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Considerations concerning the criminalization of declared but unremitted State vat ("ICMS")

On December 18, 2019, a majority of the justices on the Brazilian Federal Supreme Court ("STF"), sitting *en banc*, ruled as follows: "Taxpayers who routinely fail to remit the State VAT ('ICMS')[1] they charge to purchasers of merchandise or services, with the intent to appropriate the same for themselves, fall within the definition of the criminal violation described in art. 2, sec. II, of Law nº 8,137 (1990)"[2]. This decision came in the context of the judgment of Ordinary Habeas Corpus Appeal nº 163,334/SC, with Justice Roberto Barroso writing the opinion for the court. That opinion confirmed the prior consolidated understanding of the Brazilian Federal High Court of Justice ("STJ").

In order to better understand the decision, it should be recalled that art. 2, sect. II, criminalizes the conduct of "within the period stipulated, failure to remit the amount of the levy or social contribution tax *deducted* or *charged* in the capacity of the party subject to said obligation and which should be remitted to the public treasury". Different from other violations provided for in the same law, in which tax evasion presupposes tax fraud, this provision is more like that of unjust enrichment. Thus, in order to be considered a crime, it must be confirmed that the amount of the levy was in fact deducted from or charged against a third party and that said amount was not passed on to the public purse.

Following this logic, the understanding that had prevailed in the higher courts was that only the ICMS due under a taxpayer substitution (*"substituição tributária"*) regime could meet that requirement because, under such a regime, the amount of the levy may be discounted directly from the taxpayer and not subsequently passed on to the treasury, thereby constituting unjust enrichment.

In other words, in the decision mentioned above, the Brazilian Federal Supreme Court broadened the scope of the crime in question to also include those cases in which ICMS is not remitted in the context of a taxpayer's own operations. The rationale for this change is in the fact that, in such a case, the direct taxpayer, such as a manufacturer, charges the subsequent purchaser in the productive chain for the amount of the tax by adding the value of the ICMS owed to the sale price. Proceeding thusly throughout the chain of production, the final amount of the levy is eventually paid by the final consumer as an amount embedded in the price of the product.

The fact is, however, that, different from ICMS under a taxpayer substitution regime, the primary taxpayer himself declares the value of the levy and is responsible for remitting it to the treasury in direct operations. Though the amount of the tax is included in the final price of the product (just as other expenses, levies, and the profit margin of the seller are), the final consumer is not the taxpayer with respect to the treasury. This is precisely why the understanding had always been that, in the case of direct operations, failure to remit the tax owed amounted to taxpayer non-compliance, which seems to us the correct interpretation. To criminalize such conduct would amount to imprisonment for debt, a penalty not allowed under our legal framework.

The basis for this understanding is that the terms used in the text of the law, the *deduction* or *charging* of a levy, are associated with the concept of taxpayer liability and not with the mere passing on of the economic value of a tax already charged to a third party, such as the final consumer. Thus, it is not possible to argue that such a consumer was *charged* the value of the tax.[3]

Moreover, with respect to the expansion of the concept of the term charged to include the burdening of a third party – and one who is not a party to the taxpayer-treasury relationship – with the amount of the tax, it should be noted that the higher courts have established a condition for the imposition of the criminal penalty which is not provided for in law, that is, that the failure to remit the amount of the tax be routine. In other words, according to the decision, a one-time failure to remit the amount of ICMS due is not sufficient grounds to invoke the Penal Code, and such an omission should remain within the sphere of mere failure to comply with a tax obligation. However, by creating such a condition, the higher courts have created another degree of legal uncertainty as the concept of what constitutes routine behavior is far from clear and will certainly be the object of new court cases seeking to define its outer limits. This situation is even more worrisome in the case of ICMS taxpayers in arrears when one takes into consideration that, in the case that was before the STF, the failure to remit the tax occurred on a staggered basis (between the years 2008 and 2010), for a total of only eight months in which the tax was not remitted. That is, from the perspective of due respect for taxpayer rights, such omissions could not be called routine.

In the case under analysis, one in which the tax due was fully declared though not remitted – in other words, the debt was fully acknowledged by the taxpayer – the Public Prosecutor's Office (*"Ministério Público"*) had to prove additional factors other than the mere routine nature of the omission in order to succeed with a criminal conviction. Among these additional factors we may highlight the need to prove the intent to defraud (the effective intent to not eventually remit the tax) and criminal authorship (identification of the party responsible for the non-payment of the tax), elements that a taxpayer may use in his defense to demonstrate the lack of the necessary elements to constitute the crime of which he is accused.

For all of the reasons discussed above, it is clear that the criminalization of ICMS due and declared but not yet remitted in a taxpayer's own operations has more to do with the eagerness of the treasure to collect the tax than with any coherent theory of law. It is an example of the state acting coercively against businesses which, fearful of the ills a criminal proceeding may entail, are more likely to pay the taxes owed in full in order to have the criminal charges dropped.

Finally, it remains an open question whether this new understanding may in some way establish a precedent for other cases of simple fiscal non-compliance to be likewise criminalized, given that the final price of a product to the consumer includes not only the amount of the ICMS previously charged, but also that of other levies on the business that produced it. Thus, it is the latest challenge of the corporate criminal law bar to see that this new, punitive understanding is eventually modified or reversed.

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[1] State Value Added Tax ("Imposto sobre Operações de Circulação de Mercadorias e Prestação de Serviços de Transporte Interestadual e Intermunicipal e de Comunicação")

[2] The full text of the opinion was not yet available at the time of publication.

[3] In this regard, see the decision of Justice Maria Thereza de Assis Moura, of the STJ, in Special Appeal nº. 1,632,556/SC.

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