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Software Taxation from the Perspective of the Recent Decisions of the Brazilian Supreme Court (STF) in ADI's 1945/MT and 5659/MG

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Abstract

The recent decisions of the Brazilian Supreme Court (STF) in ADI's 1945/MT and 5659/MG have reshaped the taxation landscape concerning software. This article critically analyzes these decisions, exploring the implications for the previous tax framework and anticipating potential legal challenges. Through a comprehensive review of Brazilian legislation, jurisprudence, and academic literature on software taxation, this study investigates the evolving interpretation of software as a commodity or service. It delves into the historical context of software taxation, starting from RE 176.626 in 1998, and traces the evolution of technology, which has transformed software distribution from physical media to cloud-based services. The paper navigates through the jurisdictional conflict between the ICMS (Tax on Circulation of Goods and Services) and the ISS (Service Tax), elucidating the Supreme Court's rationale for determining the tax applicability. In its decisive ruling, the STF affirmed that ISS prevails over ICMS in software transactions, providing clarity but potentially igniting competition among municipalities for tax revenue. Additionally, the article reflects on the broader implications of these decisions for federal taxation and identifies avenues for future research in the realm of digital economy taxation.

Keywords

Software Taxation, Brazilian Supreme Court, ADI 1945/MT, ADI 5659/MG, ICMS vs ISS, Tax Jurisdiction Conflict, Digital Economy Taxation, Tax Compliance in Brazil, Software Licensing, Municipal Taxation, Federal Taxation on Software, Evolution of Software Taxation, Tax Legislation in

Brazil, STF Software Tax Rulings

1. Introduction and Context

According to OECD (2019), Digital Innovation, in the modern world, software plays a fundamental role in various areas of society. From mobile applications to complex enterprise systems, software is essential for driving innovation and increasing the efficiency of any activity.

The software sector has experienced exponential growth in recent decades, driven by rapid technological advancements and the demand for digital solutions across all sectors of the economy. Furthermore, there has also been significant growth recently due to the high demand resulting from efforts to combat the COVID-19 pandemic.

The complexity of software taxation in Brazil can pose a challenge for companies and professionals in the field, who need to understand the rules and applicable tax regimes to ensure tax compliance.

Recent decisions by the Brazilian Supreme Court (STF) in ADI's 1945/MT and 5659/MG have reshaped the taxation landscape concerning software, providing much-needed clarity. Similarly, the study of tax incentives, both conditional and unconditional, as explored by Pinheiro & Horvath (2023), reveals the importance of legal certainty in fostering economic activities and ensuring predictability in tax obligations. Additionally, the role of judicial precedents in shaping tax policy, as analyzed by Barbosa (2024), underscores the need for stability and consistency in the application of tax laws, particularly in the context of ongoing tax reforms. Furthermore, understanding the historical and constitutional underpinnings of Brazil's tax system, as outlined by Becho & Oliveira (2021), is crucial for comprehending the broader context in which these legal interpretations and reforms take place.

In this context, understanding the appropriate tax treatment becomes essential for companies and professionals in the field. In this article, we will examine the taxation of software in Brazil, starting from RE 176.626 in 1998, highlighting the main issues and relevant aspects for tax compliance after the Supreme Court's decision in ADI 1945/MT and 5659/MG. The research was conducted through a comprehensive review of Brazilian legislation related to software taxation. Furthermore, relevant case law and academic studies on the subject were consulted. The critical analysis of these sources allowed for the development of this overview of software taxation in Brazil.

2. Summary and Commentary on the General Situations of Taxation in Brazil

Brazil's taxation system is known for its complexity and the significant administrative burden it imposes on businesses and individuals. The system encompasses multiple layers of taxation at the federal, state, and municipal levels, with

key taxes including the Income Tax (IR) for individuals and corporations, Social Contributions like PIS and COFINS, the Excise Tax (IPI) on manufactured goods, the ICMS (Tax on Circulation of Goods and Services), and the ISS (Service Tax). The overlapping jurisdictions and frequent changes in tax legislation create a challenging environment for taxpayers, leading to high compliance costs and often resulting in disputes over tax liabilities. This complexity is exacerbated by the frequent jurisdictional conflicts, particularly between the state and municipal governments, regarding the taxation of certain activities, such as the recent debates over software taxation resolved by the STF in ADIs 1945/MT and 5659/MG.

The high tax burden in Brazil, particularly from indirect taxes like ICMS and ISS, poses significant challenges for economic growth and investment. However, the approval of the tax reform (EC 132/2023) in December 2023 marks a significant milestone in addressing these issues. The reform aims to simplify the tax system by consolidating several existing taxes into the new Tax on Goods and Services (IBS) and the Contribution on Goods and Services (CBS). In 2024, discussions and approvals of the laws needed to regulate these new taxes are anticipated, which could provide much-needed clarity and stability. Despite these positive steps, businesses still face the ongoing challenge of navigating the transition period and understanding the implications of the new tax structure. The success of the reform will largely depend on the effective implementation and enforcement of the new laws, which should focus on reducing the tax burden, improving compliance, and fostering a more business-friendly environment that encourages economic development and investment.

Taxpayers may receive refunds for overpaid or incorrectly paid taxes under certain circumstances. For instance, if a taxpayer has overpaid due to misclassification or has been subject to double taxation, they may be eligible for a refund. The process typically involves filing a formal claim with the relevant tax authority, providing detailed documentation to support the claim. Judicial decisions, such as those by the STF in recent tax disputes, can also pave the way for refunds, especially when they clarify tax applicability and resolve conflicts. As part of the recent tax reform, mechanisms for addressing overpayments and ensuring fairness in tax collection will be crucial in maintaining taxpayer confidence and compliance.

3. Software Definition and Classification (Off-the-Shelf & Customized)

Before delving into tax matters, it's important to understand what constitutes software or computer programs. In simple terms, software is a set of logical and functional instructions that enable tasks to be executed on an electronic device. We can distinguish between off-the-shelf software, which is mass-produced and marketed to the public in general, and customized software, which is specifically developed to meet the needs of a particular company or client. This distinction between off-the-shelf and customized software is relevant from a taxation per-

spective because each category may be subject to different tax regimes, as we will see later on.

4. From the Box (Off-the-Shelf) to the Cloud—Evolution of Jurisprudence and Legislation

For at least 25 years, since the judgment of RE 176,626, presided over by Minister Sepúlveda Pertence, the debate on software taxation in Brazil has been in the spotlight. Since its ruling on 11/10/1998, which first introduced the distinction between off-the-shelf software and custom or bespoke software, technology has advanced significantly, thereby increasing the legal complexity of businesses involving software.

At that time, in 1998, access to computer programs or software was primarily through the purchase of a "box" at the supermarket. With this "box" in hand, we eagerly returned home to open and install the "program" or software on the computer. Inside it, we found the famous and not-so-nostalgic floppy disks.

Allow me to digress for a moment to explain the lack of convenience that existed at that time when it came to software installation, from the perspective we have today. This is a fact that younger, less experienced individuals may not fully grasp, as they have mostly lived in an era where software installation is typically done through a single CD (Compact Disc).

However, before the CD, we had to use numerous floppy disks to install a simple computer program. By way of example, to install Microsoft Office 1997, the user had to do it through 46 floppy disks. This never-ending process of reading each disk, executing, and swapping to the next one until the anticipated installation was completed took around an hour and a half (in this example).

In these 25 years, we have gone through various evolutions, such as the transition from floppy disks to CDs, from CDs to DVDs, direct downloads without the need for physical media, until we arrived at SaaS, where we have the option to use software over the internet without the need for downloading and installation. Another important factor has been the evolution of the internet, which has made the new technologies available today possible.

Returning to the same example of Microsoft Office, in its current version (MS Office 365), in the cloud, we can use it without the need for local computer installation (access through the internet). Alternatively, we can install the programs within a matter of minutes through downloads, in a much more agile and flexible manner than in the past.

Today, in addition to doing away with physical media, through software downloads or cloud execution, we can pay for the software license all at once or even on a monthly or any other periodic basis, a practice that contributes to the popularization of the use of genuine software and proper licensing, reducing piracy in this field. Prices are still high, but compared to the old perpetual licenses, they are much less burdensome for consumers, at least in the short term. Moreover, they don't become obsolete because, by paying the periodic license, the software can always be updated with the latest updates and improvements.

Prior to ADI's 1945/MT and 5659/MG, software taxation in Brazil was a subject of debate and divergence. There were different interpretations regarding the nature of software and whether it should be considered a tangible asset subject to taxation, such as the Tax on Circulation of Goods and Services (ICMS) or the Tax on Industrialized Products (IPI).

In some situations, the Brazilian Federal Revenue Service considered software as an intangible asset, subject only to taxes such as the Income Tax (IR) and the Social Contribution on Net Income (CSLL). This interpretation was favorable to taxpayers as it reduced the tax burden on the sale of software.

However, some Brazilian states believed that software was a tangible asset subject to taxation under the Tax on Circulation of Goods and Services (ICMS). This position led to conflicts and uncertainties for companies in the sector, especially those that sold software digitally, through downloads or remote access.

It's worth noting that in the context of RE 176.626 mentioned above, the Brazilian Supreme Court (STF) established that ICMS would only apply if there was a physical support necessary for the installation of the software, and even then, ICMS would only be levied on the physical support in "circulation." Thus, ICMS could only be imposed on the tangible asset, namely the physical support, and not on the licensing or transfer of software usage rights. In cases of downloads without physical support, the tax in question should not apply.

In this context, we agree with the stance of Maria Ângela Lopes Paulino Padilha, who summarizes by indicating what the Brazilian Supreme Court (STF) decided in RE 176.626:

"Regardless of the type of computer program—standardized, customized, or bespoke—it was recorded in the Brazilian Supreme Court's reasoning that: IF (i) the software is an intellectual asset, with an intangible nature, not falling under the concept of a commodity; and (ii) the license serves as a contractual means of granting third parties the right to enjoy the intellectual work 'software'; THEN, (iii) ICMS-M (Tax on Circulation of Goods and Services related to the Movement of Goods) should only apply to the 'physical manifestations' of the software, as only the physical medium containing it can be the subject of commercial circulation operations."

In other words, the Brazilian Supreme Court (STF) ruled for the incidence of ICMS concerning what is known as off-the-shelf software, but only in relation to the physical medium. Regarding custom or bespoke software, it was determined that ICMS does not apply, but there was no discussion regarding ISS (Service Tax).

In a similar point of view, we also highlight the stance of Vinícius Jucá Alves and Christiane Alves Alvarenga[1], who express their position as follows:

[1]Tributação da economia digital, Tathiane Piscitelli & Daniela Silveira Lara (2020), coordenação. Thomson Reuters Brasil, São Paulo, 2ª edição, 2020, p. 15 (our translation to English). The original in Portuguese: "A nosso ver, é acertada a determinação de não incidência do ICMS sobre a licença de uso, pois não existe transferência de propriedade do software no contrato de licença, requisito essencial para a incidência do ICMS. Quando um contrato de licença de uso é assinado, o direito autora permanece sendo propriedade do licenciador, o licenciado apenas paga para usar o software com as limitações indicadas no contrato de licença. Não havendo transferência de propriedade do direito autoral, não há que se falar em incidência do ICMS.".

"In our view, the determination of non-incidence of ICMS on the usage license is correct because there is no transfer of software ownership in the license contract, which is an essential requirement for ICMS to apply. When a usage license contract is signed, the copyright remains the property of the licensor, and the licensee simply pays to use the software within the limitations specified in the license agreement. Since there is no transfer of copyright ownership, there is no basis for ICMS to apply."

These authors argue that the Brazilian Supreme Court (STF) made the right decision in determining the non-incidence on the usage license. What the Supreme Court effectively did was establish that, in the case of off-the-shelf software, ICMS should only apply to the corpus mechanicum and not to the usage license itself, as there is no transfer of software ownership in these instances, which is an essential requirement for ICMS to be levied.

The Supreme Federal Court has reiterated its stance several times following RE 176.626, asserting that so-called off-the-shelf software should be subject to ICMS, while custom or bespoke software should be subject to ISS. As we explained above, this interpretation deviates from what was decided in RE 176.626, but it is what transpired, resulting in a conflict of jurisdiction between states and municipalities, namely, the issue of taxation through ICMS or through ISS in the case of custom or bespoke software[2].

With the advancement of technology, as we explained earlier, the question of ICMS incidence on the corpus mechanicum becomes less relevant, as software is now made available through downloads, without the need for this physical medium. Consequently, the ICMS incidence, as determined in the ruling of RE 176,626, has been removed.

Thus, on December 30th, 1998, the State of Mato Grosso decided to establish the incidence of ICMS on software transferred electronically, in an attempt to encompass the taxation of software, that is, to tax the intangible asset, software, through ICMS:

Article 2[3]. The tax applies to: (…) § 1. The **tax also applies** to: (…) VI—**on transactions involving computer software programs, even when conducted through electronic data transfer**.

As a result, only 22 days later, the challenge to this provision arose through ADI 1.945/MT, filed on 1999, Jan, 1st, under the rapporteurship of Justice Cármen Lúcia. It's worth noting that in ADI 1.945/MT, there was a request for a preliminary injunction, which was considered from 1999, Apr, 4th and was only concluded on 2010, May, 5th, when the injunction that sought to exempt ICMS incidence for cases where the software was obtained by download without a physical medium was not granted.

[2]As an example, the RE 199.464/SP, judged in 1999, Mar, 2nd. RE 199464, Presiding Judge: ILMAR GALVÃO, Primeira Turma, judged in 1999, Mar, 2nd, DJ 1999, Apr, 30th PP-00023 EMENT VOL-01948-02 PP-00307.

[3]Original in Portuguese: "Art. 2˚ O imposto incide sobre: (…) § 1˚ O imposto incide também: (…) VI—sobre as operações com programa de computador software, ainda que realizadas por transferência eletrônica de dados."

ADIs 1945/MT and 5659/MG were filed with the Brazilian Supreme Federal Court (STF) with the aim of questioning the constitutionality of ICMS taxation on software. These actions sought to obtain a final decision on the matter and to harmonize the understanding throughout the country.

Complementary Law No. 157/2016 established that ISS (Service Tax) applies to the assignment or licensing of the right to use computer programs (software), including off-the-shelf software. This legislative change aimed to bring greater clarity and uniformity in software taxation, avoiding the dispute between ICMS and ISS, but the jurisdictional conflict persisted until the decision in the context of ADIs 1945/MT and 5659/MG.

5. Jurisdictional Conflict—Taxation of Software (ICMS × ISS)

The Federal Constitution of Brazil has established detailed rules for taxation in the country. It not only identifies the events and situations that may be subject to state intervention for tax collection but also sets the parameters and restrictions for this action to be validly exercised.

Tax competence can be described as the legal capacity to create, in an abstract manner, taxes through legislation that defines their triggering events, active and passive subjects, calculation bases, and rates. Thus, political entities have their tax actions delimited by the field of competence assigned to them by the Constitution.

Tax competence is characterized by exclusivity. In this context, exclusivity means that a constitutional norm that attributes tax competence to a political entity is doing so exclusively for that political entity, meaning it is that entity and no other that will have the tax competence in question, exclusively. At the same time, due to this exclusivity, no other political entity can exercise such competence, which, as we mentioned, has been exclusively assigned to that political entity.

As we know, if a political entity enabled by the Constitution, that is, endowed with tax competence, does not exercise it, no other political entity can take over such competence, which is non-transferable and non-delegable.

A jurisdictional conflict arises when there is a dispute over which federal entity (Union, States, Municipalities, or the Federal District) has the competence to legislate or tax on a particular subject.

In the tax context, a jurisdictional conflict can arise when different taxes are applicable to the same factual situation.

As Professor Roque Antonio Carrazza teaches us, the so-called jurisdictional conflict is resolved by the Judiciary, and it is the Judiciary that will have the final say in such cases, as it did regarding software taxation through ADIs 1945/MT and 5659/MG:

"In truth, the improperly named 'tax competence conflict' is caused by: I—an unconstitutional tax law; II—an illegal (or unconstitutional) administrative claim by the taxpayer; and III—a challenge from the alleged taxpayer who goes

to the Judiciary to attempt to demonstrate that: 1) the law that created the tax in the abstract is unconstitutional; 2) the action they performed is not taxable; and 3) the action they performed falls under the tax incidence scenario that, according to the Constitution, belongs to a different entity than the one seeking to impose it. In all three cases (I, II, and III), it is up to the Judiciary—and only the Judiciary—when invoked, to 'declare the law.' Once the judicial decision becomes final and binding and res judicata is established, the alleged conflict disappears. We say 'alleged' because, under the law, it had never existed. So much so that the Judiciary, dealing with the case, issued a norm with concrete effects (Kelsen) and declared who was right, according to the Supreme Code."[4].

So, in the case of software taxation, until the Supreme Court's decision in the mentioned ADIs, we had established a conflict of competence in relation to the dispute between the State Tax on Circulation of Goods and Services (ICMS) and the Municipal Tax on Services of Any Nature (ISS).

ICMS applies to the circulation of goods, while ISS is levied on service provision. The central issue in the jurisdictional conflict would be to determine whether software should be classified as a commodity (subject to ICMS) or as a service (subject to ISS).

Historically, some Brazilian states interpreted software as a commodity subject to ICMS, arguing that software is a "digital commodity," and the transfer of possession or the right to use constitutes a merchandise circulation operation.

On the other hand, there are opposing views that consider software as a service, arguing that its essence lies in intellectual creation and the provision of knowledge, which falls within the definition of a service.

As mentioned above, the Supreme Federal Court (STF) is the body responsible for resolving these jurisdictional conflicts and determining which tax should be applied in each situation. This is what it did in the final decision regarding ADIs 1945/MT and 5659/MG, as we will detail in the next topic.

6. Decision of the Brazilian Supreme Federal Court in ADIs 1945/MT and 5659/MG

In 2021, the judgment of ADIs 1945/MT and 5659/MG brought about a change in the position of the STF. The classification of off-the-shelf and custom software became obsolete. In the new understanding, led by the opinion of Justice Dias Toffoli, it was stated that this classification is no longer sufficient to de-

[4]Our translation. Original in Portuguese: "Em verdade, o impropriamente denominado 'conflito de competência tributária' é provocado: I—por uma lei tributária inconstitucional; II—por uma pretensão administrativa ilegal (ou inconstitucional) da pessoa tributante; e III—por uma insurgência do apontado sujeito passivo, que vai ao Judiciário para tentar demonstrar que: a) a lei que criou, in abstracto, o tributo é inconstitucional; b) o fato por ele praticado não é imponível; c) o fato por ele praticado subsumiu-se à hipótese de incidência de tributo que, nos termos da Constituição, pertence a pessoa diversa daquela que dele o quer exigir. Nos três casos (I, II e III), caberá ao Poder Judiciário—e só a ele—quando invocado, 'dizer o direito'. Transitada em julgado a decisão judicial e produzida a coisa julgada, o pretenso conflito desaparece. Dizemos pretenso pois, perante o Direito, ele nunca havia existido. Tanto que o Poder Judiciário, conhecendo do caso, expediu uma norma de efeitos concretos (Kelsen) e declarou a quem assistia razão, segundo o Código Supremo".

marcate the competencies of the States and Municipalities regarding software. This is also because the dichotomy between the obligation to do and the obligation to give is no longer sufficient to determine the incidence of ICMS or ISS in these cases.

The Brazilian Supreme Federal Court concluded that in the licensing of electronically transmitted software use, there is a mixed operation, where there is both an obligation to give and an obligation to do. However, the obligation to do prevails, so there is an incidence of ISS.

In Justice Dias Toffoli's opinion, he addresses guidelines from the OECD and the European Union to start from the premise that electronic transmissions should be considered as a service provision. He also relies on the principle of flexibility, in the sense that the law needs to accommodate new technological realities, allowing for an evolving interpretation of the constitutional text, thus foregoing the alternative of applying the Union's residual competence to tax software, opting for an existing tax, namely, the ISS.

Another criterion that has been widely employed by the STF in jurisdictional conflicts between ISS and ICMS is the objective criterion of the complementary law. According to Article 146 of the Constitution, we know that it is the complementary legislator who will resolve jurisdictional conflicts, as well as Article 156, which states that the services subject to ISS must be provided for in the complementary law. Finally, Article 155, §2, IX, "b" of the Constitution determines that in the case of mixed and complex operations involving both the obligation to give and the obligation to do, if the service is included in the attached list, there will be an incidence of ISS; otherwise, ICMS will apply.

With these criteria and premises, the Supreme Court legitimized the choice of the complementary legislator, who listed software use licensing in item 1.05 of the attached list to LC 116/2003 as subject to ISS. Justice Toffoli analyzes this specific situation, understanding that in the electronic software use license, there is both the giving in the transmission of that digital file, at the moment when access to the functionalities is granted to users, and the doing, at the moment when the computer program is created through directed, specialized, and humanized intellectual effort. Additionally, there is also the doing in the provision of the software itself, where various utilities and functionalities are offered to the user. This doing becomes even more evident when we talk about SaaS (Software as a Service), where technological solutions are continuously offered to users based on a subscription-based licensing model.

Finally, there was a modulation of effects as follows:

1) Taxpayers who only paid ICMS: will not be entitled to a refund of the tax. Municipalities cannot charge ISS, under penalty of double taxation.

2) Taxpayers who only paid ISS: the payment will be validated, and states cannot charge ICMS.

3) Taxpayers who did not pay either ICMS or ISS until the day before the publication of the judgment's minutes: there will only be the possibility of

charging ISS, respecting the prescription.

4) Taxpayers who paid both ISS and ICMS but did not file a tax refund action: as it is a situation of double taxation, there will be the possibility of refunding ICMS, even without an ongoing action, under penalty of unjust enrichment of the states, and the payment of ISS is valid.

5) Pending lawsuits brought by taxpayers against states, including tax refund actions, questioning the collection of ICMS: these cases should be judged based on the understanding established by the STF that ISS, not ICMS, applies to software transactions. There will be the possibility of refund or release of amounts deposited as ICMS.

6) Pending legal actions, including tax executions, awaiting judgment brought by states to collect ICMS for events that occurred until the day before the publication of the judgment's minutes: these cases should be judged based on the understanding established by the STF that ISS, not ICMS, applies to software transactions.

7) Pending legal actions, including tax executions, awaiting judgment brought by municipalities to collect ISS for events that occurred until the day before the publication of the judgment's minutes: these cases should be judged based on the understanding established by the STF for the collection of ISS unless the taxpayer has already paid ICMS.

8) Pending legal actions brought by taxpayers against municipalities, discussing the incidence of ISS on software transactions until the day before the publication of the judgment's minutes: these cases should be judged based on the understanding established by the STF for the incidence of ISS, with a ruling in favor of municipalities, including the conversion of judicial deposits into income and the attachment of assets and values.

7. Conclusion

Given that the incidence of ISS prevailed over ICMS, we now have the competence to tax software residing with the municipalities. As recognized by the STF, they have the authority to institute and collect this tax on activities related to the provision, licensing, or assignment of the right to use software.

This has significant impacts on the tax landscape of software in Brazil, as the ISS, being a municipal tax, has specific rates established by each municipality. On one hand, the end of the competence conflict regarding taxation through ISS or ICMS brings legal certainty and facilitates business. On the other hand, there may now arise or intensify a "war among municipalities" to attract "service providers," who are ISS taxpayers in the context of software. Legal issues regarding the location of these companies and the actual provision of services in municipalities with lower ISS rates may emerge or increase.

The STF's rulings affirming the applicability of ISS over ICMS in software transactions have significant implications for the tax landscape in Brazil. These decisions are crucial in reducing jurisdictional conflicts and providing a clearer

framework for businesses. This clarity is similar to the predictability induced by conditioned tax incentives, as discussed by Pinheiro & Horvath (2023), who emphasize that such incentives offer greater legal certainty by guaranteeing the immutability of conditions during their duration. This alignment between judicial decisions and tax policy principles enhances the overall stability and predictability of the tax system in Brazil. Moreover, the role of judicial precedents, as discussed by Barbosa (2024), is crucial in ensuring legal certainty and stability, particularly during periods of significant tax reforms.

There's also a philosophical aspect to consider in relation to the topic and how it developed over time, up to the mentioned ADIs, which are the scope of this work. Reflecting on how everything unfolded, I see something that seems to allude to Legal Realism. In other words, we had this competence conflict for 25 years, not knowing for sure what would prevail. Throughout this time, the legislative branch was unable to create legislation that would put an end to this conflict and clarify or determine the incidence of one tax or another. Thus, we had the judiciary bringing a resolution to the issue. To me, it's clear that the ministers' decision was influenced by political, economic, and social factors. But this has to happen for a real decision and, subsequently, the much-desired legal certainty to exist. I understand that in this case, the ministers sought to choose or decide, considering the economic and/or social impact of the decision, bringing about a realization of justice that did not exist before their decision.

Another issue that is already on the agenda is how these STF decisions affect federal taxation. Even though the major discussions in recent years revolved around the competence conflict between municipalities and states (ISS and ICMS), with these recent decisions, there is also a reflection on federal taxation. Apart from the merchandise/service classification, it's important to address the duality of services/royalties in the context of federal taxation.

Federal legislation in Article 22 of Law 4506/1964 establishes that the remuneration for the exploitation of rights constitutes royalties. In other words, there is a third category, distinct from services and goods, which influences the characterization of the legal nature of software contract remuneration. Depending on how this legal nature is characterized, services/royalties, we have repercussions on how the taxation of foreign remittances occurs for CIDE, PIS/COFINS importation, and IRRF. There will also be significant implications for determining the percentage of presumed profit.

However, this Federal Taxation topic may be the subject of a future study.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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