

Tax in Brazil's Supreme Federal Court: looking back at 2020 and forward at 2021

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2020 was indeed an atypical year. Not just because of the serious public health and economic crises brought on by the covid-19 pandemic, but also for the unprecedented speed with which Brazil's constitutional court, the Supreme Federal Tribunal (STF – Supremo Tribunal Federal), decided tax cases.

The burst of speed is very welcome, since the STF has the last word on important tax questions raised in Brazil's Federal Constitution. But the tax decisions over the course of 2020 are a series of quick, almost telegraphic, virtual judgments, without debate among the Justices, resulting, for the most part, in victories for the tax authorities.

In 2020, the STF took on significant tax matters that had been dragging on for years and sometimes decades, and decided contrary to the court's own precedents and those of the highest non-constitutional court, the Superior Court of Justice (STJ – Superior Tribunal da Justiça).

Some examples of this about-face in the STF's position are: (i) its decision that the vacation bonus of one-third of a month's salary provided for in the Constitution is subject to social security contributions (in 2018, the STF held that social security contributions do not attach to vacation bonuses payable to public servants, and in 2014 the STJ held that social security contributions are not payable on vacation bonuses, in a decision binding on all lower courts), and (ii) its decision that the federal value-added manufactured products tax, IPI (Imposto sobre Produtos Industrializados) is payable on sales of imported products following importation – which is also subject to IPI – reversing decades of taxpayer-favorable decisions by the STJ (REsp 946.948)

The STF seems to have been careless with the precedents, even binding precedents in place for many years.

Another tendency in the STF last year was its use of consequentialist arguments, especially of an economic and financial nature, to contain demands for refunds of unowed tax.

In an unprecedented move, the STF decided to modulate the effects of decisions in order to avoid the negative impacts on public treasuries of certain constitutional commands. In appeal RESp 851.108, for example, the STF held that it was unconstitutional to levy the state gift and inheritance tax (ITCMD – Imposto sobre Transmissão “Causa Mortis” e Doações) on gifts made outside the country, but did not require that amounts of ITCMD that had been paid on such gifts be refunded.

Tax issues necessarily have financial impacts, but not just for the public coffers. Failing to uphold the right of taxpayers to recover unowed amounts of tax validates conduct that is harmful to society and that, at times, is knowingly engaged in by Brazilian legislatures: creating laws that are clearly unconstitutional, but that produce effects (and revenue) for years.

So what can we expect from the STF in 2021?

The most anxiously-awaited tax issue is “Theme 69”. Themes or *temas* are legal issues on which the STF makes a statement of its interpretation of the law that will be binding on all lower courts and administrative authorities. In Theme 69, the STF held that amounts of the state value-added tax, ICMS, must be excluded when calculating the federal social contributions PIS/COFINS. Among other points, the STF is expected to consider the federal tax authority’s request that the decision establishing Theme 69 have only prospective effects.

Equally or perhaps more important is Theme 881, in which the STF will finally decide on the limits of *res judicata* in tax matters, and will seal the fate of interpretations given by the Public Treasuries to cases won by taxpayers.

In addition to these Themes, the STF will likely decide whether PIS/COFINS and ISS (the municipal service tax) should be excluded when calculating those taxes, so that tax is not charged on top of tax, and whether it is constitutional for the tax authorities to impose a fine when they disallow a taxpayer’s offset of taxes, among other matters.

Hopefully, 2021 will be a year of significant debates, so that judgments on tax issues will be thorough and insightful, taking into account taxpayers’ reliance on precedents and avoiding consequentialism.

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