STF 2020: impacts on taxation of agribusiness

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Authors

Lígia Regini

Topics

Tax Agribusiness

The year 2020 revolutionized society across the globe. In Brazil, the state of public emergency was reflected in the unprecedented rate at which Brazil's constitutional court, the Supreme Federal Court (STF – *Supremo Tribunal Federal*) decided tax cases that had enormous impact on commerce and industry, especially in the agricultural sector.

One thing is certain: the sector is already feeling the impacts, but not all is lost. Some of the decisions rendered in 2020 are favorable and even, on a macro analysis, open up the possibility of tax refunds.

One of the big cases decided by the STF involved the question of whether social contributions attached to indirect exports. Exporters' long fight ended in success, with the STF's finding that the exemption from "social contributions" (taxes and quasi-taxes levied specifically to fund social security and other social welfare programs) applicable to exports also applies to sales made specifically for subsequent export (i.e. sales to exporters) (Constitutional Challenge ADI 4735 and Appeal RE 759244).

This well-founded decision generates positive impacts: the first is prospective, by reducing the tax burden on future indirect exports, and the other is retrospective, because taxpayers will be entitled to claim refunds of social contributions that they have overpaid for years, which will help attenuate the financial losses caused by the covid-19 pandemic.

On another front, the STF dealt with the famous dispute over compensation for the fixing of prices by the now defunct Sugar and Alcohol Institute (IAA – *Instituto do Açúcar e do Álcool*), a federal government entity. The court held that the right to compensation depends on proof of actual loss in each case (Appeal RE 884.325). This conclusion threatens the claims of the companies that are still pursuing their cases against the government, given the enormous difficulty of obtaining evidence from a time long in the past.

At the state level, the STF adopted three "Theses" (teses, or concise statements of its interpretation of the question of law at issue in the case) dealing with the most important state tax, the ICMS (Imposto sobre a Circulação de Mercadorias e Serviços, a value-added tax), which has given rise to "Tax Wars" between states granting rival benefits and incentives to boost investment, jobs, and local revenues.

This year, the STF decided that (i) the national body that governs ICMS policy, CONFAZ (*Conselho Nacional de Política Fazendária* – National Tax Policy Council) must unanimously approve any arrangement that permits one or more states to grant tax benefits (Constitutional Challenge ADPF 198). The decision displeased a number of states, since it allows states to block benefits by other states in a discretionary fashion, by withholding their vote on CONFAZ; and (ii) it is constitutional for the state of destination to disallow

ICMS credits recorded by the acquirer of merchandise when the state of origin of the merchandise has granted unsanctioned tax benefits (Appeal RE 628.075), reversing the STF's earlier position on the question.

The STF also held that ICMS credits can be recorded on the acquisition of goods for use and consumption only when the credits are expressly provided for in a Complementary Law (which requires a higher majority than ordinary legislation) (Appeal RE 601.967). At the time this article was submitted, one of the STF's justices had issued an opinion – favorable to the taxpayer – on the question of whether ICMS taxpayers could be charged the difference in ICMS rates in interstate transactions, based on the lack of Complementary Legislation (Appeal RE 1.287.019).

Many other issues are up for decision on the quick-moving agenda of Brazil's highest court. Among them are matters that will have a sizeable impact on agribusiness: the exemption from state and federal value-added taxes (ICMS and IPI) for agricultural pesticides, and the exclusion of ICMS in calculating employers' contributions to the social security fund for rural workers – Funrural.

In the midst of the turbulent scenario created by the pandemic and the STF's accelerated decision-making, the legislative and executive branches are talking about a tax reform that will allow Brazil to overcome the multiple problems caused by a complex system at all three levels of government – federal, state, and municipal. As a major player in the Brazilian economy, agribusiness can make an essential contribution to the tax treatment of production chains in the sector and the essential nature foodstuffs, in line with the common ideals of a simpler, less bureaucratic system, free of aberrations (such as calculating taxes on taxes), with a view to achieving a reliable degree of certainty as to the limits of taxation in this country.

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Lígia Regini