punishments imposed on violators,

such as fines, have a clear punitive feature; iii) that although tax sanctions are applied by administrative authorities, they are genuine penalties, since they inflict on offenders sacrifices with punitive, repressive, corrective and intimidating purposes; and iv) that tax sanctions, as well as criminal sanctions, are manifestations of the state, unique and unitary ius puniendi (SAINZ DE BUJANDA, 1985, p. 6). Thus, it was because of these arguments that in several European countries this trend prevailed.

In France, both doctrine and jurisprudence recognize the substantial identity between criminal and administrative repression. French jurisprudence has recognized the need to enrich the legal regime of the Administration with techniques from criminal law (PEREZ, 1992, p. 31).

In Spain, doctrine and jurisprudence recognize the criminal nature of non-criminal offenses by virtue of their ontological identity with criminal offenses. The Spanish Supreme Court, like its Constitutional Court, has long accepted the idea of the unity of the State's punitive claim, which presupposes the denial of any substantial difference between administrative and criminal offenses.

An identical understanding also prevailed in Italy, as well as in Portugal, as Lusitanian law went on to contest any ontological and formal distinction between tax offenses typificated or not by the criminal legislator. In this regard, Nuno Sá Gomes (2000, p. 237) clarifies the peculiarities of Portuguese Law, highlighting that offenses, and infractions fall under criminal fiscal law. Thus, in several European countries, such as Germany, France, Italy, Spain and Portugal, the understanding prevails that there are no ontological differences between criminal or administrative offenses, both deriving from the unitary and indivisible power of the State.

For the Brazilian law, however, criminal offenses are not related to criminal offenses, as these are distinct institutes that have their own peculiarities in terms of the nature of the sanction applied; the competence of the authority to apply it; the type of the applied sanction; and the process for ascertaining the offense and convicting the offender.

As a result, contrary to the prevailing understanding in Europe, it is not possible for criminal offenses and criminal offenses to have the same legal nature, nor do they derive from a unitary sanctioning power, nor are they merged into a single branch of law, nor are they subject to the same legal regime. For, although there are civil, commercial, labor or tax offenses, all of them may give rise to the application of a sanction with a punitive function, but not necessarily

criminal in nature, since repression is not exclusive to criminal law. Although both are subject to general principles of repression, tax sanctions, unlike criminal sanctions, derive from the ius tributandi, and not from the ius puniendi (SILVA, 2010, p. 148, 149).

There are authors who classify tax offenses into two types: tax infraction and criminal infraction. The former arises from non-compliance with tax legislation, as is the case with incorrect payment of a tax. The latter will occur when the fact only involves a violation of criminal law, as in the case of a fiscal that demands a tax that he knows is undue.

Therefore, under the Brazilian legal system, tax offenses consist of violations of tax legislation, as defined in article 96 of the National Tax Code[2], resulting in the application of administrative sanctions, the consequences of which include monetary fines or other measures, such as, for example: interdiction of the establishment, seizure of goods (the subject of our study), in addition to other means of coercion used for the sole purpose of collecting tax credits, which are not related to criminal sanctions. There will, however, be acts that, although they are against the tax system, give rise to the application of a criminal sanction, as they are defined as crimes in the Criminal Code, in this case, the commission of a criminal offense and not a tax offense.

3 POLITICAL SANCTIONS

As far as tax sanctions are concerned, the so-called "political sanctions", which have several types of frameworks in the Brazilian legal scenario, are worth mentioning.

Political sanctions consist of restrictions or prohibitions imposed on the taxpayer as an indirect way to force him to pay the tax, such as, for example, seizure of goods and documents and interdiction of the establishment (Machado, 1998, p. 47).

The political sanctioning existing in Brazil seeks to achieve collection interests of the Treasury through indirect and punitive measures of the State, being the use of means other than those legally available so that the taxpayer is coerced to comply with an obligation (GANDARA, 2012, p. 37).

[2] Art. 96. A expressão "legislação tributária" compreende as leis, os tratados e as convenções internacionais, os decretos e as normas complementares que versem, no todo ou em parte, sobre tributos e relações jurídicas a eles pertinentes. BRASIL. Constituição (1988). Constituição da República Federativa do Brasil: Senado, 1988.

In other words, and trying to bring a simple concept of political sanctions, these are restrictions imposed by the Public Administration against the taxpayer due to non-payment of the tax to the fisco, which aims to set aside the Tax Enforcement for the receipt of the tax credit. However, in order to understand political sanctions, it is necessary to point out the historical factors in which this institute was created.

Regarding the application of these political sanctions, the Federal Supreme Court has had a consolidated understanding for several decades. This understanding was responsible for the edition of Precedents 70[3], 323[4] and 547[5], created from the repeated abusive practices brought to the Supreme Court.

In the trial of Injunction Appeal no. 9.698, of 1962, the Federal Supreme Court had already taken a position that it was not lawful for the fisco to interdict a commercial establishment in order to force taxpayers to pay the tax owed, since the State has possible means of collection, such as Tax Enforcement. This decision contributed to the issuance of Precedent No. 70, and in the same plenary session, Precedent No. 323 was also issued, dealing with a similar matter by prohibiting seizure of goods as a coercive means of collecting taxes (BARROS, 2010, p. 158).

A few years later, in 1969, the Federal Supreme Court was again called upon to resolve the same issue, and Extraordinary Appeals Nos. 63.045, 60.664 and 63.047 gave rise to a new Precedent, i.e. Precedent No. 547, which was approved in a plenary session on December 3, 1969.

Since the issue of these Precedents, several scholars have begun to relentlessly reject the application of political sanctions to tax debtors, on the grounds that this is an illegal or abusive act committed by the Public Treasury in order to compel the debtor taxpayer to pay the tax.

This is a behavior that the Public Treasury has long adopted, always with a view to faster collection. It is through such conducts that the Public Treasuries indirectly demand the payment of the tax debt from the taxpayer in debt with the Tax Authorities. However, as seen, such acts have already aroused the interest of

[3] BRASIL. Supremo Tribunal Federal. Súmula 70 – É inadmissível a interdição de estabelecimento como meio coercitivo para cobrança de tributo. Súmula da Jurisprudência Predominante do Supremo Tribunal Federal: Anexo ao Regimento Interno. Edição: Imprensa Nacional, 1964a, p. 56.

[4] BRASIL. Supremo Tribunal Federal. Súmula 323 – É inadmissível a apreensão de mercadorias como meio coercitivo para pagamento de tributos. Súmula da Jurisprudência Predominante do Supremo Tribunal Federal: Anexo ao Regimento Interno. Edição: Imprensa Nacional, 1964b, p. 143.

[5] BRASIL. Supremo Tribunal Federal. Súmula 547 –- Não é lícito à autoridade proibir que o contribuinte em débito adquira estampilhas, despache mercadorias nas alfândegas e exerça suas atividades profissionais. Diário de Justiça da União, Brasília, 10 de dezembro de 1969, p. 5.935.

scholars who consider these illegal practices of political sanctions, understood as the result of the "distorted" exercise of authority embedded in the Executive Branch.

Authors, such as Hugo de Brito Machado and Leandro Paulsen, among others, who reject the application of political sanctions, argue that these practices operate as an indirect form of Tax Enforcement, which contradict fraglantly to the fundamental rights and guarantees enshrined in the current Constitution of the Federative Republic of Brazil (MACHADO, 2008, p. 89). The authors also claim that any restriction implying a curtailment of the freedom to engage in lawful activity would be unconstitutional, as it admits that only those who pay taxes punctually are entitled to engage in economic activity (PAULSEN, 2009).

The practice of using political sanctions is rigorously repelled, since the taxpayer cannot be prevented from freely exercising his activities due to the fact that he is in default, representing a total affront to articles 5, item XIII[6], and 170, single paragraph[7], both of the Constitution of the Federative Republic of Brazil.

This is also the jurisprudential understanding, when it establishes that the retention of imported goods at customs, in order to ensure the payment of taxes, is a measure that violates the free exercise of economic activity, with Justice Marco Aurélio[8] having also emphasized the "ancient jurisprudence" of the Federal Supreme Court in the sense of preventing the State from exercising this type of coercion, because, for him, any act that involves forcing citizens to pay taxes is unconstitutional.

Despite the understanding established by doctrine and case law, this has once again been debated by legal scholars, in the sense that the fisco could apply certain restrictions, depending on the specific case, in order to ensure compliance with tax obligations by debtors who take advantage of these Precedents to avoid paying taxes, repeatedly and fraudulently, since non-compliance with tax obligations generates strong consequences for legal entities that comply with their obligations correctly, seriously damaging certain constitutional principles, such as the principles of isonomy of free competition; of good faith; and of legal security.

[6] XIII – é livre o exercício de qualquer trabalho, ofício ou profissão, atendidas as qualificações profissionais que a lei estabelecer. BRASIL. Constituição (1988). Constituição da República Federativa do Brasil: Senado, 1988.

[7] Parágrafo único. É assegurado a todos o livre exercício de qualquer atividade econômica, independentemente de autorização de órgãos públicos, salvo nos casos previstos em lei. BRASIL. Constituição (1988). Constituição da República Federativa do Brasil: Senado, 1988.

[8] Ministro do Supremo Tribunal Federal

When analyzing the principle of free competition and isonomy, everyone must be treated equally, having equality to compete in the market, under penalty of violating the principle of free competition. In this sense, if an economic agent acts in the market being less taxed than another one that is in the same condition, it will be infringing such principle. With regard to the principle of good faith, this presupposes the search for compliance with the law and justice, which does not occur in cases of defaulting companies, as these seek profits through arbitrary means of unfair competition. Finally, the relationship between the principle of legal certainty and the principle of free enterprise lies in the fact that several authors take the idea of free enterprise to its ultimate consequences, so that "anarchism prevails over legal certainty". Thus, free-initiative, if unlimited, can paradoxically generate its own fim, whether through monopolies and oligopolies, or cartels.

4 CASE OF AMERICA VIRGINIA TOBACCOS

In 1995, the cigarette industry was created, known as América Virgínia Indústria e Comércio, Importação e Exportação de Tabacos Ltda. The company, located in Nova Iguaçu, which started its activities with ten employees, seven years after it was set up, already had 550 direct employees and over 85,000 retail customers.

The abrupt growth of this company in such a short time caught the attention of the state, which decided to fiscalize its operations, since there were strong indications that the company's owner had built an economic empire using dubious methods.

After ascertaining the facts, the Federal Revenue Service found that part of the company's revenues came from tax default, mainly in relation to the Tax on Industrialized Products (IPI). This was because the company was not paying this tax, which amounted to R$ 0.46 cents per pack of cigarettes.

Thus, in 2005, América Virgínia Tobaccos had its registration as a cigarette manufacturer cancelled for not collecting the IPI tax with the Federal Revenue Service, which started a deep judicial discussion regarding the validity of the application of the "political sanctions" in this specific case, considering the existence of bad faith of the company from the moment of its incorporation.

After its registration was cancelled, the company filed a Precautionary Action with the Federal Regional Court for the 2nd Region, so that it could continue with

its activities, regardless of the payment of taxes. To this end, the company used the argument that the Federal Revenue Service would be applying a so-called political sanction, which is inadmissible under Brazilian law.

With the granting of the preliminary injunction and the acceptance of the main action, the Federal Government filed an Appeal (no. 2005.51.10.007057-3). This appeal reformed the decision, considering the requirement imposed by the Federal Revenue Service valid.

Against this decision, the company filed an Extraordinary Appeal with the Federal Supreme Court. In addition, the company also filed a Precautionary Action with the Federal Supreme Court, seeking a stay on the aforementioned appeal so that it could continue its activities. However, despite the well-established understanding that political sanctions violate the Brazilian legal system, in accordance with Precedents 70, 323 and 547, when judging AC 1.657 MC/RJ, the Higher Court ruled, by a majority of votes (seven votes to four), that the special registration should be cancelled in this specific case, given that the systematic and isolated noncompliance with tax obligations by the company entails behavior that is offensive to free competition due to the reduction in the sale price of the product on the market.

> EMENTA: Recurso Extraordinário. Inadmissibilidade. Estabelecimento industrial. Interdição pela Secretaria da Receita Federal. Fabricação de cigarros. Cancelamento do registro especial para produção. Legalidade aparente. Inadimplemento sistemático e isolado da obrigação de pagar Imposto sobre Produtos Industrializados – IPI. Comportamento ofensivo à livre concorrência. Singularidade do mercado e do caso. (...) consequente redução do preço de venda da mercadoria e ofensa à livre concorrência. (destaquenosso). (AC 1.657, Rel. Min. Joaquim Barbosa)[9].

In his vote, former minister Joaquim Barbosa emphasized the concern with guaranteeing the fundamental right to the free exercise of lawful economic activity, so that the cancellation of the special registration comprises a measure of extreme gravity, whose effects would be difficult to repair. The former minister also considered the importance of such judgment, due to the change in the jurisprudential orientation already long adopted by the Supreme Court.

The also former minister Cezar Peluso, however, opposed Joaquim Barbosa's decision, by manifesting himself in the sense that there is a factual and

[9] BRASIL. Supremo Tribunal Federal. RECURSO Extraordinário. AC 1.657-6. Rel. ministro Cezar Peluso. Diário de Justiça da União, Brasília, 31 ago. 2007.

normative singularity that exposes consumers and free competition to periculum in mora. Cezar Peluso recognized the historical jurisprudence in not accepting the use of political sanctions, but, according to him, in the específicult case, this jurisprudence would not apply, sustaining his theory in the search for the control of cigarette production and commercialization, besides mainly ensuring free competition.

In the same vein, Justice Carmen Lúcia follows the vote of former Justice Cezar Peluso, as well as Ricardo Lewandowski, Gilmar Mendes, Elen Grace, Carlos Brito, and Eros Grau, the latter of whom stresses the non-absolute nature of the principle of free enterprise, i.e., according to him, "it would not be legitimate to protect the principle of free enterprise in such a way as to vilify other fundamental principles.

Justice Marco Aurélio and Justices Celso de Mello and Sepúlveda Pertence, however, followed Joaquim Barbosa's vote, justificating the impossibility of escaping from the sedimented and consolidated jurisprudence formed by the Federal Supreme Court on the unconstitutionality of using political sanctions.

On May 22nd, 2013, Extraordinary Appeal No. 550.769 was tried, under the presidency of former minister Joaquim Barbosa, and, by majority vote, decided to dismiss the appeal.

> EMENTA: CONSTITUCIONAL. TRIBUTÁRIO. SANÇÃO POLÍTICA. NÃO-PAGAMENTO DE TRIBUTO. INDÚSTRIA DO CIGARRO. REGISTRO ESPECIAL DE FUNCIONAMENTO. CASSAÇÃO. DECRETO-LEI 1.593/1977, ART. 2º, II. 1. Recurso extraordinário interposto de acórdão prolatado pelo Tribunal Regional Federal da 2ª Região, que reputou constitucional a exigência de rigorosa regularidade fiscal para manutenção do registro especial para fabricação e comercialização de cigarros (DL 1.593/1977, art. 2º, II). 2. Alegada contrariedade à proibição de sanções políticas em matéria tributária, entendidas como qualquer restrição ao direito fundamental de exercício de atividade econômica ou profissional lícita. Violação do art. 170 da Constituição, bem como dos princípios da proporcionalidade e da razoabilidade. 3. A orientação firmada pelo Supremo Tribunal Federal rechaça a aplicação de sanção política em matéria tributária. Contudo, para se caracterizar como sanção política, a norma extraída da interpretação do art. 2º, II, do Decreto-Lei 1.593/1977 deve atentar contra os seguintes parâmetros: (1) relevância do valor dos créditos tributários em aberto, cujo não pagamento implica a restrição ao funcionamento da empresa; (2) manutenção proporcional e razoável do devido processo legal de controle do ato de aplicação da penalidade; e

> (3) manutenção proporcional e razoável do devido processo legal de controle da validade dos créditos tributários cujo não-pagamento implica a cassação do registro especial. 4. Circunstâncias que não foram demonstradas no caso em exame. 5. Recurso extraordinário conhecido, mas ao qual se nega provimento. (RE 550.769, Rel. Min. Joaquim Barbosa)[10].

One of the most interesting aspects of this judgment consisted of the vote presented by Joaquim Barbosa, who once ruled in favor of the appeal filed by the cigarette company. According to the former minister: *"there is no question of political sanctions if the restrictions on the practice of economic activity aim to combat corporate structures that have in systematic and conscious tax default their greatest competitive advantage".*

Faced with this case, the following question arises: Is the Supreme Federal Court changing its historical jurisprudential orientation, which condemned the so-called political sanctions, and admitting them in some situations?

In order to answer this question, recent decisions will be presented, judged after the controversial decision of the Federal Supreme Court regarding the America Virginia Tobaccos case.

5 OTHER JUDGEMENTS

ADI number 173[11] was filed by the National Confederation of Industry, and ADI number 394[12] by the Federal Council of the Brazilian Bar Association, both aimed at declaring the unconstitutionality of articles 1 and 2 of Law number 7.711, of 1988, due to the fact that this provides for the requirement of proof of tax good standing in cases of transfer and domicile abroad, as well as the settlement of tax credits for the registration or filing of the articles of incorporation or similar acts.

[10] BRASIL. Supremo Tribunal Federal. RECURSO EXTRAORDINÁRIO RE 550.769, Rel. Min. Joaquim Barbosa. 22 de maio de 2013. Disponível em: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=5569814, acesso em: 2 de abril de 2018.

[11] BRASIL. Supremo Tribunal Federal. Ação Direta de Inconstitucionalidade – ADI nº 173. Constitucional. Min. Rel. ministro Joaquim Barbosa. Diário de Justiça da União, Brasília, 20 mar. 2009. Disponível em:http://stf.jus.br/portal/diarioJustica/verDiarioProcesso.asp?numDj=53&dataPublicacaoDj=20/03/2009&incidente=1493516&codCapitulo=5&numMateria=7&codMateria=1
Acesso em: 29 de março de 2018.

[12] BRASIL. Supremo Tribunal Federal. Ação Direta de Inconstitucionalidade – ADI nº 394. Constitucional. Min. Rel. Joaquim Barbosa. Diário de Justiça da União, Brasília, 20 mar. 2009. Disponível em:

When considering the intimidatory intention of the rule, by demanding intimidation of tax credits in order for several activities of the company to be validated, the former minister and reporter of the case, Joaquim Barbosa, warned the sedimented understanding of the Federal Supreme Court when exposing:

> "Esta Corte tem historicamente confirmado e garantido a proibição constitucional às sanções políticas, invocando, para tanto, o direito ao exercício de atividades econômicas e profissionais lícitas (art. 170, par. ún., da Constituição), a violação do devido processo legal manifestado no direito de acesso aos órgãos do Executivo ou do Judiciário, tanto para controle da validade dos créditos tributários, quanto para controle do próprio ato que culmina na restrição. É inequívoco, contudo, que a orientação firmada pelo Supremo Tribunal Federal não serve de escusa ao deliberado e temerário desrespeito à legislação tributária. Não há que se falar em sanção política se as restrições à prática de atividade econômica objetivam combater estruturas empresariais que têm na inadimplência tributária sistemática e consciente sua maior vantagem concorrencial. Para ser inconstitucional, a restrição ao exercício de atividade econômica deve ser desproporcional e não-razoável"(BARROS, 2010, p. 160).

Joaquim Barbosa's vote is also followed by Justice Marco Aurélio, who does not admit any contemporization or relativism in accepting any form of intimidation by the State against the taxpayer, highlighting precedents number 70, 323, and 547, as the basis to prevent the State from forcing the taxpayer to pay taxes in a manner other than that foreseen in the Enforcement Procedure.

Later, on the twenty-ninth day of May 2014, this issue was again on the Supreme Court's decision agenda, in Extraordinary Appeal number 565.048.

In his vote, the Reporting Justice Marco Aurélio is very well positioned when he states that

> "O tema não é novo, tendo sido enfrentado em diferentes oportunidades neste Plenário. Em julgados anteriores, entendi conflitantes com a Carta da República procedimentos dessa natureza. Concluí que a Fazenda deve buscar o Judiciário visando à cobrança, via executivo fiscal do que devido, mostrando-se impertinente recorrer a métodos que acabem

> inviabilizando a própria atividade econômica, como é o relativo à proibição de as empresas em débito[13][14]".

Of fundamental importance to the present work, the former Minister Joaquim Barbosa expressed himself as follows:

> "Esta Suprema Corte tem uma venerável série de precedentes que consideram inconstitucionais quaisquer instrumentos de indução indireta, por sacrifícios de direitos fundamentais, destinados a levar o sujeito passivo ao recolhimento do valor do tributo que se supõe devido. As chamadas sanções políticas são absolutamente incompatíveis com a Constituição. Somente são admissíveis as medidas extremas se, em ponderação, ficar demonstrado sem dúvida razoável que a intenção da pessoa jurídica é obter sistematicamente vantagens econômicas com a contumaz sonegação. Porém, precisamos nos lembrar que a isolada falta de pagamento de valor do tributo, a inadimplência tributária, é insuficiente para caracterizar a intenção criminosa do sujeito passivo. (...) No caso em exame, a Fazenda Estadual não provou que o recorrente é empresa que deriva sua maior vantagem concorrencial de inadimplência preordenada e sistemática. Um empreendedor pode acumular dívidas simplesmente por ser administrativamente inapto, ou por externalidades como situação econômica desfavorável ou concorrentes mais eficazes ". (Grifo nosso)

Justice Celso de Melo voted the same way, as did Justice Luis Roberto Barroso, who made a point of "following and praising the careful, detailed, and erudite vote of Justice Marco Aurélio.

The same happened in the judgment referring to the Special Interlocutory Appeal in Bill of Review No. 623.739, in which its ruling establishes the unconstitutionality of the application of political sanctions aimed at tax collection.

In his vote, the reporting Justice Luis Roberto Barroso argues thus:

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[13] BRASIL. Supremo Tribunal Federal: Recurso Extraordinário 565.048, disponível em:http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=6911989. Acesso em: 2 de abril de 2018.

[14] BRASIL. Supremo Tribunal Federal: Recurso Extraordinário 565.048, disponível em:http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=6911989. Acesso em: 2 de abril de 2018.

> "Cumpre registrar que a Corte já se pronunciou acerca da inconstitucionalidade de medidas coercitivas, por parte do Fisco, objetivando a satisfação de débito tributário. Em síntese, é inconstitucional legislação local que submete o contribuinte, quando em débito, à prestação de garantias reais ou fidejussórias para obter autorização alusiva à impressão de talonário de notas fiscais[15]."

Moreover, the reporting minister warns that the Supreme Court's understanding regarding.AC number 1.657/RJ does not apply to the case at hand, since it is a different matter from the one under analysis. In that case, the taxpayer was systematically in default.

Finally, on October 15th, 2015, in the Extraordinary Appeal with Appeal number 914.045, there was a reaffirmation of the Jurisprudence that had already been adopted by the Supreme Court. The case dealt with an interlocutory appeal filed against a decision that dismissed an extraordinary appeal against a decision of the Court of Appeals of the State of Minas Gerais, which dismissed the Appeal filed by the State of Minas Gerais.

The State Treasury had conditioned the approval of the taxpayer's rural producer registration to the regularization of tax debts contained in PTAs.

In view of this fact, the taxpayer filed a writ of mandamus, which was promptly granted by the first degree judge and later upheld by the Court of Justice of that state, which denied further action on the remaining matters based on the case law of the highest court.

When it reaches the Supreme Court, in his report, the reporting minister Edson Fachin says this:

> "Constata-se que o acórdão recorrido não diverge da jurisprudência desta Corte, segundo a qual é inconstitucional a imposição de restrições ao exercício de atividade econômica ou profissional do contribuinte, quando este se encontra em débito para com o Fisco[16]."

On the other hand, Justice Luis Roberto Barroso states that he has doubts about the convenience of a reaffirmation of jurisprudence in the terms proposed,

[15] BRASIL. Supremo Tribunal Federa: AG. REG. NO AGRAVO DE INSTRUMENTO 623.739/RS, disponível em: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=9232296, Acesso em: 2 de abril de 2018.

[16] BRASIL. Supremo Tribunal Federal: RECURSO EXTRAORDINÁRIO COM AGRAVO ARE 914045 RG/MG, disponível em: http://stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28SAN%C7%C3O+POL%CDTICA%29&base=baseRepercussao&url=http://tinyurl.com/j96h3en, acesso em: 2 de abril de 2018

because, according to him, despite the existence of Precedents numbers 70, 323 and 547 of the STF, the matter involves subtleties that should be better discussed in a Physical Plenary, given that the Plenary of the Court has already stipulated parameters for the cigarette industry to exercise its activities in the event of tax default:

> "Portanto, sem propriamente discordar do entendimento do Min. Edson Fachin, considero, no entanto, que o tema (ii) deveria ser melhor debatido em Plenário físico, com todas as suas nuances. 13. Diante do exposto, manifesto-me no sentido do caráter constitucional e da repercussão geral de ambas as questões suscitadas, pela reafirmação da jurisprudência quanto à tese (i), e pela não reafirmação da jurisprudência quanto à tese (ii), para cuja apreciação me reservo em eventual julgamento pelo Plenário físico[17]". (Grifo nosso)

However, despite positions to the contrary, the Federal Supreme Court, by majority vote, recognized the existence of general repercussion of the constitutional issue raised, with Justice Marco Aurélio dissenting. On the merits, it reaffirmed its dominant jurisprudence on the matter, with Marco Aurélio and Roberto Barroso dissenting.

In this way, the decision of the Federal Supreme Court, in view of the cases presented, reinforced and broadened the consolidated understanding as to the unconstitutionality of the application of political sanctions, what leads us to conclude that the Federal Supreme Court has not changed its position in the judgment of Precautionary Action number 1657/RJ, as well as in RE number 550.769/RJ, by allowing the interdiction of the establishment, but only gave a specific interpretation to the concrete case.

Although the Constitution of the Federative Republic of Brazil, in its article 170, sole paragraph[18], ensures the free exercise of economic activity, it safeguards some cases in which it will require authorization from the public agency, since, as noted, the freedom of economic initiative is not absolute, being possible in certain more serious cases, the interdiction of an establishment in respect of the duty to pay taxes, free competition, fiscal justice and, still, aiming to safeguard the counterface of the provision of collective benefits.

[17] BRASIL. Supremo Tribunal Federal: RECURSO EXTRAORDINÁRIO COM AGRAVO ARE 914045 RG / MG, disponível em: http://stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28SAN%C7%C3O+POL%CDTICA%29&base=baseRepercussao&url=http://tinyurl.com/j96h3en, acesso em: 2 de abril de 2018.

[18] BRASIL. Constituição (1988). Constituição da República Federativa do Brasil: Senado, 1988.

In this sense, there is no way to disagree with any of the arguments used by the Supreme Court, and it is important to emphasize the defense of the interdiction or restriction of tax rights in cases where fraud or bad faith in the intention to cheat the Tax Administration is proven.

6 CONCLUSION

It is through taxation that the State will provide for collective needs, as well as the fundamental rights of its citizens. However, there are companies that constantly seek to evade this responsibility, either through tax evasion or by failing to comply with their tax obligations. In these cases, tax law reserves the application of certain tax sanctions, including those known as political sanctions.

This paper presented the doctrinal divergence regarding the exposed theme. Some decisions of the Federal Supreme Court were also presented, proving that it has always been against any kind of restriction imposed on the taxpayer in order to compel him to pay the tax due. There was, however, a great novelty in relation to the case of the cigarette company América Virginia Tabacos, as it holds a debt of 1.42 billion due to non-payment of the Tax on Industrialized Products (IPI), which allowed accelerated and growing accumulation of wealth through non-payment of tax and, consequently, unfair competition.

In addition, after the company was found to be in default on its taxes, the establishment was banned, which is supposedly one of the three forms of political sanctions prohibited by the Supreme Court.

However, the subsequent decisions handed down by the Supreme Court, once again involving political sanctions, have proven that there has been no change in case law, given that the application of these sanctions is still considered unconstitutional by this Court, with the understanding prevailing that there has only been a específiculty interpretation of the specific case, taking into account the factual and normative singularity of the case under analysis.

In fact, the interdiction of an establishment cannot become a mechanism for collecting tax debts. However, in situations where repeated tax default is detected, when public interest is harmed, when free competition, isonomy, good faith and legal security are threatened, it becomes possible and necessary, as an exceptional measure, to apply certain restrictions with the aim of ensuring the legal tax order.

Therefore, we conclude that there is a need for a review of the interpretation and application of certain restrictions by the Federal Supreme Court, so that they can be used in accordance with the specific case, applying them whenever necessary to maintain the legal and economic order. In agreement with the position of Dutra (2010, p. 22), the understanding that had been formed, doctrinally and the fact that the Constitution of the Federative Republic of Brazil of 1988, which reaffirmed the tax nature of the Brazilian State and enshrined a series of public goods that must be provided to citizens, is no longer compatible with the Democratic State of Law adopted by the Constitution of the Federative Republic of Brazil of 1988, which also enshrines the existence of the fundamental duty to pay taxes.

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