BMA ADVOGADOS

Res judicata in tax matters and an unprecedented decision by Brazil's Supreme Court

27.03.2023 3 min read

Authors

Lígia Regini

Related areas

Tax

Overturning *res judicata* in tax matters is an issue that has caused great commotion and concern among taxpayers recently. There is good reason for that concern: respect for final judicial decisions is one of the most fundamental principles of the rule of law, so much so that it is found among the fundamental rights and guarantees set out in article 5 of the Federal Constitution of Brazil. Fair or not, final, unappealable judicial decisions is one of the pillars of legal certainty.

At the very beginning of the 2023 judicial year, the Supreme Federal Court (STF – *Supremo Tribunal Federal*), Brazil's constitutional court, ruled that final, unappealable decisions in cases dealing with taxes that are levied periodically will cease to have effect if the STF later issues a contrary decision in a Constitutional Challenge proceeding, or in a "general repercussion" case, where the STF's decision is also binding on all lower courts. Essentially, the STF's rulings in Themes 881 and 885 mean that when STF issues a decision in a Constitutional Challenge proceeding, or in a "general repercussion" case, all taxpayers are subject to the STF's understanding of the law, even if they had obtained final judicial decisions reflecting a different interpretation .

The case dealt with by the STF involved one of Brazil's corporate income taxes, the Social Contribution on Net Profit (CSLL – *Contribuição Social sobre o Lucro Líquido*). At the beginning of the 1990s, the taxpayer won a case contesting CSLL, on the grounds that the tax was unconstitutional. Years later, in 2007, in a Constitutional Challenge against CSLL, the STF held that CSLL is constitutional.

Now, in 2023, the STF has decided on the impact of its 2007 decision on *res judicata* in individual cases, where taxpayers had obtained rulings contrary to the STF's later decision. The STF concluded unanimously that *res judicata* in individual cases will lose effect from the time the STF issues its judgment in the Constitutional Challenge.

There was intense debate, and a close vote (6 to 5), but the STF decided not to modulate the effects of its decision, which means that the 2023 decision on *res judicata* has retroactive effect to 2007 – and exposes taxpayers that relied on *res judicata* in individual cases to potential liability for CSLL in past tax years.

Unusually, even before publication of the STF's judgment, the National Treasury and the STF itself commented publicly on the decision, going so far as to suggest that the STF's decision as to the retroactive effects (or lack thereof) of its ruling was specific to CSLL, and that the court might take a different position with respect to other taxes (interview given by Justice Luís Roberto Barroso).

The scope of the STF's position has the potential to reach far beyond CSLL, extending to industrialized products tax (IPI) levied on resale of imported products, service tax (ISS) on franchise contracts, and social security contributions on the constitutionally-guaranteed vacation "bonus" of one-third of a month's salary.

In this unsettled scenario, we can expect the debate over retroactivity to heat up, especially where *res judicata* in individual cases is disturbed by decisions made by the STF in general repercussion cases (unlike the CSLL decision, which was made in a Constitutional Challenge).

For the time being, we can say that the STF's position is unprecedented, important, but not yet formally published,[1] and does not affect any and all final decisions favorable to taxpayers. As always, care and critical analysis are recommended when assessing the effects of favorable judgement in tax cases, precisely to promote legal certainty and stability.

>>>This article belongs to BMA Review 79. Click here to read more articles.

[1] Até o fechamento desta edição, o acórdão ainda não havia sido publicado.

› PROFESSIONALS

Professionals who combine legal insight and market perspective

Lígia Regini