



Modulation of the effects of the declaration of unconstitutionality of the ICMS on the calculation basis of the PIS and cofins

Modulation of the effects of the declaration of unconstitutionality of icms in the pis and cofins taxbase

Maria Clara Reis Curvello¹

Bruna Marcelle Bastos Dias Marinho²

Renato Marcelo Resgala Junior³

Summary

The purpose of this paper is to address the modulation of the effects of the declaration of unconstitutionality of ICMS on the calculation basis of PIS and COFINS. To this end, it aims to answer the research problem: Are taxpayers entitled to the refund of amounts paid unduly in the past? In addition, it also aims to understand: What are the advantages of modulating effects, considering the balance between legal certainty and tax justice? Whether retroactive effects are due only to taxpayers who had already filed lawsuits before the decision or also to

those who, after the decision, will file a lawsuit and obtain a favorable decision? Its general objective is to analyze the arguments against and in favor of the modulation of effects after the publication of the statement of Theme 69. And as specific objectives, to analyze the controversy raised in terms of defense in actions in which the return of amounts unduly paid in the past is sought. To explain the foundations and principles of tax law; to argue about each of the rights in conflict and to suggest a weighting between them. To this end, the qualitative methodology is used in order to analyze in case law and doctrines the advantages and disadvantages of modulating effects and its impact on the economy, considering the balance between legal certainty and tax justice. In view of the proposed study, at the end, a proposed solution inspired by the case of juvenile offenders in Rio de Janeiro is suggested, a collective agreement between the Union, taxpayers and business entities is suggested. With a model that would include a gradual transition to the exclusion of ICMS, tax compensations for companies affected by rescission actions, time limitation for reviews. With an approach that would balance public and private interests, reducing litigation.

Keywords: PIS and COFINS calculation basis; ICMS; modulation of effects; legal certainty.

Abstract

Introduction: The purpose of this paper is to answer the research problem: Are taxpayers entitled to a refund of amounts unduly paid in the past? What are the advantages of modulating effects, considering the balance between legal certainty and tax justice? Are retroactive effects due only to taxpayers who had already filed lawsuits before the decision or also to those who will file after the decision and obtain a favorable ruling? **Objectives:** To analyze the arguments for and against the modulation of effects after the publication of Topic 69. And as specific objectives, to analyze the controversy raised in defense matters in lawsuits claiming the return of amounts unduly paid in the past. To expose the foundations and principles of tax law; to argue about each of the rights in conflict and suggest a weighting between them. **Methodology:** STF decisions involving the calculation basis of taxes, to make a comparison with each other, in order to understand jurisprudential trends in Brazil. Analyzing the advantages and disadvantages of modulation of effects, considering the balance between legal certainty and tax justice. **Conclusion:** Suggesting a solution inspired by the case of juvenile offenders in Rio de Janeiro, we suggest a collective agreement between the Union, taxpayers and business entities. With a model that would include a gradual transition to exclusion from the ICMS, tax compensation for companies affected by termination actions, a time limit on reviews. With an approach that would balance public and private interests, reducing litigation.

Keywords: PIS and COFINS calculation basis; ICMS; modulation of effects; legal certainty.

¹ Law student at the Rio Redentor University Center. E-mail: mariacurvello@gmail.com

² Professor: PhD, Redentor University Center. E-mail: bruna.marinho@uniredentor.edu.br ³ Professor, PhD in Political Sociology – UENF. E-mail: renato.resgala@uniredentor.edu.br

INTRODUCTION

The judgment of Theme 691 by the STF, which excluded ICMS from the PIS calculation base and COFINS, redefined tax parameters in Brazil. The decision, published in 2017 and modulated in 2021², generated debates about the retroactivity of effects, the restitution of values unduly paid and the flexibility of *res judicata* via rescission actions.

General repercussion theme 1.2793, where the Federal Supreme Court (STF) reaffirmed understanding that there is no request for refund of amounts or tax compensation regarding the exclusion of ICMS from the PIS and Confins calculation base after 03/15/2017 if the taxable event occurred before that date.

It appears that the decision sparked discussions and a significant increase in the judiciary. So, what happened to those taxpayers who filed lawsuits after March 2017 and obtained a final and favorable decision before 2021?

Chiaradia and Salles (2024) question why many of these taxpayers had been authorized, by final and binding decision, to promote the recovery of amounts paid in the five years prior to the filing of the lawsuits, having even taken advantage of the decided and carried out compensations. However, as they are in disagreement with what was determined by the Supreme Federal Court in 2021, came into the sights of the National Treasury, which began to file rescission actions, seeking to prevent these taxpayers from obtaining a refund of the values under discussion.

Modulating effects in Theme 69 avoided a fiscal collapse, but compromised the legal certainty. Furthermore, rescission actions, although legally valid, deepened insecurity and judicialization.

The interest in legal certainty consists, in the words of Leandro Paulsen (2013, pg. 978), as that which is free from danger, free from risk, protected,

1 Established thesis: "ICMS does not form the calculation basis for the incidence of PIS and COFINS."

2 Established thesis: "under the terms of article 535, paragraph 8, of the Code of Civil Procedure (CPC), the filing of a rescission action is admissible to adapt a judgment rendered before 5/13/2021 to the modulation of effects established in Theme 69/STF – general repercussion".

3 The general repercussion thesis established: "In view of the modulation of effects in RE 574,706/PR, the request for recovery of undue payment or compensation of the tax declared unconstitutional, if the taxable event occurred before the time frame set by the Supreme Federal Court, except for legal actions and administrative procedures filed up to March 15, 2017."

cautious, guaranteed, of what one can be sure of or, even, of what one can be sure of trust, conviction. The rule of law constitutes, in itself, a reference for security. This is revealed in detail, furthermore in numerous constitutional provisions, especially in guarantees that aim to protect, safeguard, guarantee, free from risk and ensure, provide certainty and confidence, protecting people from arbitrariness. The guarantee and determination to promote safety are revealed on the deontic plane, implicitly, as principle of legal certainty.

In view of this, the present study will address the topic in order to understand how controversy raised in terms of defense in actions in which the return of the amounts paid unduly in the past have been analyzed in the courts and debated in doctrine, as well as the principles and foundations of tax law, and other branches of right.

The first section will cover effects modulation, then the effects it has for both the tax authorities and the taxpayer. The second section will deal with ICMS, PIS and COFINS, the explanation of the ICMS charge based on the calculation of the last two and the reason for this declaration of unconstitutionality of this charge. The third section will address security legal. In the fourth section, a proposal will be presented weighing the interests of the tax authorities and of the taxpayer.

1 METHODOLOGY

The present study adopted a qualitative approach, of an applied nature, aimed at understanding of the topic and possible reformulation of specific aspects of the legislation and legal practice. This is because the analysis aims to integrate legal perspectives and economic, highlighting the impact of the decision on taxpayers, companies and the tax authorities.

This methodology was chosen because, after the decision, the STF allowed the restitution only for taxpayers who filed lawsuits, with the modulation of effects defined on 03/15/2017, limiting it to five years prior to the filing. The modulation protected the Union from losses estimated at R\$258.3 billion, but harmed companies that obtained favorable decisions after that date, which are now the target of rescission actions.

Thus, the combination of three essential pillars of legal-scientific research became essential for the present research, therefore, the following will be used: analysis doctrinal, the jurisprudential examination and the elaboration of a proposed plan for modification normative or interpretative.

Firstly, an in-depth theoretical review of the legal doctrine is carried out. relevant to the topic, with the aim of identifying the main concepts, currents interpretative and doctrinal criticisms on the modulation of the effects of unconstitutionality of the ICMS.

Next, a case law analysis was carried out, based on judgments originating from mainly from the Superior Courts (STF and STJ). This analysis aims to check how these courts have decided on the subject. The selected judgments will be examined based on criteria such as relevance, topicality and impact.

Finally, based on the conclusions drawn from the previous steps, a way of resolving the problem encountered in a way that impacts the Union as little as possible and its contributors.

This methodology, by combining theory, practice and proposition, allows not only the critical understanding of the topic investigated, but also the presentation of a contribution effective to the science of Law and to improving the application of justice in the legal system national.

2 EFFECTS MODULATION

The modulation of effects is a legal mechanism that allows, based on certain criteria, define from when a court decision will start to produce effects. This instrument aims to guarantee legal certainty and avoid situations of insecurity arising from abrupt changes in the interpretation of legal norms.

When declaring the unconstitutionality of a law or normative act, the STF may restrict the effects of that declaration or decide that it will only be effective from the moment it is in transit judged or at another time that may be fixed. Thus, the decision

ceases to have *ex tunc* effects and begins to have *ex nunc* effects.⁴ For Heleno Taveira statements of unconstitutionality of laws in the tax sphere, when the tax is not cumulative they have a serious impact on tax relations, as they bring notable consequences for the taxpayers, with regard to the credit regime and accessory obligations involved. With this, the modulation of the effects of the decision (*ex nunc*, retroactive or pro futuro) is fundamental to ensure legal certainty and the effectiveness of the values that allow determining the exceptional social interest.

The modulation of effects is provided for in art. 27 of Law No. 9,868/995. Restricted originally to direct actions of unconstitutionality, its application was extended by STF to the decisions it issued in the diffuse control of constitutionality⁶. As assumption and basis, reasons of legal certainty or exceptionality are necessary social interest.

With this, the modulation of effects avoided a fiscal collapse by limiting the refund to lawsuits filed up to 03/15/2017. However, the flexibility of *res judicata* for adequacy of consolidated decisions to the thesis of Theme 69 generated strong legal uncertainty, exposing companies to unexpected liabilities through rescissory actions.

2.1 Effects of Modulation

Through the well-known thesis of the century, ICMS was excluded from the PIS calculation base and of COFINS, decision on General Repercussion Theme 69, judged on 03/15/2017.

Extraordinary appeal in which it is discussed, in light of art. 195, I, b, of the Constitution Federal⁷, whether or not ICMS is included in the calculation basis for the contribution to

4 Art. 27. When declaring the unconstitutionality of a law or normative act, and taking into account security reasons legal or of exceptional social interest, the Supreme Federal Court may, by a majority of two-thirds of its members, restrict the effects of that declaration or decide that it will only be effective from the moment it becomes final or from another time that may be determined.

5 Art. 27. When declaring the unconstitutionality of a law or normative act, and taking into account security reasons legal or of exceptional social interest, the Supreme Federal Court may, by a majority of two-thirds of its members, restrict the effects of that declaration or decide that it will only be effective from the moment it becomes final or from another time that may be determined.

6 The Federal Supreme Court (STF) confirmed the suspension of ongoing legal proceedings in the Special Courts of the State of Paraná that waived the requirement of budget availability, vacancy and publication of a concessionary act for promotions and progressions in the state public service. In the virtual session that ended on 3/14, the Plenary upheld the preliminary decision of Minister Alexandre de Moraes in the Claim of Non-Compliance with a Fundamental Precept (ADPF) 1174.

7 Art. 195. Social security will be financed by the whole of society, directly and indirectly, in accordance with the law, through resources from the budgets of the Union, the States, the District



Social Integration Program - PIS and Social Security Financing Contribution
Social – COFINS.

On May 13, 2021, the Supreme Federal Court finalized the trial of the declaration of opposition, in order to accept the Union's request, deciding "Action is admissible rescission to adapt the judgment to the temporal modulation of the effects of the repercussion thesis general fixed in the judgment of RE 574,706 (Theme 69/RG)". In other words, the effects of the trial, with the declared unconstitutionality only beginning after the 15th March 2017, with the exception of legal actions already filed that could recover what had been paid in the five years prior to the distribution of the shares.

It appears that the decision sparked discussions and a significant increase in the judiciary. So, what happened to those taxpayers who filed lawsuits after March 2017 and obtained a final and favorable decision before 20218 ? According to information brought by the Attorney General's Office of the National Treasury show that 78% of the more than 56 thousand processes mapped on the subject arise from actions filed from 2017 onwards, when the STF fixed the thesis in general repercussion.

Chiaradia and Salles (2024) question why many of these taxpayers had been authorized, by final and binding decision, to promote the recovery of amounts paid in the five years prior to the filing of the lawsuits, having even taken advantage of the decided and carried out compensations. However, as they are in disagreement with what was determined by the Supreme Federal Court in 2021, came into the sights of the National Treasury, which began to file rescission actions, seeking to prevent these taxpayers from obtaining a refund of the values under discussion.

In a recent trial, the Federal Supreme Court (STF) recognized the repercussions general of the topic, due to the financial impact, and maintained the understanding

Federal and Municipalities, and the following social contributions: I - from the employer, the company and the entity equivalent to it in accordance with the law, levied on: b) revenue or turnover.

⁸ "Partially defeated regarding the extension, Ministers Herman Benjamin and Benedito Gonçalves, who proposed the expansion of the establishment of the legal thesis. It was approved by majority, with the Rapporteur Minister voting against, partially, Ministers Herman Benjamin Benedito Gonçalves, following legal thesis, in theme 1245: terms of art. 535, § 8, of the CPC, the filing of a Rescissory Action is admissible to adapt a judgment rendered before 05/13/2021 to the modulation of effects established in Theme 69/STF" https://processo.stj.jus.br/processo/julgamento/eletronico/documento/mediado/?documento_tipo=integra&documento_sequencial=277372489®istro_numero=202300574482&peticao_numero=&publicacao_data=20241022&formato=PDF



of the Superior Court of Justice (STJ), which when judging Theme 1,245, under the appeals procedure repetitive, the thesis was established that, "under the terms of article 535, paragraph 8, of the Code of Civil Procedure-CPC, the filing of a rescission action to adapt the judgment is admissible carried out before 5/13/2021 to the modulation of effects established in Theme 69/STF – general repercussion" STJ (10/22/2024), that is, the decision admitted the possibility of filing rescission action against a final decision that contradicts the modulation of the effects of the thesis of Theme 69.

Legal security, which avoids abrupt impacts on the public budget.

Tax Justice, which allows gradual compensation for companies.

However, the relativization of *res judicata*, Themes 8819 and 88510 of the STF, weakened the predictability, allowing the Union to review consolidated decisions. The STF admitted actions rescissions to adapt previous decisions to the modulation of Theme 69. What ended leading to several criticisms, as companies that have already used tax credits face unexpected liabilities, violating the principle of legitimate trust.

For the tax authorities, the economic impact is approximately R\$258.3 billion. The impact of the decision is complex and depends on several factors, as it depends on the way in which companies apply the ICMS exclusion and the duration of the period analyzed, as the economic impact for the Tax Authorities varies radically depending on the methodology. For example, the impact economic officially estimated at R\$258.3 billion by the Attorney General's Office National (PGFN), contrasts radically with the R\$ 358 billion calculated by the Institute Brazilian Institute of Planning and Taxation (IBPT)¹¹, this is because the PGFN only considers facts generators after 03/15/2017 (date of the judgment of Theme 69 by the STF), ignoring

⁹ Established thesis: "1. The decisions of the STF in incidental control of constitutionality, prior to the institution of the general repercussion regime, do not automatically impact the *res judicata* that has been formed, even in tax legal relations of successive treatment. 2. Decisions handed down in direct action or in the context of general repercussions automatically interrupt the temporal effects of final decisions in said relations, respecting non-retroactivity, annual and ninety-day prior notice or prior notice

nonagesimal, depending on the nature of the tax."

¹⁰ "1. The decisions of the STF in incidental control of constitutionality, prior to the institution of the regime of general repercussion, do not automatically impact the *res judicata* that has been formed, even in relations tax laws of successive treatment. 2. Decisions handed down in direct action or in the context of general repercussion automatically interrupt the temporal effects of final decisions in the aforementioned relationships, respecting non-retroactivity, annual prior notice and ninety or ninety-day prior notice, depending on the nature of the tax."

¹¹ "The total estimate of the economic impact of the STF decision on the exclusion of ICMS from the calculation basis of R\$ billions;" PIS and from the COFINS and of approximately https://www.migalhas.com.br/arquivos/2021/7/087FFAACFDD99E_estudo-tese-seculo.pdf 358

retroactive periods, while the IBPT includes values since 1988, covering three decades of undue collections. The complexity is closely linked to the lack of parameters unified for calculating the "period analyzed" makes precise projections unfeasible, generating insecurity in budget management.

For companies, there would be an average reduction of 8% in tax costs, with an improvement in cash flow. As studied and explained by Ana Carolina Ortiz (2024), where analyzed the impact of excluding ICMS from the PIS and COFINS calculation basis, demonstrated the results presented showed that the exclusion of ICMS from the PIS calculation base and COFINS generated different impacts on the companies studied. One of the companies analyzed, average reduction in the calculation basis of contributions to be collected was 3.19%. For the second company, the average reduction was 5.12%.

Broetto, Silva and Gugel (2017) analyzed a food distributor and found a tax saving of 21% over five years, generating a financial impact of R\$ 113,861.74, which considers the exclusion of ICMS in both input and output operations. in output operations.

Ana Carolina Ortiz (2024) also concluded that for the first company, there was a average reduction of 5.96% in the calculation basis for PIS and COFINS credits in both periods. In the second company, this reduction was 3.88%. With this, it concluded that the results demonstrate that the impact of the exclusion of ICMS on inputs is more significant for companies with a larger volume of tax credits, as is the case with the first company. On the other hand, in the second company, whose volume of tax debts is more expressive, the the impact is more evident in outgoing transactions, where the reduction in the tax base affects directly the amount due to PIS and COFINS.

Therefore, the repercussions that the exclusion of ICMS on PIS and COFINS presents in their demonstratives, aiming to file a lawsuit requesting the credits allowed as per Brazilian legislation prescribes, giving the right to review the last 5 (five) years of the value collected.

As a result, there was increasing judicialization in search of a decision favorable based on Theme 69/STF, which ended up burdening the judicial system, but



with the late modulation of effects, it ended up discouraging investments and generating a insecurity of the final judgment.

The STF's decision, in 2021, when modulating effects created asymmetry between companies that used credits based on decisions made after 2017 were subject to legal action rescissory. Which ended up burdening the Judiciary even though the measure preserves the balance of public accounts.

3 ICMS IN THE CALCULATION BASIS OF PIS AND COFINS

Until the judgment of the well-known "thesis of the century", the tax authorities considered that sales of goods, products and services included ICMS for the purposes of calculating revenue or gross revenue taxable by PIS and COFINS.

Therefore, based on the argument that ICMS does not make up the revenue or turnover of the company for having a specific destination to a third party, namely, the state or district tax authorities, taxpayers took the issue to court, arguing that revenue is the input that, becoming part of the assets without any reservations, conditions or correspondence in the passive, comes to add its importance, as a new and positive element. Starting from this constitutional definition, the ICMS portion could not be understood as revenue earned by taxpayers and, therefore, would not be subject to the incidence of PIS and COFINS.¹²(Whaling,1997)

Because PIS and COFINS are social contributions that are levied on income or companies' turnover, in accordance with art. 195, I, "b" of the Federal Constitution, and may be charged under its cumulative system, mainly based on Law 9,718/1998, or under its non-cumulative regime, according to Laws 10.637/2002 (PIS) and 10.833/2003 (CONFINS).

The ICMS is provided for in the provisions of art. 155, II, § 2º, I, of the Federal Constitution¹³, which states that its incidence occurs from the circulation of

¹² WHALES, Aliomar. Brazilian Tax Law. By Mizabel Abreu Machado Derzi. Rio de Janeiro: Forense, 1997.

¹³ "Art. 155. The States and the Federal District are responsible for establishing taxes on: II - operations related to the circulation of goods and on the provision of interstate and intermunicipal transportation and communication services, even if the operations and services begin abroad; § 2º The tax provided for in item II shall comply with the following: I - it shall be non-cumulative, offsetting what is due in each operation relating to the circulation of goods or provision of services with the amount charged in previous operations by the same or another State or by the Federal District;"



goods and in certain services, in compliance with the principle of non-cumulatively, the compensation of what is due in each operation occurs with the amount charged in the previous ones, by the same or another state or by the Federal District.

But the thesis was not successful in the Superior Court of Justice (STJ), which ended up decide to charge.

However, on 03/15/2017, the thesis that ICMS does not make up the calculation base for purposes incidence of PIS and COFINS, the STF when judging RE No. 574,706/PR. With the understanding that ICMS represents a temporary revenue passed on to the state at the end. It cannot be understood as revenue or gross income and, therefore, could not be subject to the incidence of PIS and COFINS, therefore, ICMS is state revenue, not taxpayers.

The exclusion of ICMS from the calculation basis of PIS and COFINS, consolidated by the STF in 2017 (RE 574,706/PR), reflects the understanding that this state tax represents a temporary revenue, destined to the federative entities and not to the taxpayer. Thus, by not integrate the billing or gross revenue of companies, ICMS cannot be submitted to incidence of federal social contributions. This decision, aligned with the principle constitutional provision of non-cumulativeness, art. 155, II, §2º, I, CF, assured taxpayers the right to resize your tax obligations, excluding amounts unduly collected for decades.

4 LEGAL SECURITY

The interest in legal certainty consists, in the words of Leandro Paulsen (2013, pg. 978),

Safety is the quality of being free from danger, free from risk, protected, safeguarded, guaranteed, of what one can be sure of or, even, of what one can have confidence in, conviction. The Rule of Law constitutes, in itself, a reference for security. This is revealed in detail, furthermore, in numerous constitutional provisions, especially in guarantees that aim to protect, safeguard, guarantee, free from risk and ensure, provide certainty and confidence, protecting people from arbitrariness. The guarantee and determination to promote security are revealed on the deontic level, implicitly, as a principle of legal certainty.



It is generally understood that judgments that have a financial impact and relevant economic factors will suffer from the modulation of effects provided for in article 927, §3, of the Code of Civil Procedure¹⁴, which provides for the possibility of imposing a framework time for the start of the production of effects of what was decided, in the interest of security legal and the protection of trust and equality.

As analyzed, the Supreme Court only judged the declaratory appeals after four years of his opposition and modulated the effects of his decision to the trial date of merit of the extraordinary appeal. So, what would happen, therefore, with the actions that were filed after 03/15/2017 and had a final judgment?

Due to the principle of *res judicata*, enshrined in item XXXVI of article 5, of the Constitution¹⁵, taxpayers believed they were safe. However, the Union, based on in article 535, §§ 5º and 8º of the Code of Civil Procedure, rescission actions were filed so that the lawsuits filed after 03/15/2017 were suitable for the proposed modulation of effects by the STF.

It turns out that many taxpayers who filed their lawsuits after the judgment on the merits of the STF began to use the credits determined, and any change in the sentences favorable would result in the glossing of the credits used and, consequently, in the creation of a unexpected tax liability. Salgado and Sobreira (2024).

There has been much talk of the violation of legal certainty in the tax issues under consideration by the Higher Courts. And, unfortunately, it was once again possible to verify the rupture of a system of predictability that is expected from the Judiciary.

However, the measure also raises a debate about the effectiveness of *res judicata* and the limits of the rescissory action. Is this procedural resource the best

14 "Art. 927. Judges and courts shall observe: § 3 In the event of a change in the prevailing case law of the Supreme Federal Court and higher courts or that arising from the judgment of repetitive cases, the effects of the change may be modulated in the social interest and in legal certainty."

15 "XXXVI - the law shall not harm acquired rights, perfect legal acts and *res judicata*;"



How to deal with changes in case law? What happens to legal certainty?

In the winning vote, Minister Luiz Roberto Barroso pointed out that, in the case of Theme 69, there was no change in the STF's guidance, given that the first time the court ruled on the modulation of effects when assessing the embargoes of declaration, so that modulation must be applied even if there is already a court decision final and binding on a date prior to the modulation trial. The minister highlighted that "the authority of the STF decision can be imposed even if there is a judicial executive title previous, provided that a rescission action is filed in order to adapt the judgment to the modulation of the effects." (STF, 2024)¹⁶.

By making *res judicata* more flexible via the admissibility of a rescissory action to align with new understandings, the Supreme Court's decision may create an environment of greater uncertainty, where the closure of a legal dispute becomes more susceptible to changes in future decisions of the higher courts.

The modulation of the effects of the STF decision on ICMS, art. 927, §3º of the CPC, associated with the filing of rescission actions by the Union, art. 535, §§5º and 8º of the CPC¹⁷, seriously weakened legal certainty in the tax system. By allowing the review of proceedings that became final after 03/15/2017, the Judiciary violated the principle of the thing judged, art. 5, XXXVI, CF, and the legitimate trust of taxpayers, generating tax liabilities unexpected events and systemic uncertainty. As highlighted by Salgado and Sobreira (2024), this flexibility of the authority of judicial decisions, even if based on the interests of standardization, as in the vote of Min. Barroso, compromises the predictability essential to Rule of Law, calling into question the effectiveness of guarantees against state arbitrariness.

16 Theme: 1,338 A rescission action is admissible to adapt the judgment to the temporal modulation of the effects of the general repercussion thesis established in the judgment of RE 574,706 (Theme 69/RG).

17 Art. 535. The Public Treasury will be notified in the person of its legal representative, by cargo, shipment or means electronically, to, if they wish, within 30 (thirty) days and in the proceedings themselves, challenge the execution, being able to argue:

§ 5 For the purposes of the provisions of item III of the caput of this article, the obligation recognized in a judicial executive title based on a law or normative act considered unconstitutional by the Supreme Federal Court, or based on the application or interpretation of the law or normative act considered by the Supreme Federal Court to be incompatible with the Federal Constitution, in concentrated or diffuse constitutionality control, shall also be considered unenforceable; § 8 If the decision referred to in § 5 is issued after the final judgment of the decision

enforceable, a rescission action will be admissible, the term of which will be counted from the final decision rendered by the Federal Supreme Court.



FINAL CONSIDERATIONS

Inspired by the case of juvenile offenders in Rio de Janeiro¹⁸, an agreement is suggested collective between the Union, taxpayers and business entities. The model would include a gradual transition to exclusion of ICMS, in addition to tax compensations for companies affected by rescission actions and a time limit for reviews, with the aim of avoiding collapses in state revenues and allow economic adjustments. Bringing the implementation of staggered reductions of ICMS on specific items, such as inputs essential, linked to goals of increasing tax efficiency or diversifying revenues.

This approach would balance public and private interests, reducing litigation and based in dialogue and gradual planning, it is essential to stabilize the tax system. Recommending the review of procedural mechanisms to preserve *res judicata* and ensure predictability for taxpayers.

A consensual solution, based on the analogy with cases of juvenile offenders in Rio de Janeiro, which contemplated the principle of benign non-retroactivity, with decisions of the Rio de Janeiro which ruled out the retroactivity of harmful effects on adolescents in conflict with the law. The model applies the same principle to tax law, where decisions future legal actions, such as rescission actions, should not destabilize consolidated situations under the validity of previous laws.

The solution brings proportionality and justice, as it avoids “collective punishment” taxpayers who acted in accordance with the understanding in force at the time.

Tax compensation for companies affected by rescission actions as they had credits questioned via rescission actions after complying with previous rules suffer double penalty (loss of credit + retroactive encumbrance). The refund may be made in installments, future non-cumulative tax credits, or deduction

18 The Supreme Federal Court (STF) has determined that the State and the municipality of Rio de Janeiro shall not apprehend or take minors to the police station unless they are caught red-handed committing an infraction or comply with a written court order. [https://defensoria.rj.def.br/noticia/detalhes/29608-STF-proibe-que-Rio-apreenda-jovens-sem-flagrante-de-ato-](https://defensoria.rj.def.br/noticia/detalhes/29608-STF-proibe-que-Rio-apreenda-jovens-sem-flagrante-de-ato-infracional#:~:text=21%20de%20fevereiro%20de%202024%20%C3%A0s%2000%3A00&text=O%20S)

[infracional#:~:text=21%20de%20fevereiro%20de%202024%20%C3%A0s%2000%3A00&text=O%20S](https://defensoria.rj.def.br/noticia/detalhes/29608-STF-proibe-que-Rio-apreenda-jovens-sem-flagrante-de-ato-infracional#:~:text=21%20de%20fevereiro%20de%202024%20%C3%A0s%2000%3A00&text=O%20S)
[upremo%20Tribunal%20Federal%20\(STF,compliance%20of%20judicial%20order%20written.](https://defensoria.rj.def.br/noticia/detalhes/29608-STF-proibe-que-Rio-apreenda-jovens-sem-flagrante-de-ato-infracional#:~:text=21%20de%20fevereiro%20de%202024%20%C3%A0s%2000%3A00&text=O%20S)



in other federal taxes. Having the effect of reducing litigation by repairing damages without encourage indiscriminate questioning.

One point to be addressed would be the time limit for reviews, rescission actions, establishing a peremptory deadline for filing rescission actions based on changes jurisprudential.

Seeking to preserve *res judicata* and legal certainty, pillars of the State Democratic Law. Preventing the tax authorities from endlessly resorting to revisions to re-discuss matter already settled.

Balancing Public and Private interests, providing cooperation rather than confrontation, with systemic gains in efficiency and economic attractiveness. Making that companies invest more by trusting in the stability of the rules, generating a reduction in administrative and judicial costs frees up resources for public policies. As well as, have legitimacy agreed solutions strengthen trust in institutions and the system tax.

The proposal synthesizes legal innovation and economic pragmatism. By transplanting principles of transitive justice, as in the case of juvenile offenders, for the tax sphere, an orderly transition model is created, capable of:

- (a) Implement necessary reforms without major fiscal trauma;
- (b) Redress historical equities through calculated compensation; and
- (c) Crystallize legal certainty by shielding *res judicata* against infinite revisions.



REFERENCES

1. BARRENI, Smith. Modulation of effects in tax matters. São Paulo: Almedina, 9788584937059. 2024. E-book. ISBN Available at in: <https://integrada.minhabiblioteca.com.br/reader/books/9788584937059/>. Accessed on: November 14th. 2024.
2. BROETTO, Willyan Tadeu; SILVA, Rafael Rodrigo; GUGEL, Everton Jaime. Reflections of the exclusion of ICMS in the calculation basis of PIS and COFINS applied in a food distributor in Cascavel-PR in 2016.
3. CANCELIERI, Luiz Henrique; CAPANO, Prof. Evandro Fabiani. Exclusion of ICMS from the calculation basis of PIS and COFINS. 2023. 23 p. TCC (Graduation) - Law Course, Mackenzie Presbyterian University, São Paulo, 2023.
4. CHIARADIA, Tatiana del Giudice Cappa; SALLES, Victoria. New chapter on modulation of effects: STF allows rescissory action in the adequacy of Theme 69. 2024. Published on November 9. Available at: <https://www.conjur.com.br/2024-nov-09/novo-capitulo-sobre-modulacao-de-efeitos-stf-permite-acao-rescisoria-na-adequacao-do-tema-69/#:~:text=No%20voto%20vencedor%2C%20o%20ministro,ser%20aplicada%20me smo%20que%20j%C3%A1>. Accessed on: November 15, 2024.
5. FAVER, Scilio. The disturbing late modulation of theme 69 of general repercussion and the impact res judicata. in the Crumbs. In: <https://www.migalhas.com.br/depeso/403760/perturbadora-modulacao-tardia-do-tema-69-da-repercussao-geral>. Accessed on November 14.
6. PANDOLFO, Rafael. THEME 69, MODULATION OF EFFECTS AND RESCISSION ACTION. 2021. 16 p. Thesis (Doctorate) - Law Course, Coordinator of the Brazilian Institute of Tax Studies in Rio Grande do Sul, Ibet - Brazilian Institute of Tax Studies, South, <https://www.ibet.com.br/wp-content/uploads/2023/09/Rafael-Pandolfo.pdf> River Big of 2021.
7. PAULSEN, Leandro. Tax Law, Constitution and Tax Code in light of the doctrine and jurisprudence. 16th edition. Pg. 978.
8. PÊGAS, Paulo H. Pis and Cofins, 5th edition. Rio de Janeiro: Atlas, 2018. E-book. page 16. ISBN 9788597017182. Available <https://integrada.minhabiblioteca.com.br/reader/books/9788597017182/>. Accessed on: November 14th. 2024.
9. RAFANTE, Vitório. STF modulates effects in the decision that excludes ICMS from the BC of PIS and Cofins. Legal Consultant. In: <https://www.conjur.com.br/2021-mai-22/rafante-modulacao-efeitos-decisao-stf-icms/>. Accessed on 11/13/2024.
10. SALGADO, Mateus Santos; SOBREIRA, Marina Xavier M.. Authorization of rescission actions on Theme 69 and the collapse of legal certainty. 2024. Published on 24 September. <https://www.conjur.com.br/2022-abr-29/uniao-devolver-dinheiro-excluir-icms-base-pis-cofins/> Available at: <https://www.conjur.com.br/2024-set-24/autorizacao-de-acoas-rescisorias-quanto-ao-tema-69-ea-derrocada-da-seguranca-juridica/>. Accessed on: November 15. 2024.



11. SANTOS, Jucicléia Avelino dos. TAX IMPACTS OF THE EXCLUSION OF ICMS FROM THE CALCULATION BASE OF PIS AND COFINS APPLIED TO A WHOLESALE COMPANY WITH SALES OF MACHINERY AND EQUIPMENT. University
Federal from Alagoas. Maceio, 2022.

<https://www.repositorio.ufal.br/jspui/bitstream/123456789/10619/1/Impactos%20tribut%C3%A1rios%20da%20exclus%C3%A3o%20de%20ICMS%20da%20base%20de%20c%C3%A1lculo%20do%20PIS%20e%20da%20COFINS%20aplicado%20a%20uma%20company%20atacadista%20com%20venda%20de%20m%C3%A1quinas%20e%20equipamentos.pdf>

12. SINTZ, Ana Carolina Ortiz. **EXCLUSION OF ICMS IN THE CALCULATION BASE OF PIS AND COFINS:** financial impact on two agribusiness companies in Paraná. FINANCIAL IMPACT ON TWO AGRIBUSINESS COMPANIES IN PARANÁ. 2024.

Available in:
<https://repositorio.utfpr.edu.br/jspui/bitstream/1/36431/1/exclusaoicms.pdf>. Accessed on: February 15, 2025.

13. SUPERIOR https:// COURT OF JUSTICE. IN:
www.stj.jus.br/sites/portalp/Paginas/Comunicacao/Noticias/2024/17052024-Repetitive-decided-if-it-is-possible-rescisory-to-adapt-judgment-to-general-repercussion-on-ICMS-in-PIS.aspx .
Accessed on: 11/13/2024.

14. SUPERIOR COURT OF JUSTICE. Modulation of the thesis on ICMS in the calculation basis of PIS and Cofins should continue on Thursday (13). In:
<https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=465803&ori=1> . Accessed on November 14, 2024.

15. SUPERIOR COURT OF JUSTICE. NEWS. IN:
<https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=516801&ori=1>. Ac essao .
Accessed on: 11/13/2024.

16. SUPERIOR IN: <https://www.conjur.com.br/2024-jun-21/stf-va-defina-analise-sobre-novo-icms-de-pis-e-cofins-na-compra-de-reciclaveis/#:~:text=Em%202021%2C%20o%20STF%20declarou,que%20adquirisse>
[m%20determinados%20insumos%20recicl%C3%A1veis](https://www.conjur.com.br/2024-jun-21/stf-va-defina-analise-sobre-novo-icms-de-pis-e-cofins-na-compra-de-reciclaveis/#:~:text=Em%202021%2C%20o%20STF%20declarou,que%20adquirisse). Accessed on: 11/14/2024.

17. FEDERAL SUPREME COURT. EXTRAORDINARY APPEAL 574,706 PARANÁ. In: <https://www.jusbrasil.com.br/jurisprudencia/busca?q=tema+69%2Fstf> .
Accessed on 11/14/2024.

18. TEIXEIRA, Pedro de Mello Martins. GUIMARÃES, Renata. Theme 69 and impacts beyond the exclusion of ICMS from the tax calculation basis. Conjur, 2023.
[https://www.conjur.com.br/2023-nov-01/pedro-mello-tema-69-impactos-alem-icms/#:~:text=O%20Supremo%20Tribunal%20Federal%20\(STF,da%20Seguridade%20Social%20\(Cofins\)](https://www.conjur.com.br/2023-nov-01/pedro-mello-tema-69-impactos-alem-icms/#:~:text=O%20Supremo%20Tribunal%20Federal%20(STF,da%20Seguridade%20Social%20(Cofins)).
Accessed on November 14, 2024.