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Tax Responsibility of Economic Groups

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Abstract

This paper aims to assess the possibility and the legal support of the tax liability of the economic groups in accordance with Brazilian laws. It starts by explaining the principle of legality in the Brazilian tax law. Later, it expounds on the possible types of tax responsibility. At the end of the paper, the real possibility of tax liability for an economic group in light of the main legal provisions that should support that imputation was analyzed, and the final conclusions were presented.

Keywords

Tax Law, Tax Passive Capacity, Tax Responsibility, Economic Group

1. Introduction

This article will seek to examine, in light of the principle of legality and the legal system in force in Brazil, the legal hypotheses for the tax liability of economic groups, as well as its effective applicability.

The Brazilian Tax Law has the Constitution of the Federative Republic of Brazil of 1988 as its main source of validity and emanation of principles and foundations.

The current Brazilian Federal Constitution has been in force for more than thirty years. That is, its study did not start recently, so there was enough time for our courts to consolidate the norms and principles contained in that document. In turn, the National Tax Code (Law number 5.172/1966) (Brasil, 1966), which specifies the general tax rules for the country, has been in force for more than half a century, certainly a sufficiently long period for its concepts to be properly absorbed and applied by the doctrine, magistrates, and operators of the Law. However, that is not what we usually experience in Brazil.

Among the various issues that still have no exact definition, there is the issue of tax responsibility, which is certainly a very troubled subject in the corridors of our courts, especially driven by the efforts of state lawyers, often with lawsuits not

covered by the current legislation, aiming at the payment of the tax debt in any way.

It is also important to mention that the Constitution devotes a whole chapter to dealing with the national tax system. The 1988 Political Charter marked the consolidation of democracy in Brazil and the end of the military regime. It is also called "the citizen's constitution" because it is the most comprehensive in our history and has various provisions regarding the citizens' rights. Therefore, there is no doubt that the constitution brought, in its text, the beacons to the power of taxing so as to assure the fundamental rights of Brazilians, raising the taxes to the level of the citizens' fundamental rights and guarantees.

The theme is extremely broad, so we will focus our analysis exclusively on the responsibility of the so-called "economic group", in light of the principle of legality. Incidentally, we right away point out the difficulty in defining this nomenclature, whose elements, principles, outlines, and limits are not found in any legal text, nor are they unified in the doctrine and jurisprudence.

Our analysis will especially follow the legal approach so that anyone who wants to understand the Brazilian tax context can go deeper into the analysis.

2. The Principle of Legality in the Brazilian Tax Law

We have already mentioned the importance of the 1988 Constitution in the Brazilian political context. That document also strongly advanced the guarantees and contours of the country's tax system. In order for the subject to be treated completely and comprehensively, an entire chapter containing eighteen articles was dedicated to deal exclusively with this question. In addition, developing the issue with an open approach, we have that the tax limits are true rights and fundamental guarantees of the citizen, assuring principles that are basic and of great importance for a fair society, such as the principles of legality, the capacity to contribute, non-confiscation and respect to private property.

Aware of this importance not only by the legalistic approach, but also from the point of view of the concepts of federation and republic it selves, the great master Roque Antonio Carrazza brings specific work that addresses with magnitude the importance of this issue for the study of the Tax Law, and that also composes a fundamental framework for the understanding of the Brazilian tax system, which is called "Constitutional Tax Law Course". In this important work, we can gather indispensable concepts for the analysis that will be carried out in this paper.

In this sense, the great master states,

> Constitutional norms, besides occupying the apex of the legal pyramid, are characterized by the imperative nature of their commands, which are applied not only to natural or legal persons under public or private law, but also to the State itself.
>
> What we are trying to emphasize is that the Constitution is not merely a repository of recommendations to be followed or not, but a set of supreme norms that must be unconditionally observed even by the infra-constitu-

> tional legislator.
> It is for that reason that we say the "Constitution is the fundamental law of the State". (Carrazza, 2007: p. 34).

The same counselor pointed out later:

> We also note that our Constitution, in the laudable purpose of transforming the Brazilian Republic into a Democratic State of Law, subjected the taxation of political persons to an extensive list of principles (federative and of legality, equality, precedence, legal certainty, the reserve of jurisdiction, etc.), which protect taxpayers as much as possible against any pecuniary abuses.
> Moreover, it is the constitutional principles that, so to speak, direct the content of tax laws and their ways of application. (Carrazza, 2007: p. 56)

The previous passages reinforce the importance of constitutional analysis when one is dealing with taxation, as well as establish the hierarchical positioning of the principles outlined in the Constitution.

According to a classic lesson in Brazilian Tax Law, whoever seeks to verify whether a tax rule is valid and legal starts their analysis by consulting the constitutional text. They will certainly be on the right path.

It is also important to state that this analysis can be performed from different perspectives. The constitutional concept of taxation can be viewed in a legalistic way simply as a hierarchical framework for the validity of tax norms, this right being eminently focused on the study of the legal norms.

With regard to the principle of legality, we have that this concept is intrinsic to the Rule of Law. Hugo de Brito points out that the principle of legality is the "most important legal principle regarding taxation" (Machado, 2015: p. 71).

In addition, Renato Lopes Becho stresses that "because it is an internal public law relationship, legality is a strong aspect of taxation. The tax obligation is notably established in the law (*ex lege*), as determined by law" (Becho, 2014a: p. 68).

Finally, Alberto Xavier points out:

> The notion of the Rule of Law, at least in its original formulation, has a double meaning, both material and formal: the material content of the Rule of Law is that the essential purpose of the State is to achieve justice, above all, with a strict delimitation of the free sphere of citizens, in order to prevent the arbitration of power and thus giving the greatest possible expression to legal certainty; the formal aspect of the Rule of Law, in turn, basically involves the idea that, in carrying out its purposes, the State must exclusively use the legal forms, outlined in the formal law. In other words, the Rule of Law was, at least initially, conceived to have the Law as a purpose and to act according to the Law; that is, the one that has justice as an objective and the law as the means of its achievement. (Xavier, 1978: p. 8)

Deepening our analysis into the tax context, this truth becomes even more robust because in this constitutionally defined system, the principle of strict legality

in the institution or tax increase is applied.

In the words of Geraldo Ataliba:

> Law is par excellence and, above all, an instrument of security. It is what assures rulers and the governed of reciprocal rights and duties, making social life viable. The more secure a society, the more civilized it is, and the more secure the people are, who are sure that their right is necessarily one and that the behavior of the state or other citizens will be the same. (Ataliba, 2007: p. 184)

Certainly, as indicated by the immortal professor, legal certainty is indispensable for a society that wants to prosper. In the same direction, we find lessons by Celso Antônio Bandeira de Mello.

> This "legal certainty" coincides with one of mankind's deepest aspirations: The security in itself and the certainty in relation to what surrounds them, being that an object of permanent search by the human being. (Mello, 2007: p. 119)

However, in addition to security, it is also necessary to protect legal trust. Anyone who performs a particular act or starts a large enterprise, taking the risk inherent in any business, does so by thinking that they will be minimally guaranteed by similar conditions to those at the time of the investment decision and also that no act that can change suddenly and substantially the competitiveness of the business will be inflicted to them.

In the words of Rafael Maffini:

> The protection of confidence should be regarded as a principle immediately deduced from the principle of legal certainty and, in indirect terms, from the principle of the Rule of Law, with the primary purpose of achieving a state of affairs that will lead to stability, predictability, and calculability of acts, procedures or simple state behavior and which entails the intermediary behavioral duties that require the preservation of state acts and their effects. (Maffini, 2005: pp. 48-49)

Regarding the relationship between the two principles presented here, with the usual mastery, Canotilho emphasizes,

> These two principles—legal certainty and the protection of trust—are closely related to a degree that some authors consider the principle of the protection of trust as a sub-principle or as a specific dimension of legal certainty. In general, legal certainty is considered to be in connection with objective elements of the legal order—ensuring legal stability, certainty of orientation, and realization of the law—while the protection of trust is more related to the subjective components of certainty, i.e., the calculability and predictability of individuals in relation to the legal effects of the public authorities' acts. (Canotilho, 2012: p. 257)

Therefore, we understand that tax law in Brazil is strongly influenced by the principle of legality, which is a logical consequence of the State of Law itself, lacking observation for the preservation of legal security and the national system, fundamental questions for the achievement of commandments displayed on the Brazilian national flag: order and progress.

To conclude this topic, it is important to assert that the Brazilian Constitution provides for two types of law: ordinary and complementary. Basically, they differ in the quorum needed for their approval: the ordinary ones require a simple majority, and the complementary ones require an absolute majority (article 69 of the Constitution). Besides that, the approval process follows the same rites and foundations.

In addition, it is not correct to state that there is a hierarchy between the complementary law and the ordinary law. In fact, the Political Charter gave different attributions to such instruments, each of which should govern discipline-specific issues. Any norm that exceeds its attributions should be rejected from the legal system for unconstitutionality.

In that regard, the Federal Constitution was clear in foreseeing the set of issues only ruled by the complementary law to dispose of the general norms of the tax law. The Constitution states that:

Art. 146. The complementary law is responsible for:

(...)

II—regulating the constitutional limitations to the power of taxing;

III—establishing general rules about tax legislation, especially on:

a) the definition of taxes and their types, as well as in relation to the taxes described in this Constitution, the respective generating facts, calculation bases, and taxpayers;

b) tax liability, posting, credit, prescription, and decay;

c) appropriate tax treatment of the cooperative act practiced by cooperative societies;

d) definition of differentiated and favored treatment for micro and small enterprises, including special or simplified regimes in the case of the tax described in Article 155, II, the contributions described in Article 195, I, and paragraphs 12 and 13, and the contribution referred to in Article 239.

This differentiation between complementary law and ordinary law is very important for the reflection that will be presented later.

3. Types of Tax Responsibility

In this item, we will discuss passive tax liability. However, it is important to bring out a broad view of the tax obligation in the national law.

All tax obligations emanate from an imposed norm that creates a legal relationship in which this imputation is described. Paulo de Barros Carvalho explains legal relationship as being:

> The abstract bond according to which a person, called an active person, by virtue of the normative imputation, has the subjective right to demand from another, called a taxable person, the fulfillment of a given provision. (Carvalho, 2014: p. 354)

Regarding the concept of tribute, we find in Eduardo Marcial Ferreira Jardim great mastery and precision when citing that:

> In other words, the aforementioned legal concept means that the tax is characterized as an obligation to give, created by a law of a non-sanctioning nature that was compulsorily born, i.e., which was not a result of a will agreement, according to which the taxpayer must hand over to the Public Treasury a sum of money or something equivalent, if the law so permits, operating this collection by means of a linked administrative act. (Jardim, 2011: p. 411)

This form of state funding comes from human history itself, especially due to the need of this organization for the survival of the species itself. If the State is important for the preservation and security of a given human group, its cost must be shared among all, and the tax is the juridical form found to obtain it.

Still, on this concept, Paulo de Barros Carvalho points out:

> The word "tax" (tributo in Portuguese) has no less than six different meanings when it is used in the texts of positive law, in doctrine lessons, and in the manifestations of jurisprudence. They are: a) "tax" as a sum of money; b) "tax" as the fulfillment of the legal duty of the taxable person; c) "tax" as a subjective right held by the active person; d) "tax" as a synonym of a tax law relationship; e) "tax" as a legal tax norm; f) "tax" as a legal norm, fact, and relationship. (Carvalho, 2014: p. 45)

The taxable person arises as part of the tax legal relationship, i.e., the person who has the obligation coming from a taxable situation imposed against him and from whom the payment of the aforementioned pecuniary obligation is expected.

The legal text of the National Tax Code itself states the following provision in its article 121: "The taxable person subjected to the principal obligation is the person required to pay taxes or monetary penalties".

In addressing this concept, Roque Antônio Carrazza teaches:

> The person who is passive to the tax obligation also includes the consequences of the tax norm. It is the person—natural or legal, public or private —compelled by law to collect the tax to the treasury or to whoever is in its place after the realization of the taxable situation, the practice of the posting, and the regular notification of this normative act. (Carrazza, 2010: p. 159)

Bringing these questions to our normative context, the respected and voluminous doctrine points out that passive subjection is a matter reserved for constitutional competence. That is, our Major Charter, the Federal Constitution of 1988, brings in its bulge the details on whom specific tax obligations can be imposed.

In this sense, we can highlight the valuable lesson of Renato Lopes Becho, one of the country's leading authorities regarding passive subjection and tax liability:

> For us, in accordance with Article 145 of the Charter of the Republic, a taxable person is constitutionally implied for taxes, fees, and improvement contributions. In addition, when we identify any of the taxes described in the Federal Constitution (mainly in Articles 149, 153, 155, 156, and 195), we understand that it is possible to identify, with the constitutional command alone, who should be responsible for the exaction. (Becho, 2014b: p. 17).

In the same sense, we can find the teachings of master Roque Antonio Carraza:

> The Constitution indicates the taxable person of each tax, that is, the person who may be placed by law in the contingency of making the payment. It is the person who—obviously as long as they are indicated in the law—generates the tax obligation, realizing its taxable situation (generating fact "in concrete"). (Carrazza, 2010: p. 161)

Still, with respect to passive subjection, we can find its types in our legal system. The National Tax Code states:

> Art. 121. The taxable person (sujeito passivo in Portuguese) subjected to the principal obligation is the person required to pay taxes or monetary penalties.
> Single paragraph: The taxable person subjected to the principal obligation is:
> I—the taxpayer, when he has a personal and direct relationship with the situation that constitutes the respective generating event;
> II—responsible, when, without being a taxpayer, his obligation arises from a provision of law.

In Brazil, they favored a technique in which those who practice the typical tax act are not necessarily the ones responsible for collecting the exaction from the public coffers. Often, for simple convenience and practicality, such responsibility is transferred to other people who are part of the obligatory relationship, facilitating the work of the treasury.

When discussing the categories of taxable person, Professor Renato Lopes Becho accurately asserts:

> I—taxpayer: the person who has a direct and personal relationship with the taxable event (or the person who realizes the taxable event);
> II—substitute: the one who, without being the taxpayer but being bound to the taxable event, must collect the tax;
> III—responsible: the one who, without being a taxpayer and without having a connection with the taxable event, must collect the tax. (Becho, 2014b: p. 32)

The same author makes an interesting summary of the work of Rubens Gomes de Sousa (one of the most important jurists in Brazil, responsible for the project of the National Tax Code) (Becho, 2014b: p. 38):

> a) Direct passive subjection: taxpayer

b) Indirect passive subjection:
b.1) substitution
b.2.) responsibility
b.2.1.) in the National Tax Code
b.2.1.1) by succession
b.2.1.2) of third part
b.2.1.3) due to infractions
b.2.2) in non-codified legislation

Whenever we talk about tax responsibility of an "economic group" we are dealing with the hypothesis provided in item "b.2." above.

Knowing that the tribute itself already represents, to a certain extent, a deprivation of the individual right of the citizen in favor of the collectivity and the life in society and that it must keep strictly in line with the legality, the tax liability needs to be further protected by avoiding that the people under jurisdiction suffer abuse in one of their fundamental guarantees, even included in the Universal Declaration of Human Rights coined by the United Nations Organization on December 10, 1948: the right to property.

About the tax responsibility, master Aliomar Baleeiro says:

> The law, and it alone, can expressly substitute the taxpayer for another person, since this person is linked to the taxable event.
> It may do so by excluding the taxpayer or assigning to him the partial or total payment of the tax. This is at the discretion of the legislator responsible for the decree of the tax. (Baleeiro, 2007: p. 735)

It is also worth mentioning, in this preliminary section, the provision in Article 128 of the National Tax Code, which introduces the Tax Responsibility Chapter:

> Article 128. Notwithstanding what was presented in this chapter, the law may expressly assign responsibility for the tax credit to the third part linked to the event generating the respective obligation, excluding the responsibility from the taxpayer or assigning to the latter the total or partial fulfillment of such obligation on a supplementary basis.

With a simple reading of this article, we can find a clear prescription of the requirements for the cases in which the legislation intends to assign the tax responsibility to third parts: 1) it lacks law; 2) the third part must be linked to the generating fact; 3) the taxpayer's responsibility will be excluded or attributed on a supplementary basis.

We will discourse about this responsibility and legal hypotheses as follows.

4. Hypotheses of Economic Group Responsibility

We will now analyze the legal provisions, specifically those that have a correlation with the tax regulatory environment so that we can find out if any of the provisions of the legal system would be valid and sufficient to generate responsibility

to the economic group for the debt of some of its entities and also what are the conditions for that

It is worth highlighting that the National Tax Code will obviously be our main guide since it has an entire Chapter to discuss the Taxable Person (Chapter IV of Title II—Tax Obligation).

We also emphasize that we are conducting this analysis under the aegis of the Constitutional Tax Law, as well as the Principle of Legality, which must be observed to their maximum extent, notably because we are dealing with accountability that goes beyond the sphere of autonomy of the debtor legal person, invading the assets of others.

The purpose of this study is to determine if the liability of an economic group due to the simple debt of one of the member companies of the conglomerate is admissible and also identify if the article is specific to such an issue or if it addresses the subject in a generic way.

In order to do so, we will cover each provision in a specific item, contemplating the following:

National Tax Code: Article 124, subsection I; Article 128; Article 134; Article 135; Article 116, single paragraph.

Civil Code: Article 50.

Law number 8,212/91: Article 30, subsection IX.

4.1. National Tax Code: Article 124, Subsection I

The National Tax Code article 124, subsection I says:

> Article 124. The following shall be solidarity liable:
> I—persons having a common interest in the situation constituting the event generating the principal obligation.

That provision, which is exaggeratedly broad and, to our mind, imprecise, generates great discussions about its actual application.

On this concept, Professor Paulo de Barros Carvalho teaches with great mastery,

> ...the common interest of the participants in the factual event is not satisfactory for the definition of the bond of solidarity. In none of these circumstances did the legislator consider this link that brings the participants closer to the fact, which ratifies the precariousness of the method advocated by subsection I of article 124 of the Code. It is valid for situations in which there is no bilaterality within the taxed fact, such as in the incidence of the Municipal Property Tax when two or more people own the same property. However, in situations where the fact is consubstantiated by the presence of people in opposing positions, with antagonistic objectives, the solidarity will settle between subjects who were on the same pole of the relationship, if and only if that is the side chosen by law to receive the legal impact of the exaction. This is what happens with the real estate transfer tax when the buyers are two or more; with the State Tax on the Transfer of Goods whenever there are two or

more sellers, with the Municipal Service Tax whenever two or more subjects render a single service to the same consumer. (Carvalho, 2018: p. 332).

Hugo de Brito Machado's lessons follow the same path:

A typical example of passive solidarity is that of married people in the communion of assets in relation to the income tax. The obtainment of income by the husband interests the wife, the reciprocal situation being equally true. For this reason, the husband and wife are jointly and severally liable for the payment of the respective taxes.
The existence of common interest is a situation that can be examined only in each case.
(...)
The common interest in the situation which constitutes the event that generates the obligation, whose presence creates solidarity, is not merely an interest in the fact, but a legal interest. Such interest depends on a legal situation like the one established between the spouses in the example just quoted. (Machado, 2009: p. 146)

Finally, we also consider it useful to the objectives outlined here to cite the constant explanation of the work of Luciano Amaro,

The common interest in the generating event puts debtors in solidarity in a common position. If, in a given situation (co-ownership in the example above), the law defines the owner of the domain as a taxpayer, none of the co-owners would qualify as a third part since both would occupy, in the Treasury-taxpayer binomial, the place of the second (the place of taxpayer). What happens is that each one could only be considered the taxpayer in relation to the portion of tax that corresponds to his share of interest in the situation. As the tax obligation (being pecuniary) would be divisible, each one could be at first compelled only by the part equivalent to his share of interest. What the National Tax Code (article 124, I) determines is the solidarity of both as debtors of the entire tax obligation, where we could say that the condition of taxpayer would assume a hybrid form in which each co-debtor would be a contributor in his part and would be responsible for the portion that belongs to the other. (Amaro, 2014: p. 342)

That said, we do not find in this article the provision that gives a subsidy to the responsibility of the economic group for the simple absence of tax payment nor for the economic interest alone. In this sense, the jurisprudence understands:

TAXATION. FISCAL EXECUTION. MUNICIPAL SERVICE TAX. PASSIVE LEGITIMACY. ECONOMIC GROUP. SOLIDARITY. INEXISTENCE. JURISPRUDENCE STATEMENT 7/HCJ.
1. The jurisprudence of the High Court of Justice understands that there is joint tax liability between companies of the same economic group only when both jointly perform the situation of the generating event, not when there is

merely the economic interest in the achievement of such a situation.
2. The claim of the applicant to recognize the common interest between Banco Bradesco S/A and the leasing company in the occurrence of the event generating the tax credit finds an obstacle in Jurisprudence Statement 7 of this Court. Appeal against Court regulations denied (High Court of Justice, AAC in Special Appeal 21,073/RS, Justicer rapporteur Humberto Martins, 2nd Circuit, j. 18/10/2011).
CIVIL PROCESSUAL. TAXATION. SPECIAL APPEAL. MUNICIPAL SERVICE TAX. FISCAL EXECUTION. PASSIVE LEGITIMACY. COMPANIES BELONGING TO THE SAME FINANCIAL CONGLOMERATE. SOLIDARITY. INEXISTENCE. VIOLATION OF ART. 124, I, OF NTC. NON-OCCURRENCE. DENIAL.

1. "In the joint responsibility ruled by NTC Article 124, I, it is not enough that the companies belong to the same economic group, which in itself does not have the power to provoke solidarity in the payment of the tax owed by one of the companies" (HARADA, Kiyoshi. "Joint tax liability for common interest in the situation that constitutes the taxable event "). 2. In order to characterize joint liability in tax matters between two companies belonging to the same financial conglomerate, it is essential that both carry out the situation of the generating event together, being irrelevant the mere participation in the results of any profits made by the other related company or from the same economic group. 3. Special appeal denied (HCJ, Special Appeal 834,044/RS, Justicer rapporteur Denise Arruda, 1st Circuit, j. 11/11/2008).

In contrast, we can accept the liability of companies of the same economic group when they are in a situation in which there is the "common interest" set forth in Article 124 subsection I of the National Tax Code. However, this provision is not specific to an economic group, and it may or may not be applied to companies of the same conglomerate.

Therefore, it is clear that in this norm, we do not have a broad, general, and unrestricted authorization for the co-responsibility of companies of the same group.

4.2. National Tax Code: Articles 134 and 135

Due to the intimate connection between these two articles, especially because they are included in the same section in the National Tax Code, we will address them together.

Regarding Third Part Responsibility, the National Tax Code states:

Article 134. In cases of impossibility of requiring the taxpayer to comply with the principal obligation, they shall be jointly and severally liable with the latter in the acts in which they intervene or for the omissions for which they are responsible:
I—the parents, for the taxes owed by their underage children;
II—tutors and trustees for the taxes owed by people under some form of

guardianship;
III—the administrators of third-part assets, for the taxes owed by them;
IV—the will executor for the taxes owed by the estate;
V—the trustee and the commissioner for the taxes owed by the bankrupt estate or by the concordat;
VI—Notaries, clerks, and other servants of office, for the taxes owed on the acts performed by them, or before them, by virtue of their office;
VII—the partners, in case of liquidation of the partnership.
Single paragraph. The provisions of this article apply only, in terms of penalties, to those of a moratorium.
Article 135. They are personally liable for the credits corresponding to the tax obligations resulting from acts committed with excessive powers or infractions of law, social contract, or statutes:
I—the persons mentioned in the previous article;
II—representatives, agents, and employees;
III—the directors, managers, or representatives of legal entities under private law.

From the simple reading of the above provisions, we can deduce that each one deals with a different situation. Therefore, it would not make sense for the second provision to list all the people mentioned in the first one if it were to guard them in the same way because each one has different effects, requirements, and objectives. Likewise, the second provision is more comprehensive and enables its application to a larger number of people.

Because they are not connected with the responsibility of the "economic group", as we will later conclude, we will simply approach the subject using, above all, the work of Renato Lopes Becho, which deals specifically with the theme in its fullness and with great comprehensiveness.

After analyzing the history of these norms carefully, passing through the Draft and the Project of the National Tax Code (NTC), as well as examining the doctrine in a detailed way, the same professor presents the following conclusions:

> In relation to Article 134 of the NTC, we understand that there are two presuppositions for its application: the economic impossibility for the taxpayer to pay the debt and the guilty performance of the responsible for this to occur. Moreover, after considering the matter, it seems reasonable for us to support the subsidiary nature of third-part liability. Perhaps the legislator, by mistake, stipulated apparent solidarity only in order to keep the taxpayer in the passive pole of the action of collecting the tax credit. However, subsidiarity (and not solidarity) is rationally identified since the first assumption for redirecting the taxpayer's charging to the responsible party is that it is impossible for the debt to be collected from the former. (Becho, 2014b: p. 88).
> As explained above, we believe the best understanding for Article 135 is to correlate it to Article 258 of Law number 6,404/76 (Law of the Corporations).

> It means that when tax officials perform licit acts against the taxpayers' interests, which means non-compliance with the legislation that binds one to the other (taxpayer and responsible), they will personally answer for the tax credits arising from their actions. Under the terms as enacted by the legislator, since the responsible person would have acted against the interests of the taxpayer, the latter will be excluded from the collection action (third-part personal liability). (Becho, 2014b: p. 102)

Still quoting the junction between one provision and the other, the same professor asserts:

> We also believe that a common element in third-party liability (Articles 134 and 135 of the NTC) is its punitive character. In both texts, it is necessary to see that the reduction in the property that the one appointed as responsible will undergo will be the punishment that he will suffer. As such, the subjective elements must be provided in the application of the penalty of having to bear the tax burden owed by another (the taxpayer). (Becho, 2014b: p. 102)

Analyzing the provisions in these articles, as well as their history, it seems to us that these articles do not authorize, in any way, the accountability of economic groups.

Firstly, through the history of the formation and the text of the provisions themselves, it seems that such provisions apply exclusively to individuals. It should be noted in particular that when dealing with the liability of partners, the text speaks only of "societies of persons", that is, those typically carried out by technical training professionals. In addition, article 135 has a punitive character on the acts practiced by natural persons to the detriment of the legal entities' interest, not being necessary to speak about unrestricted responsibility.

At no time do we find in these provisions the possibility of accountability of a partner company, affiliate, or member of the same economic conglomerate. As a result, these norms are not valid for expanding the liability for a debt of a certain entity to other companies in the group.

Lastly, it is important to emphasize that, with regard to the liability set forth in Article 135 subsection III of the National Tax Code, the jurisprudence was correct in consolidating that "The non-compliance of the tax obligation by the company does not generate alone the joint liability of the manager-partner" (Jurisprudence Statement 430 of the High Court of Justice).

The mere fact that such understanding has precedents indicates that such a thesis has been extensively applied before.

Thus, the above-mentioned provision does not give any basis that validates the imputation of responsibility to an economic group.

4.3. National Tax Code: Article 116, Single Paragraph

A quite different situation occurs in the understanding of what is stated in article 116, single paragraph:

> The administrative authority may disregard acts or legal transactions practiced for the purpose of concealing the occurrence of the event generating the tax or the nature of the constituent elements of the tax obligation, observing the procedures to be established in ordinary law.

With reference to the reasons that led to the incorporation of such provision into the legal system, Paulo de Ayres Barreto says that it aimed at opposing the plans made with abuse of law. In the words of the author:

> The inclusion of the single paragraph of Article 116 is necessary to establish a rule within the scope of the Brazilian legislation that allows the tax authority to disregard acts or legal businesses aiming at tax evasion, thus being an effective instrument to oppose the tax planning procedures practiced with abuse of law. (Barreto, 2016: p. 171)

In this respect, it is appropriate to differentiate tax avoidance from tax evasion. The first is lawful and consists of a plan based on legal guidelines that allow the use of a less costly tax regime to implement a certain activity. The second consists of the use of illegal means to avoid or reduce the payment of taxes, usually through the production of false documents or the supplying of inaccurate information.

The Treasury may often disregard a certain commercial operation if it understands that the suppression of taxes was solely the cause of such an operation. In our sense, that seems to be the true intention of the legislator.

We can also find rich exposition on this question in the words of Charles McNaughton:

> With reference to the selection of terms, we have already said that the text of the article allows the fiscal agent to disregard the legal acts practiced in order to conceal the occurrence of the taxable event or the effects of the tax obligation.
> (...)
> Well, in tax evasion, the agent does not conceal the occurrence of the tax event, nor the effects arising from the obligation. What happens in such cases is that the operations are practiced in such an order that the related norms have as little taxation as possible.
> If the agent masks the occurrence of the tax event or the constituent elements of the tax obligation, he will eventually fall into the figure of evasion, no longer being considered an avoidance act. (McNaughton, 2014: p. 489).

Again, we see in this provision a specific possibility that is applicable through objective requirements that could have consequences for companies of the same economic group or not.

Therefore, such a provision cannot be invoked as a legal and unrestricted permission to reduce the tax liability of the economic group.

4.4. Civil Code: Art. 50

This is the provision that is most used by Treasury attorneys in the pursuit of

economic group accountability in the scope of the tax enforcement process.

However, before we evolve in the analysis of the conformity of this provision as an authorizer of the tax liability of the economic group, it is appropriate to make a brief reflection on this possibility.

That is because we are moving away from a specific norm of tax law, applicable especially to the private sphere. When dealing with the application of a norm that is strange to the subarea of the law that we are dealing with, we cannot forget that our legal system is unified, i.e., all norms, rules, and principles, although belonging to different areas, subsist equally in the same ecosystem and then should, in theory, coexist harmoniously.

However, it does not mean that the applicator can understand the system as a "blank check" to use the norm that best serves him. In the words of the great master Paulo Ayres Barreto,

> The legal system is unified. It should be seen as a harmonious and coherent whole. This characteristic, however, does not authorize the free transit between the prescriptive contents of the several didactically autonomous branches of Law. Such branches are structured precisely because of their peculiarities, their informing principles, and the specificity of the kinds of behavior they intend to regulate. (Barreto, 2016: p. 197)

Still, on this matter, we have the following provisions brought by the National Tax Code on the interpretation and integration of the tax legislation:

> Article 107: The tax legislation shall be interpreted in accordance with the provisions of this Chapter.
> Article 108: In the absence of a clear provision, the competent authority to apply the tax legislation shall use successively and in the following order:
> I—the analogy;
> II—the general principles of tax law;
> III—the general principles of public law;
> IV—equity.
> Paragraph 1: The use of the analogy cannot result in the requirement of a tax not provided by law.
> Paragraph 2: The use of equity may not result in the waiver of the payment of due taxes.
> Article 109. The general principles of private law use the content and scope of its institutes, concepts, and forms to research the definition but not to define the respective tax effects.
> Article 110: The tax law cannot change the definition, content, and scope of institutes, concepts, and forms of private law that are used expressly or implicitly by the Federal Constitution, by the State Constitutions, or by the Organic Laws of the Federal District or Municipalities, in order to define or limit tax competencies.

The first consideration related to that provision is that Article 108 is very clear

and explicit in stating, based on the lack of a provision, that the general principles of private law shall not be used in the absence of a provision.

Subsequently, article 109 indicates the effective use of such principles in the field of tax law, presenting an important restriction regarding the definition of tax effects. That is, the use of a private law norm for tax matters cannot create a new legal fact in the scope of the tax law.

Last but not least, article 110 states the importance of respecting the provisions contained in the Federal Constitution and the State Constitutions in the definitions, content, and scope of the tax legislation.

In addition, we cannot forget that the Federal Constitution was explicit in providing for the set of issues only ruled by the complementary law so as to dispose of general rules of the tax law.

Therefore, the use of the provisions of the Civil Code (an ordinary law) to try to extend tax liability to other persons not directly provided for in the law is certainly subject to great impugnation.

In this particular, for reflection only, we reproduce the vision of Paulo de Barros Carvalho on the General Principles of private law:

> The general principles of private law do not appear in the list of integrative resources made available to the law enforcer in cases of gaps. The directive to recommend its use for the research on the definition, content, and scope of the institutes, concepts, and forms that constitute the structure of tax rules was accepted, excluding the demarcation of the specific legal effects of the taxes. The tax legislation intends to govern such effects with full primacy. This is the content of article 109.
>
> (...)
>
> Moreover, the freedom that the tax legislator has to discipline the legal effects inherent to the taxes encounters a powerful and definitive obstacle. He cannot change the definition, content, and scope of institutes, concepts, or forms of private law, explicitly or implicitly used by the Federal Constitution, by the State Constitutions or by the Organic Laws of the Federal District, or by the Municipalities to define or limit tax jurisdiction. This is how article 110 of Law number 5,172/66. The imperative does not come directly from the precept stated in article 110. It is a logical imposition of the hierarchy of our legal system. The commitment of the constituent would fall into sterile soil if the infra-constitutional law could enlarge, modify, or restrict the concepts used in those laws to draw the ranges of skills offered to political persons. The rigid discrimination of material fields for the exercise of the legislative activity of taxing entities, having constitutional stature, by itself already determines this inalterability. (Carvalho, 2018: pp. 124-125).

That said, the very application of Article 50 of the Civil Code seems inappropriate for tax liability.

However, we will focus our efforts on the responsibility of the economic group.

The provision states:

> Article 50. In case of abuse of legal personality, characterized by a misuse of purpose or by a confounding of assets, the judge may decide that the effects of certain and specific obligation relationships are extended to the private assets of the managers or partners of the legal entity, at the request of the part or of the Public Prosecutor's Office when the latter is intervening in the proceedings.

The way in which the normative text was approved in the end was strongly criticized by a competent part of the doctrine in the light of the disregard doctrine theory. In this particular, Fábio Ulhoa Coelho points out:

> The Civil Code does not contemplate any provision with specific reference to "disregard of legal personality"; it contemplates, however, a norm designed to address the same concerns that guided the elaboration of the disregard doctrine. (...) The investigation of the origin of this provision highlights that the intention of the writers of the Civil Code Project was to incorporate, in Brazilian law, the theory of disregard of legal personality. While filing for the House, the provision text received more than one alteration, all of which received varied criticism. In the course of the project by the Senate, the text was improved, and, thanks to the contribution of Fábio Konder Comparato, it then showed the private view of this jurist on the subject. (Coelho, 2007: pp. 55-56)

It is worth mentioning that Fabio Comparato brought the thesis of the objective theory of disregard, for which the assumption lies precisely in the confounding of assets, also covering any chance of fraud.

About that provision, we can also quote the words of Marlon Tomazette:

> Contrary to what it may seem, our Code does not accept the objective conception of the theory because the confounding of assets is not sufficient grounds for the disregard, being simply a very important means to prove the abuse of legal personality that occurs in the hypotheses of abuse of law and fraud. Therefore, what is necessary for the disregard is the abuse of legal personality, which can be proven by the configuration of a confounding of assets. (Tomazette, 2001: p. 76)

Having presented these concepts and assuming that such provision is applied in the tax sphere, we do not find any provision concerning the liability of affiliated companies, partners, or members of the same economic group in the text of the norm.

In this norm, we only found legal permission exclusively for the liability of administrators and partners of the legal entity, nothing else. Understanding that such a provision authorizes any extension of liability to collateral, affiliated, or even controlled legal entities is to completely misrepresent the nature of this provision.

That said, such a provision cannot be used to create economic group responsibility as some Treasury attorneys wish. This interpretation completely disagrees with the objectives of the norm.

4.5. Law Number 8212/91: Article 30, Subsection IX

Lastly, we enter the only article of the national tax legislation that explicitly brings the figure of the economic group (although it does not define the concept), attributing to it the responsibility for debts.

We find in the Social Security costing law the following provision,

> Article 30. The collection of taxes and other amounts owed to Social Security shall comply with the following norms:
> (...)
> IX—companies that are part of an economic group of any kind are jointly liable for the obligations arising from this Law;

We then proceed to examine that rule. As the aforementioned classical teachings of tax law warn us, "those who begin their work by analyzing the constitutional text in order to interpret the tax law will do so accurately".

The harmonization of the ordinary tax rules with the constitutional text and the Tax Code is so necessary that similar analyses have already been targeted even by a Binding Precedent Statement:

> Binding Precedent Statement No. 8 (HCJ): The single paragraph in article 5 of Decree-law number 1,569/1977 and articles 45 and 46 of Law number 8,212/1991, which deal with the prescription and decay of tax credits, are unconstitutional.

Therefore, we continue.

First of all, we must not forget that we are faced with a rule of ordinary law, and the provisions regarding tax liability are a set of issues only ruled by a complementary law (Article 146, subsection III of the Constitution).

It is imperative, then, to delve into the provisions contained in the National Tax Code, especially with regard to passive subjection. Ab initio, it is worth remembering the provision that inaugurates the Chapter:

> Art. 121: The taxable person (sujeito passivo in Portuguese) subjected to the principal obligation is the person required to pay taxes or monetary penalties.
> Single paragraph: The taxable person subjected to the principal obligation is:
> I—the taxpayer, when he has a personal and direct relationship with the situation that constitutes the respective generating event;
> II—responsible when, without being a taxpayer, his obligation arises from a provision of law.

Still, in the complementary text, we found a provision on solidarity in article 124, whose first subsection was previously analyzed. However, we found legal permission in this norm conferring powers to the ordinary law so that it can define

hypotheses of passive subjection. In verbis:

> Article 124. The following shall be solidarity liable:
> (...)
> II—persons expressly designated by law.

However, such norms cannot be applied separately. A systemic view is needed. The understanding that the supplementary law simply confers jurisdiction on ordinary legislation so that it can dispose of whatever it wants would be a denial of the constitutional text.

In order to better understand the purpose of this norm, it is convenient to consult the understandings proclaimed by our Constitutional Court. In this sense, we can choose the following paradigmatic case:

> 2. The National Tax Code establishes some rules of tax liability, such as article 135, III, and also some directives so that the legislator of each political entity can establish other specific rules of tax responsibility regarding the taxes of its competence, according to article 128.
> 3. The precept of article 124, II, where the "persons expressly designated by law" are jointly and severally obligated, does not authorize the legislator to create new cases of tax liability without observing the requirements of article 128 of the NTC, nor to disregard the third part liability rules generally established by articles 134 and 135 of the same law. The legal provision of solidarity between debtors—so that the payment made by one avails the others, the interruption of the limitation in favor or against one of the obliged also causes them common effects, and that the exemption or remission of credit exonerates all obliged when it is not personal (article 125 of the NTC)—presupposes that the condition of the debtor itself had been validly established (Supreme Court of Justice, Extraordinary Appeal No. 562,276 / PR, Justicer Rapporteur Ellen Gracie, j. 3/Nov/2010).

Accordingly, the provisions of the Social Security Law must be submitted to the provisions of article 128 of NTC:

> Article 128. Notwithstanding what was presented in this chapter, the law may expressly assign responsibility for the tax credit to the third party linked to the event generating the respective obligation, excluding the responsibility from the taxpayer or assigning the latter the total or partial fulfillment of such obligation on a supplementary basis.

The current jurisprudence of the High Court of Justice moves in the same direction:

> CIVIL AND TAX PROCESSUAL. APPEAL AGAINST COURT REGULATION IN APPEAL IN SPECIAL APPEAL. SOLIDARITY LIABILITY. ART. 30 OF LAW NUMBER 8.212/1991 AND ART. 124 OF THE NTC. ECONOMIC GROUP. CONFOUND OF ASSETS. JURISPRUDENCE STATEMENT 7 OF HCJ.

> 1. This Superior Court understands that the joint liability in article 124 of the NTC, c/c article 30 of Law number 8.212/990, does not arise exclusively from the demonstration of the formation of an economic group, but it demands the confirmation of common practices, joint practice of the generating fact or, also, when there is a confounding of assets. Precedents. 2. The ordinary Court held that the company was jointly and severally liable not for the mere fact that the company belonged to the same economic group as the original taxable person. In fact, it acknowledged the existence of a confound of assets, considering that there is, among the companies, a clear identity of addresses of the headquarters and subsidiaries, corporate purpose, corporate name, corporate structure, accounting, and accountant, in addition to the fact that the companies sell their products on the same website. 3. The question was decided on the basis of the factual and evidential support of the case so that the conclusion in a different way is unfeasible in the scope of the special appeal before the obstacle of the Jurisprudence Statement 7. 4. Appeal against Court regulations denied. (HCJ, Appeal against Court regulations in Special Appeal 89,618/PR, Justicer Rapporteur Gurgel de Faria, 1st Circuit, judged June 23, 2016).

That said, the application of such a provision also requires the taxpayer and the responsible party to be bound to the taxable event.

We are, therefore, facing a norm that accepts the linking of companies from the economic group not in an unrestricted way, but by means of certain requirements.

5. Conclusion

Given all the reflections presented throughout the development of this paper, we have that the responsibility of economic groups in the tax field is a subject of great complexity, not being covered by the specific legislation in a broad and unrestricted way in any provisions.

Obviously, the tax legislation cannot, nor should, privilege fraud and abusive planning covered by the absence of specific provisions on economic group accountability; however, the antidotes to such practices must be those contained in the regulations, which provide for specific situations of liability, based mainly on the participation of the company in the "fraud" of the generating event, in the manner provided for in the single paragraph of article 116 of the National Tax Code, which must be applied together with article 128 and article 149, subsection VII of the same law.

Yet, we recall that this provision is not applied to the exclusive detriment of the so-called economic group and can reach companies that are not organized under the veil of this legal figure.

It is worth noting that both doctrine and jurisprudence are reconciled in the sense that a simple default of taxes does not generate the co-responsibility of the economic group, not existing, in these cases, the so-called "common interest" present in subsection I of article 124 of the NTC.

As already mentioned, articles 134 and 135 of the Tax Code do not provide legal subsidies for the accountability of economic groups, being applicable especially to natural persons under certain requirements.

Also, article 50 of the Civil Code, whose applicability to the tax field is subject to extensive discussions, does not contain a provision authorizing the extension of liability for debts to associated, subsidiary, or controlled companies, not giving support to this liability.

With regard to the only tax mechanism that expressly provides for the figure of the economic group, subsection IX of article 30 of Law number 8,212/91, we show that such a norm cannot be applied in an unrestricted way, needing to be reconciled mainly by the provisions of the Federal Constitution. Since it is the responsibility of the complementary law to establish the general guidelines of the tax law, such provision can only be applied if it observes the words contained in articles 121 and 128 of the Tax Code. Hence, it is necessary that the responsible person be bound to the event generating the obligation, as understanding is pacified in our courts.

Therefore, the unrestricted application of tax liability to an economic group is a strange figure in the Brazilian legal system and should be promptly rejected when pleaded. This provision is important to guarantee investment security, as well as the autonomy of the companies, encouraging free initiative and economic freedom.

This course of action should follow the appropriate legislative procedures, with the approval of the correct legal instrument (complementary law) for the matter in question. Such a rule could be inspired by European models, such as the Groupement d'Intérêt Économique—GIE, in France; the Agrupamento Complementar de Empresas—ACE, in Portugal; and the Agrupación de Interés Económico—AIE, in Spain, and the European Economic Interest Grouping (EEIG), established by Regulation No. 2137/85 of the Council of the European Union, of July 25, 1985.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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