

CONSIDERATIONS REGARDING INTERPRETATION THEORY ECONOMIC OF THE TAXABLE FACT

CONSIDERATIONS REGARDING THE THEORY OF ECONOMIC INTERPRETATION OF THE GENERATING FACT

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Angela Medeiros Ramos**SUMMARY**

A topic discussed by the main doctrine, the application of the theory of economic interpretation of the triggering event is of paramount importance with regard to the inspection activity of the Tax Administration. In this context, in cases in which the taxpayer tries to hide the occurrence of a certain fact generating the tax obligation, applying the aforementioned theory, it is possible that the tax authorities disregard the simulated act and carry out the collection, as the facts should not be interpreted according to the legal form in which they take, but based on the economic effects actually produced. **Key words:** Theory of Economic Interpretation of the Generating Event. Tax Obligation. Economic Effects.

ABSTRACT

The theme discussed by the main doctrine, the application of the theory of economic interpretation of the generating fact is of paramount importance about the supervisory activity of the Tax Administration. In this context, in cases where the taxpayer tries to hide the occurrence of a certain fact that generates the tax obligation, applying this theory, it is possible that the tax authorities disregard the simulated act and carry out the collection, because the facts should not be interpreted according to the legal form with which they are, but from the economic effects produced.

Keywords: Theory of Economic Interpretation of Generating Fact. Tax Obligation. economic effects.

1. INTRODUCTION

The obligation to pay tax (main obligation) arises with the occurrence of some factual or legal situation that is characterized as the “generating event” of the obligation, and must be expressly provided for in the law. However, there are cases in which the taxpayer uses illicit strategies in an attempt to conceal the occurrence of this triggering event with the aim of not paying the tax or paying less. In these cases, the theory of economic interpretation of the triggering event applies, according to which, in short, the tax authorities may disregard the simulation made by the taxpayer and charge the real amount due.

With regard to the methodology used, articles and doctrinal works that specifically dealt with the topic were initially analyzed, in addition to jurisprudential consultation in the *websites* of the Superior Courts.

2 THEORETICAL FRAMEWORK

2.1 CAUSE OF TAX OBLIGATION

We know that the tax obligation is one imposed by the State, taking the form of a main or accessory obligation. In short, the main obligation is the duty to “give” or “pay” the tax or fine, that is, it is the pecuniary benefit. An additional obligation involves the duty to do or not do something, such as the duty to keep tax books.

According to article 114 of the National Tax Code, the event generating the main obligation is the situation defined by law as necessary and sufficient for its occurrence. In this context, professor Ricardo Alexandre teaches us that “necessary situations” are all those that need to be present to configure a fact. For example, the entry of a foreign merchandise into national territory is the necessary situation for the event generating the import tax to occur, thus giving rise to the main tax obligation, that is, the payment of the tax. (2017, p. 334).

Regarding the event generating the accessory obligation, article 115 of the National Tax Code makes it clear that it will be any situation that, in accordance with the applicable legislation, imposes the practice or abstention of an act that does not constitute a main obligation. In other words, it will be the obligation to do or not to do, which does not fall within the main obligation.

It is important to highlight that, due to the principle of legality, the main obligation (requirement to pay the tax) must be provided for by law, as expressly provided for in articles 3 and 114 of the National Tax Code. However, in the case of ancillary obligation, there is no such requirement, and the matter can be dealt with by “tax legislation”, which includes, for example, the decrees:

Art. 3 Tax is any compulsory pecuniary payment, in currency or whose value can be expressed therein, that does not constitute a sanction for an illicit act, established by law and charged through fully linked administrative activity.

Art. 114. The event generating the main obligation is the situation defined by law as necessary and sufficient for its occurrence.

Art. 115. The event generating an accessory obligation is any situation that, in accordance with the applicable legislation, imposes the practice or abstention of an act that does not constitute a main obligation (BRASIL, 1966).

Therefore, when the triggering event defined in the law occurs, the tax obligation arises for the taxpayer. However, there are some situations in which taxpayers use certain means to avoid taxation, trying to hide from the tax authorities that the triggering event occurred, as will be explained below.

2.2 APPLICATION OF THE THEORY OF ECONOMIC INTERPRETATION OF THE GENERATING FACT

Much of the doctrine highlights the possibility of the existence of different means of avoiding taxation. In this sense, these are ways of mitigating the tax effects on a given taxpayer by reducing, eliminating or postponing the tax obligation. Thus, we have the application of three situations: avoidance, evasion and tax avoidance. The distinction between these institutes is basically in terms of the legality of the procedure.

Clearly, Ricardo Alexandre explains that tax avoidance occurs when the taxpayer chooses, within the possible legal formats for concluding the intended business, the one that will result in an exemption, a non-incidence or, at least, a lower incidence. onerous. It should be noted that avoidance normally occurs before the triggering event, being considered legitimate tax planning. It should be noted, however, that it is also possible for tax avoidance to occur, exceptionally, after the triggering event, but, in fact, in general, it occurs before. (2017, p. 341).

Also according to the aforementioned author, unlike tax avoidance, tax evasion is an illicit conduct in which the taxpayer, normally after the occurrence of the triggering event, carries out acts that aim to avoid knowledge of the tax obligation arising from the tax authority (2017, p. 342), such as the sale of goods without issuing an invoice.

Finally, Rafael Oliveira teaches that there is a case of tax evasion, also called ineffective avoidance or abusive avoidance, where the taxpayer simulates a legal transaction in an attempt to conceal the occurrence of the triggering event. The keyword for identifying elusion is “abuse of form”. Whenever the taxpayer apparently lawfully escapes through artifices

that of taxation, there will be tax evasion. (2017, p. 342 and 343). In this context, article 116, sole paragraph of the National Tax Code, provides a general anti-avoidance rule, applying the Theory of Economic Interpretation (or Consideration) of the Generating Event, whose objective is to prevent illicit avoidance of taxation, which generally occurs due to by means of concealing the occurrence of the triggering event:

Art. 116. Unless otherwise provided by law, the triggering event is considered to have occurred and its effects to exist:

[...]

Single paragraph. The administrative authority may disregard acts or legal transactions carried out with the purpose of concealing the occurrence of the tax-generating event or the nature of the constituent elements of the tax obligation, observing the procedures to be established in ordinary law (BRASIL, 1966).

Thus, according to the author already mentioned above, in terms of the Theory of Interpretation or Economic Consideration of the Generating Fact, originating in German law, facts must be interpreted according to the legal form in which they take, but based on the economic effects effectively produced. (2017, p. 346).

As an example of the application of this theory, the Superior Court of Justice allowed, in the case in question, the economic interpretation of the triggering event to be used, privileging the essence of the fact to the detriment of merely formal characteristics, stating that the “economic interpretation is imposed, since reality must prevail over the simple legal form”, as judged in REsp no. 696.745/CE:

TAX. INCOME TAX. ALLOWANCE GRANTED UNDER COLLECTIVE AGREEMENT. SUBSTITUTE CHARACTER OF SALARY ADJUSTMENT. SALARY NATURE. INCIDENCE. FOOD AID COMPENSATION. CHARACTERIZATION SUPPRESSION OF LABOR LAW. INDEMNIFICATION CHARACTER. NON-INCIDENCE. Income tax has as its triggering event the acquisition of economic or legal availability of income (product of capital, labor or a combination of both) and earnings of any nature (art.43, of the CTN). The funds received by the worker as compensation cannot be taxed as if they were income, as they do not reflect the idea of "asset addition" required by art.43 of the CTN. The monetary allowance granted in replacement of the salary adjustment paid in due time, despite being recognized via transaction, is a salary adjustment and, as such, the tax due is levied, just as the exaction would be levied if the correction was actually paid in due time. A salary bonus with this content is, in essence, an adjusted salary, regardless of whether the update takes place due to a court decision or a transaction. Economic interpretation that is necessary, since economic reality must prevail over the simple legal form (STJ), REsp696745/CE, Rel. Minister LUIZ FUX, FIRST PANEL, judged on 06/07/2005, DJ29/08/2005, p.183, REPDJ 10/10/2005, p.241).

FINAL CONSIDERATIONS

In accordance with all of the above, we saw that the triggering event for the tax obligation arises when the situation defined by law or legislation as necessary and sufficient for its occurrence takes place in the real world. If this occurs, the taxpayer is obliged to pay (give), do or not do.

However, some practices carried out by taxpayers aim to mitigate the tax effects on a specific taxpayer by reducing, eliminating or postponing the tax obligation. Thus, the Theory of Economic Interpretation of the Generating Event emerged in the doctrine, whose objective is to avoid the illicit avoidance of taxation, mainly provided for in article 116, sole paragraph of the National Tax Code.

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