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The removal of ICMS from the PIS and Cofins calculation basis in electricity bills: an interpretation under the teachings of the General Theory of Law

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ABSTRACT: The typical complexity of a federal system of state organization, coupled with the existence of a large number of taxes and the respective powers of the federative entities, generates much confusion in the interpretation of Brazilian tax laws. In the electricity distribution sector, there has been discussion about the basis for calculating federal taxes related to PIS and Confins. The center of the discussions refers to the doubt about the consideration of the value of the state tax under ICMS in the calculation of the two aforementioned taxes. Several electricity distribution companies have already filed a lawsuit in Brazil demanding reimbursement of amounts wrongly transferred to the state. The cases have already reached the Supreme Court, and consumers have also claimed a similar right. The Court ended up deciding that the COFINS amount should not be part of the PIS and COFINS calculation basis. This article proposes to analyze the theme under different methodological approaches offered by the General Theory of Law, which could give reasons for the undesirable insecurity brought a priori by the situation analyzed.

KEYWORDS: Law, Taxes, Calculation Basis, Distribution, Electricity.

I. INTRODUCTION

is organized as a federative system, formed by the indissoluble union of states, municipalities, and the Federal District, pursuant to art. 1st of the Constitution. This form of organization makes several aspects of the state structure more complex. This is the case with the tax system, which has different taxes with different incidences-for example, on assets, income and consumption-, with different powers from the three levels of federated entities. This complexity contributes to confusion in the interpretation of Brazilian tax laws and, in numerous situations, the taxpayer turns to the judiciary branch to resolve doubts regarding the correct application of the law. This situation occurs with the search for a correct understanding of the tax calculation basis such as PIS/PASEP and Cofins. In this case, one of the doubts raised concerns the ICMS value of the operations of the companies that must (or not) make up the calculation basis of those two taxes. Such questioning occurred with great prominence in the electric energy distribution sector, in which several distribution companies appealed to the Judiciary Branch demanding reimbursement of amounts improperly transferred to the State. The cases have already reached the STF, and consumers, not just the electricity distribution companies, have claimed a similar right. The STF ended up deciding to exclude the ICMS value from the PIS and COFINS calculation basis. This article proposes to analyze the theme under different methodological approaches offered by the General Theory of Law, which could have given rise to the undesirable insecurity brought a priori by the situation analyzed and which may have helped to support the decisions of the Judiciary on the subject matter. Among these approaches are Hans Kelsen's normativism and Ronald Dworkin's principles. This is the idea that permeates this article, which proposes, in the end, to offer an analysis of the law in light of the philosophical approaches of the aforementioned authors, based on a concrete case related to the electricity sector, which involves the Tax Law, an object of appreciation by the STF. Thus, it is expected to promote the discussion, with a view to mitigating controversies about the analyzed case, which in part already had a decision by the STF.

II. From the discussion on the tax calculation basis, its legal support and the possibilities offered by the Theory of Law. ICMS is the basis for calculating PIS and Cofins in the electricity sector

The analyzed taxes : In recent years, in Brazil, among 53 electric power distribution concessionaires in operation, 49 have filed a lawsuit against the National Treasury, intending to recover tax credits, based on the

thesis that the PIS tax calculation basis and Cofins could not consider the amount referred to ICMS as part of the companies' billing [3]. In order to have proper knowledge of the subject, it is necessary, first, to deepen knowledge of these taxes. The first two taxes mentioned, PIS and Cofins, are taxes [4] of federal competence, while the ICMS is a tax of state competence. Both PIS and Cofins are calculated based on the gross operating revenue of legal entities, without considering deductions in relation to costs, expenses, and charges. According to the ordinary provisions of the applicable legislation, the contribution rates for PIS and Cofins are applicable, therefore, to the invoicing, or gross operating revenue, of the companies, pursuant to art. 2nd and 3rd of Law No. 9,718, of November 27, 1998 [5], in verbis:

> "This Law applies within the scope of federal tax legislation regarding contributions to the Social Integration Programs and the Formation of Public Servant Assets-PIS/PASEP and the Contribution for the Financing of Social Security-COFINS, which deal with art. 239 of the Constitution and Complementary Law No. 70, of December 30, 1991, on Income Tax and Tax on Credit, Exchange, and Insurance Transactions, or related to Bonds or Securities-IOF.

III. CONTRIBUTION TO PIS/PASEP AND COFINS

> Art. 2nd Contributions to PIS/PASEP and COFINS, payable by legal entities governed by private law, will be calculated based on their income, in compliance with current legislation and the changes introduced by this law. Art. 3 The billing referred to in art. 2 comprises the gross revenue referred to in art. 12 of Decree-Law No. 1598, of December 26, 1977."
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> It should be noted that legal entities in general contribute to these taxes, including persons equivalent to them under the Income Tax legislation, except for micro and small businesses, which are subject to the system called Simples Nacional [6].The same Law No. 9,718, of November 27, 1998, provides, in its art. 3, § 2, exclusions that must be made from the aforementioned gross revenue, for purposes of calculating the calculation basis of these taxes, as can be seen below: "Art. 3rd.
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> **.....**
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> **.....**

§2 For the purposes of determining the calculation basis of the contributions referred to in art. 2nd, the following are excluded from gross revenue: I-canceled sales and unconditional discounts granted; II-reversals of provisions and recoveries of credits written off as losses, which do not represent the inflow of new income, the positive result of the investment evaluation by the value of equity, and profits and dividends derived from equity interests, which have been computed as income gross; III-(Revoked by Provisional Measure No. 2.158-35, of 2001); IV-Revenues referred in Art.187, IV, of Law 6404, of December 15, 1976, arising from the sale of non-current assets, classified as investment, property, plant and equipment, or intangible assets; and V-(Revoked by Law No. 12,973, 2014) VI-the revenue recognized for the construction, recovery, expansion, or improvement of infrastructure, the counterpart of which is an intangible asset representing the right to explore, in the case of public service concession contracts." Note, therefore, that ICMS would not be configured as one of the

exclusions listed in the device. ICMS is levied on the circulation of products in general (such as household appliances and food), communication services, and transport between cities and states, and is charged when the service or merchandise reaches the consumer. There are different rates for intrastate and interstate transactions. It is up to each state to establish the ICMS and collect it, which is done indirectly and based on the price of the products. This tax has regressive aspects, since, at the interstate level, those who receive less pay more and everyone pays the same percentage of tax. If the ICMS rate for interstate operations is 12% between a State X and a State Y, then all services and products on which the ICMS is levied will have a 12% tax. The payment is due by any person or company (taxable person of the tax) that undertakes operations of circulation of goods or services, whether in the sale, transfer, or transport [7].In practice, ICMS is charged indirectly, that is, its value is added to the price of the product sold or the service provided. When an operation in which ICMS is applied is carried out, the taxable event is carried out [8] when title to this good or service is transferred to the buyer. Thus, the tax is levied only when the merchandise is sold, or the service is provided, to the consumer, who becomes the holder of the item or the result of the activity performed. Each state and the Federal District are responsible for regulating the ICMS, establishing the percentages to be charged on internal transactions (within the respective state), or interstate. In the case of the latter, there are laws in common between the states to agree on the rates to be applied, which are established through ICMS Agreements, prepared by Confaz [9]. The electric energy production chain : In the 1990s, when the Fernando Henrique Cardoso government embarked on a set of institutional reforms in the electricity sector with a view to enabling a privatization process, it can be said that the sector was segmented into three groups of activities, which were possible to

transform itself without many complications in independent activities, which could operate along the lines of a market economy. These groups were classified as: generation, transmission and distribution of electricity [10]. Thus, Generation included the electricity production activities that could be contracted with large consumers and from different sources and with public service concessionaires. In this way, they are intended to transmit electrical energy from generators to electrical energy distribution.Transmission comprised long-distance transmission lines and regional interconnections. Distribution comprised urban lines in extensive networks, which did not support competition and were configured as monopolistic markets. It is characterized, therefore, as a supplier of electricity to the final consumer of these services. Such activities cover the set of electrical installations and equipment that operate at lower voltages.This system organization remains until today, with some differences that impact the regulatory environment [11]. This is the case of the emergence of several energy generating companies from alternative sources, made possible by technological advances. More recently, other advances began to allow self-generators to be compensated for excess energy that was generated and not used, making this surplus available for use by others through connection to the electricity grid.The case analyzed here comprises energy distribution companies and their consumers, who are those affected by the uncertainty of the definition of the PIS and Cofins calculation basis, under the Tax Law.

The calculation basis of ICMS, PIS, and Cofins, and their effects on electricity distribution: ICMS has a constitutional provision pursuant to art. 155, II, of the Charter. Among its structural aspects is the calculation basis, which can be understood as a measure of the taxable fact, or as a perspective of the dimension of the matter of the incidence hypothesis that has been qualified by law. The calculation basis, therefore, corresponds to a measure of certainty for the material aspect of the incidence hypothesis. In this context, the ICMS calculation basis must be a measure of the commercial operation carried out, and the ordinary legislator then established as a calculation basis for the ICMS the value of the goods output of an establishment, within the scope of a transaction of goods or services [12]. The value of the merchandise that leaves an establishment is given by the unit value (or price) of each item or fraction of the object of the transaction. Since there are many quantities traded, this value is a function of the unit price multiplied by the quantity of items traded. In the cases of PIS and Cofins, these are taxes that are levied on the companies' gross revenue. From a simplified managerial-financial perspective, gross revenue can be understood, roughly, as the result of

the total number of items sold, or the unit quantity of services provided, multiplied by the unit price of these goods or services. It is possible to infer, therefore, that when focusing on gross revenue [13] [14] of the company, these taxes are also levied on the quantities sold, as well as on the respective unit prices, considering, as mentioned above, that gross revenue is a function of these variables. In accounting terms, these taxes must be deducted from the company's gross revenue, which results, in turn, in the net revenue (net of taxes), the calculation basis for, once discounted, the respective costs (of the product sold, or of the service provided), if you calculate the so-called gross profit of the company. This profit, after discounting the net operating expenses, the financial result, and the taxes on the respective result, arrives at the

company's result. If it's positive, it's called profit. If it's negative, it's called a loss.Since the ICMS calculation basis, as well as PIS and Cofins, are similar, questions arise as to the form, timing and order in which the respective tax incidence hypotheses occur. With regard to this last question, considering that doubts may arise as to the order of the sequence of moments in which the incidence of each of these taxes occurs, it is possible to have an idea about the limits of recognition and application of the basis of calculation of each of the incidence hypotheses.Turning attention to the ICMS situation, in the specific case of electricity, the production, import, circulation, distribution, and consumption of electricity are also subject to taxation by this tax. The situation is explained because the Federal Constitution of 1988 considered electricity as a commodity for ICMS taxation purposes, which is based on the acceptance that such energy is a movable property endowed with economic value, and that, in terms of art. 83, I, of the Civil Code, "energy that has economic value" is considered chattel for legal purposes [15].According to the provisions of the Federal Constitution, the ICMS is based on the circumstances of a person producing, importing, making, circulating, distributing or consuming electricity. The competent legislator, state or district, when creating this tax, could then use any of these facts to configure the hypothesis of the incidence of the tax. In the case discussed here, the fact in question refers to the distribution of electricity. In the meantime, the possible basis for calculating the ICMS levied on electricity corresponds to the value of the operation from which the delivery of electricity (understood as a commodity) to the final consumer arises, a value that is represented by the price of the electricity consumed effectively, in accordance with the provisions of art. 34, 9, of the ADCT of the Federal Constitution [16], in verbis:

> " Art. 34. The national tax system will come into force on the first day of the fifth month following the promulgation of the Constitution, maintaining, until then, the 1967 Constitution, with the wording given by Amendment No. 1, of 1969, and by subsequent amendments.
> .....
> ..... §9º Until a supplementary law provides for the matter, the electricity distribution companies will be responsible for the payment of the tax on operations related to the circulation of goods levied on electricity, from production or import to the last operation, calculating the tax on the price then practiced in the final operation and ensuring its payment to the State or the Federal District, depending on the location where this operation must take place."

Imagine that in an energy distribution operation, this will be delivered to the consumer, giving rise to the hypothesis of ICMS incidence and the materialization of the taxable event. The consequence will be the application of the tax rate on the resulting calculation basis. At the end of a period, the energy bill will be issued to the consumer with the entry of the amount of tax due. Once the bill is paid, the distribution company will receive the amount paid and will record it in its accounting as gross revenue for the service provided. The quantum due in relation to PIS and Confins will be calculated on this revenue.The correct calculation of taxes due in the situation illustrated above is the generator of a conflict of interpretation. On this subject, Brazilian Justice has already advanced in legal interpretation.

IV. The judgment of the conflict in the Federal Supreme Court

The STF decided, on March 15, 2017, in the judgment of RE No. 574.706-PR, under the rite of general repercussion, on a matter related to the calculation basis of PIS and Cofins in electricity distribution companies. It so happens that another tax, the ICMS, has a calculation basis similar to that of the first two taxes, namely: the gross revenue (or billing) of the companies.The Plenary of the Federal Supreme Court recognized this position, understanding that the calculation of ICMS, considering each good or service, is unfeasible for companies. Furthermore, it also understands that the amount due for this tax must be calculated each month, and that the legal analysis of the principle of non-cumulativeness applied to ICMS must comply with the provisions of art. 155, 2, I, of the Federal Constitution, in verbis:

> "EXTRAORDINARY APPEAL WITH GENERAL REPERCUSSION. EXCLUSION OF ICMS ON THE BASIS OF THE PIS AND COFINS
>
> CALCULATION. DEFINITION OF BILLING. SCRIPTURAL ASSESSMENT OF ICMS AND NON-CUMULATIVENESS REGIME. REMEDY PROVIDED. 1. The ICMS calculation is not feasible. Taking each good or service and the corresponding chain, the accounting calculation system is adopted. The amount of ICMS to be paid is calculated month by month, considering the total credits arising from acquisitions and the total debts generated from the output of goods or services: accounting or book-entry analysis of ICMS. 2. The legal analysis of the principle of non-cumulativeness applied to ICMS must comply with the provisions of art. 155, 2, item I, of the Constitution of the Republic, complying with the principle of non-cumulativeness for each operation. 3. The non-cumulative regime imposed to conclude, although the bookkeeping of the installment is still to be offset by ICMS, not including all of it in the definition of revenue used by the Supreme Court. ICMS is not part of the calculation basis for the incidence of PIS and COFINS."

Considering this understanding, several court decisions from different instances declared the incidental unconstitutionality of the inclusion of ICMS in the calculation basis of the two federal taxes mentioned above. They also recognized the right of electricity distributors to exclude ICMS from this calculation basis and, in addition, to obtain the respective credit that had been paid in the years prior to the court decision ("PIS/COFINS Credits"). These 1st and 2nd instance court decisions are now known as "PIS/COFINS Judicial Decisions". Aneel decided to gather the opinion of regulated agents on the matter, before expressing itself more decisively on how these rights could be shared with consumers. A subsidy of this nature is an instrument through which the Agency promotes the participation of society in its decision-making processes. The discussion is of interest to many electricity distribution companies, and the amounts discussed reached figures in excess of R $50 billion reais. The consequence was that, on January 9, 2021, Aneel announced the opening of a public consultation to discuss how to return this amount, related to tax credits, to electricity consumers, including families who pay for their electricity bills. Aneel predicted the return via rebate in the next tariff readjustments, within a period of five years. The Agency has already advanced more than R $700 million to consumers of the distributor Cemig, which it also did for the 2020 readjustment that would be applied to the consumers of the company EDP Esprito Santo. Other electricity distribution companies also had lawsuits questioning the matter, with the merits being decided in favor of their claims. There are concessionaires with lawsuits in various stages of processing, and there are also companies in the segment that have not yet filed lawsuits in court. It can be inferred that there would be four possible decisions on the case discussed here, in the sense of recognition: 1st) the unconstitutionality of including ICMS in the PIS and COFINS calculation basis; 2nd) the right of electricity distributors to exclude ICMS from the PIS and COFINS calculation basis; 3rd) the right to obtain credit corresponding to the exclusion of ICMS from the PIS and COFINS calculation basis, which had been paid in certain years prior to the court decision; 4th) of the right to return the amounts via rebate in the next tariff adjustments, within a period of five years.

The possibilities of methodological solutions offered by the Theory of Law. : The decisions signed by the Supreme Court and the Justice as a whole are not always strictly based on the letter of the law, because, in the same way, the Positive Law does not always reach all the situations that it intends to regulate. Thus, the case in question will be used, and the four court decisions highlighted, to assess how the judicial decision-making bodies may have used the Philosophy of Law, and the different methodological solutions it offers, to provide solutions to the inherent issues in Tax Law raised by the interested parties: the Ministry of Finance (today the Ministry of Economy) and the respective Attorneys, on the side of the government; and electricity distributors, on the private sector side. Likewise, it offers paths to be followed in the judgments of claims inherent in the case in question, which have not yet been sent to court or are still being processed without judgment. When poring over the General Theory of Law, the first work that is always remembered in our times is the Pure Theory of Law, the main work of the Austrian Hans Kelsen, in which he innovated in so-called legal science, by treating as an object only legal content, seeking to remove different motivations, such as those of an ideological, economic, political, and other nature. In this way, it rejected the methods recurrently used by the judicial authorities to resolve conflicts submitted to them until then, and sought to describe how the law could be used in its "purest" form, making the results of its application more predictable. [17]

This would be the intended situation when the state sets standards for society, with the intention of regulating human relations, supported by the power to use force if there is no compliance with the standards. Kelsen prescribed that there would be two types of norms: those that describe the legal consequences; and those that describe regulated conduct. These norms are submitted to an unnatural order of the things that men deal with (order of what is, or not), but of the ought-to-be (of what should be, or should not be). This theory, then known as Positivism (in which it was also considered that there was a hierarchy between the norms), has as its object the legal norm, which can be understood as a prescription addressed to others, supported by a coercive measure placed and monopolized by the state. On the other hand, it is worth mentioning the author Ronald Dworkin, who rejected Legal Positivism during the first phase of his work, which he considered to be an authoritarian theory-it would be difficult for a law theory to divorce itself from a democratic theory. In this sense, he argued that, in the so-called "hard cases" (for which the Positive Law did not offer answers, or for situations where there were conflicting laws), the solution to conflicts should use legal principles, a different idea from a solution, for example, that defends the use of a certain discretion by the judge. Dworkin, therefore, opposed the principles to the simple use of the so-called "Rules of Law". The rules would comprise: binary norms, fulfilled by subsuming the facts into the rule; solutions for "everything" or "nothing"; little abstract analysis; solutions specific to the situation faced; and direct application of the rule. The principles defended by Dworkin comprised: the balancing of interests; solutions by "more" or "at least"; very abstract analysis; generic solutions; and application dependent on the interpretation of the situation. Thus, Dworkin defended the application of so-called Constructive Interpretation, through which the legal system is understood as a whole, composed of principles, rules, and political guidelines.

V. CONCLUSION

First of all, it should be noted that of the four decisions presented on the case, the first of which, it is said, the unconstitutionality of the inclusion of ICMS in the PIS and COFINS calculation basis, there was no positive rule on the matter so far, nor convergent precedent applicable, with the need for the STF to extend the limits of legal interpretation to rule on the case.If there is no law, methodological solutions through Positivism become innocuous. The direct application of the understandings of other positivists falls apart, then.The application of methodological proposals brought by Dworkin seems to be much more promising, as they use the interpretation of norms through the use of principles to make decisions. The use of the principle of non-cumulative tax (ICMS)-applied to the stages of incidence of the import in production chains-, with expanded interpretation to reach the case in question-applied to the PIS and Cofins calculation bases-, refers to the methodology brought by Dworkin.Based on this interpretation, it is possible to create a rule to be applied in similar future cases, as reflected in the

Court Decision. The statement in this agreement was in the following terms: "The non-cumulative regime imposes to conclude, although the bookkeeping of the installment is still to be offset by the ICMS, not all of it is included in the definition of billing".The analysis differs in the cases of the second and third decisions presented. It is said, from the right of electricity distributors to exclude ICMS from the PIS and COFINS calculation basis, and from the right to obtain credit corresponding to this exclusion, that they had paid in certain years prior to the court decision. In both, since the first decision was crystallized in law, after the STF's agreement, the Positive Law provides for the defense of these rights in the current legislation: the right not to comply with an unconstitutional (state) requirement, and compensation for undue collection. In such cases, the solutions are supported by positivist theories, and the direct application of the insights offered by Kelsen gains momentum. However, the form and term of this reimbursement require interpretation based on principles – the principle of non-cumulative tax, with expanded interpretation, as already highlighted – which refers to the teachings of Ronald Dworkin. Going further, the Judiciary, when interpreting the law to reconstruct the legal norm in a concrete case, fostered the discussion, now debugged by the STF.The Court, by taking a stand, eliminates conflicts and the inherent legal uncertainty of the issue. Thus, it deliberates on an understanding that henceforth will serve as a guide for the future understanding, now convergent, of the situation discussed.Therefore, the methodologies raised in this work offer a wide range of alternatives both to promote the improvement of law, as well as to enable solutions to problems arising in the dimension of law. The idea of the work is to promote a brief discussion about the possibilities of revising the law from its General Theory, applied to concrete cases: in a decision already taken by the Supreme Court and in discussions that may still arise, which often involve values expressive interests, and the interests of the government, companies, and consumers in general.

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