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The Relevance of Jurisprudence in Tax Law: An Analysis from the Perspective of Brazilian System of Precedents

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Abstract

In Brazil, the relevance of jurisprudence as a primary source of tax law is evidenced by the legislative changes that have taken place since the creation of the binding dockets from the Supreme Court (dockets of jurisprudence; extracts that summarize decisions from a Court, showing a stare decisis), until the edition of the Civil Procedure Code of 2015 (CPC/15), which contains, generally speaking, binding judicial precedents aiming, above all, the standardization of judicial decision as instrument to give effect to the principle of legal certainty. In this context, despite Brazilian law having roots in Civil Law, its connection with Common Law is identified by adopting the system of precedents in the Civil Procedure Code of 2015. As will be demonstrated throughout this article, however, the system of precedents in Brazil differs substantially from the system adopted by Common Law countries, especially because biding judicial decisions are so qualified from the outset, reaching this status *ex lege*. The main purpose of this article is to demonstrate that the binding effect attributed by the procedural rules to certain judicial decisions, with regard to tax law, implied a relevant paradigm shift in classical doctrine, which attributed a merely secondary to the jurisprudence to guide the relationship between tax authorities and taxpayer. As a bibliographical methodology, we confronted classical books to specific statutes—as the Brazilian Constitution of 1988—as well as new academic works developed. In addition, we analyzed recent Supreme Courts pronouncements that point to jurisprudence as the primary source of tax law.

Keywords

Brazilian Judicial Precedent, Tax Law, Strict legality, Legal Certainty

1. Introduction

In general terms, as based on Brazilian jurisprudence, sources of law are understood to be those facts and acts capable of producing legal norms. The term source refers precisely to the idea of spring where the law originates from.

In this context, specifically with regard to tax law, which is the object of our study, it is verified that, in the past, jurisprudence was considered a secondary source, especially because judicial decisions were not mandatory to other cases. They served only as elements of guidance in regard to the interpretative direction of certain legal rules by the Courts, as stated by Rubens Gomes de Sousa (Sousa, 1975).

This reality, however, has been undergoing a notorious paradigm shift. The jurisprudence has reached an important role as a source of tax law in Brazil in recent years, especially after the enactment of the Civil Procedure Code of 2015 (CPC/15), which consolidated the binding effect of decisions enacted in the circuit of the Superior Courts (art. 927 of CPC/15).

This system introduced by the Civil Procedure Code is similar to the technique adopted by common law countries, although it contains substantial differences inherent to the Brazilian judicial system, especially with regard to tax law, as will be seen below.

Sources of Brazilian Tax Law

The classical doctrine in Civil Law system usually defines the sources of law as those facts or acts capable of producing legal norms (Bobbio, 1995). Brazilian doctrine usually distinguishes between material sources (those formed by social phenomena and elements extracted from social reality) and formal sources (means by which positive law can be recognized).

However, part of the more contemporary doctrine does not like to use the term material sources. Miguel Reale, for example, understands that this term is more applicable to legal sociology (Reale, 1986). Paulo de Barros Carvalho, as well, prefers to use the term legal fact (Carvalho, 2004). Anyway, for the purpose of this article, we will only stick to the formal sources of law, considering that the formal sources comprise the most traditional and ancient approach to the subject, involving laws, jurisprudence, uses and customs, contracts and jurisprudence (Becho, 2011).

We will briefly address the formal sources in tax law to situate the proposed subject. In our legal system, the competence or capacity to produce tax legislation is a matter explicitly set forth in the Federal Constitution.

The principle of legality has been applied since the first Brazilian Constitution (1824), the 15th article of which was dedicated to Legislative and stipulated that Parliament had "the power to make laws, interpret, suspend and revoke them". The current Constitution (1988) establishes similarly in article 5, item II: "No one shall be obliged to do or refrain from doing anything except by virtue of a law" (Becho & Oliveira, 2021).

In its art, 150, item I, provides that the requirement or increase of tax, by any of the federated entities (Union, State, Municipalities and Federal District) must be established by law. Law, in this context, means act or statute, as can be interpreted by article 59 of the Constitution: "The legislative process comprises the preparation of: I—amendments to the Constitution; II—supplementary laws; III—ordinary laws; IV—delegated laws; V—provisional measures; VI—legislative decrees; VII—resolutions" (Becho & Oliveira, 2021). In this context, the art. 146 of the Constitution also provides that the supplementary act (a type of law that requires an absolute majority—more than 50% of the valid votes—of the members of each House of the Legislative Power) is responsible for 1) providing for conflicts of jurisdiction in tax matters; 2) regulate constitutional limitations on the power to tax and 3) establish general rules on tax legislation.

Typically, therefore, the Federal Constitution is the first formal source of tax law. We do not intend here to exhaust all the constitutional precepts that involve tax law in Brazil. We believe it is sufficient to refer, for example, to the aforementioned articles (146 and 150, item 1, of CF/88), which already give a good dimension of what we are trying to demonstrate.

In Brazilian tax law, accordingly, the constitutional principle of strict tax legality constitutes the cornerstone of the system. At this point, jurists of the tax field converge.

On the subject, for example, Roque Antonio Carrazza asserts that the Constitution "is the foundation of all our public law, notably our tax law" (Carrazza, 2010). Geraldo Ataliba asserts as well: "The cornerstone of its (the taxpayer's) citizen tranquility must be the integration of the normative sources and the consequent integration of the norms emanating from them (integration per legal entity with political capacity)" (Ataliba, 1984). In tax law, the law exercises a preponderant role, notably by the principle of strict tax legality, explained in the Federal Constitution, art, 150, 1 (Becho, 2011).

The National Tax Code (CTN) articles 98 to 100 also reveal other sources of tax law. Article 98 refers to treaties and conventions as sources of tax law, stating that "International treaties and conventions revoke or modify domestic tax legislation, and will be observed by whichever occurs in relation to them". Following, National Tax Code art. 99 sets forth the rules related to decrees, emphasizing that "The content and scope of the decrees are restricted to those of the laws under which they are issued, determined in compliance with the rules of interpretation established in this Law", and art. 100 lists the complementary rules, referring to 1) the normative acts issued by the administrative authorities; 2) the decisions of individual or collective bodies of administrative jurisdiction, to which the law attributes normative validity; 3) practices repeatedly observed by administrative authorities; 4) the agreements that the Union, the States, the Federal District and the Municipalities enter into.

Concerning our study, it is important to note that the National Tax Code refers only to administrative jurisprudence, "to which the law attributes normative validity", as a complementary tax rule. There is no mention of judicial decisions,

as can be seen from the mere reading of arts. 98 to 100 above.

The omission in the National Tax Code pertaining to judicial precedents or case law in the topic in which it deals with complementary norms is symptomatic, since the legal text dates from 1966, a time when there was no law attributing normative effectiveness to judicial decisions, as will be seen in the next topic.

2. The Evolution of Case Law-Judicial Precedents as a Source of Tax Law in Brazil

In recent years, regardless of carrying out a more detailed analysis on the subject, any professional who has been working in the legal field for over a decade will have the perception of the crucial role that judicial precedents have reached in the study of law. In tax law classes, we used more to focus on understanding the legal text through the study of the Federal Constitution and legislation (statutes, acts; and complementary rules), than through the analysis of judicial precedents.

There was no line of research dedicated to judicial precedents as is currently the case, in which there is a concern to extract from the entire content of judicial rulings the legal concepts adopted to reach a conclusion on a particular tax issue. This can be explained, in large part, by the fact that before to be introduced in Brazil the system of precedents, a binding force was not attributed to judicial precedents emanating from the Superior Courts. Jurists and their jurisprudence reverberated the idea that the judge should enjoy full autonomy for its decision-making, with no hierarchical subordination to the decisions applied by the Superior Courts, except for court ruling of the specific cases.

According to Ruy Barbosa Nogueira's scholio, in that time, "The legislated solution (constitution, act, decree) has a normative character, that is, it obliges all cases that may fall under its operative part, while judicial precedents are only valid as a precedent, as an example of a solution. The court ruling has an operative part and its conclusion is imposed coercively only on the disputing parties, or rather, within the subjective and objective limits of the effects of the decision." (Nogueira, 1993)

The binding force of judicial precedents in Brazil begins to take shape, effectively, from 2004, through the binding dockets from the Supreme Court introduced in our legal system by Constitutional Amendment No. 45 (art. 103-A of CF/88) and regulated in December 2006, by Act no. 11,417.

It is true that, long before the binding dockets from the Supreme Court were introduced in our Federal Constitution, there was already a concern in the legal scenario regarding the need to value precedents, in order to safeguard the interests of the individuals in their jurisdictions, especially to avoid discrepancy of understanding on certain matters in identical factual situations, for the sake of legal certainty.

According to Victor Nunes Leal, justice from the Brazilian Supreme Court

(STF) in 1960s, since that time, practical reasons, inspired by the principle of equal treatment, advise that the jurisprudence have relative stability, especially because "equal claims, within the same social and historical context, should not have different solutions" (Leal, 1964).

In the same sense, Oscar Correa, justice from the Brazilian Supreme Court (STF) in 1980s, stated that jurisprudence should have been relative stability because is "essential to the fair distribution of justice". (Correa, 1985).

To understand this concern in the legal scenario regarding the need to value precedents it is important to notice "that Courts in Brazil do not always respect their own decisions and sometimes even the decisions of higher courts. It is mandatory that judges justify their decisions, but it was not mandatory (at least until the new CPC) that they apply precedents" (Becho, 2020).

This way, since 1963 it was included in the Internal Regulations of the Federal Supreme Court, in its art. 102, the provision of the Predominant judicial precedents of the Federal Supreme Court, an important instrument to enable the persuasive force of precedents emanating from that Court, is still in force.

In that time, "the STF decided to publish súmulas, very short and synthetic—not analytical—(*dockets of jurisprudence*, abstracts or summaries of the decision), like "statutory X is unconstitutional" or "restaurants need do pay state tax on the sale of food and drink, instead of municipal tax". They have always been a persuasive force in rulings." (Becho, 2020)

Therefore, this kind of precedent, according to Justice Celso de Mello, from the Brazilian Supreme Court (STF), had no "binding effect contrary to Common Law." (Brazil. Supremo Tribunal Federal. Agravo 179560)

In this context, the binding dockets from the Supreme Court were introduced in our legal system by Constitutional Amendment to meet society's desire not only for the need for stability of judicial decision, with a view to attaining greater legal certainty, in order to prevent identical cases from reaching different legal decisions, but also, to obtain greater agility of judicial decisions, in the face of a overwhelmed Judiciary.

Also, by virtue of Constitutional Amendment no. 45/2004 and striving to reduce disputes, especially within the Supreme Court, the system of general repercussion was introduced in the legal system as a requirement for admissibility of extraordinary appeal (art. 102, Section 3, of CF/88). However, the binding effect is attributed by the Federal Constitution of 1988 only to the Precedent, having said nothing about it with regard to judgments handed down under the general repercussion system.

The binding force to precedents issued under the system of general repercussion and repetitive appeal was introduced in the Code of Civil Procedure of 1973 (arts. 543-B and 543-C), in 2006, by virtue of Act no. 11.418.

Under the terms of the aforementioned procedural provisions, in short, proceedings remain on hold until the definitive judgment of the paradigms established by Supreme Court and the Federal Supreme Court, respectively, the Courts *a quo* being obliged to apply the same conclusion reached by those Superior

Courts.

This binding effect of precedents was reverberated by arts. 1036 et seq. of the Civil Procedure Code of 2015 (CPC/15). However, CPC/15 was even more incisive and comprehensive with regard to the binding force of precedents, provided in its art. 926 that "Courts must standardize their judicial precedents and keep it stable, integral and coherent".

The legislator's concern to avoid the existence of conflicting decisions is clearly noted on the same factual issue, with a view to preserving the legal certainty of the jurisdictions.

Still, art. 927 of CPC/15 provides that judges and Courts must observe Section I—the decisions of the Federal Supreme Court in concentrated control of constitutionality; Section II—the statements of binding precedent; Section III—judgments in incident of assumption of competence or resolution of repetitive demands and in judgment of extraordinary and special repetitive appeals; Section IV—the statements of the precedents of the Federal Supreme Court in constitutional matters and of the Superior Court of Justice in infra-constitutional matters; and Section V—the orientation of the plenary or the special body to which they are linked.

Therefore, the expansion of the binding force of precedents carried out by CPC/15 is evident. It should be noted that, pursuant to art. 927, referred to above, the legislator attributed binding force not only to precedents, decisions rendered under the repetitive system and with general repercussion, but also to judgments rendered within the scope of the Courts, and here we highlight the figure of the incident of resolution of repetitive demands, which did not exist in CPC/73.

The Incident of Repetitive Claims (IRDR) is set forth in Chapter VIII of CPC/15 and provides, in general terms, for binding repetitive decisions issued by the Courts *a quo* within the scope of their respective jurisdictions. Specifically in the tax sphere, it is important to highlight that the binding to precedents established by the Federal Supreme Court (STF) and by the Superior Court of Justice (STJ), in a regime of general repercussion and repetitive systematic, respectively, was reverberated by the Administrative Council of Tax Appeals (CARF), which determines in its in-house regulation (Section 2 of art. 62) that Administrative Court must, mandatorily, apply the aforementioned decisions.

A degree of similarity can be found in art. 19, of Act n. 10,522/2002, included by Act n. 13,874/2019, exempts the National Treasury Prosecutor's Office from contesting, offering counterarguments and filing appeals, as well as authorizing said Body to withdraw from appeals already filed, in the event that the action or decision court deals, among others, on repetitive topics with general repercussion, decided, respectively, by the Superior Court of Justice (STJ) and the Federal Supreme Court (STF).

Art. 19-A, of Act n. 10,522/2002, also included by Act n. 13,874/2019, likewise, authorizes the Tax Auditors of the Federal Revenue Service of Brazil not to constitute tax credits related to the topics dealt with in art. 19 of the same Law.

The other public administration bodies that administer tax credits subject to

registration and collection by the Attorney General's Office of the National Treasury are also exempt from constituting and promoting collection based on the exemption hypotheses referred to in art. 19 of Act n. 10,522/2002 (cf. art. 19-B of the same Law).

Finally, this legislative historical framework gives a good dimension of the relevance that jurisprudence has reached as a source of Brazilian tax law in recent years. The successive legislative changes that have taken place since the edition of the precedent provided for in art.

103-A of CF/88 ward off the justification previously raised by jurists and their jurisprudence that judicial precedents would be a secondary source of tax law because it lacks an *erga omnes* binding force.

As seen, under the terms of the governing legislation, the judicial precedents established by the Federal Supreme Court (STF) and the Superior Court of Justice (STJ) is also binding to Tax Administration Institutions or authorities, which cannot charge a tax deemed unenforceable by these Superior Courts under the systems of general and repetitive repercussion.

The path is two-way, insofar as, equally, taxpayers cannot (re)discuss a tax deemed unenforceable by the Federal Supreme Court (STF) and the Superior Court of Justice (STJ) under these systems, except in the event of overruling (change in the understanding of a certain court on a previously pacified, by alteration in the legal system or by historical factual evolution).

This new procedural reality has brought jurisprudence closer to the law as a source of tax law. Thus, "the judicial decision can be considered a source of law in terms very close to the law, generating effects on the community as a whole, as they create expectations that other judicial processes will be judged in the same sense" (Becho, 2021).

In this context, "the Code of Civil Procedure of 2015 brought us the theory of precedents, which is typical of common law and atypical of civil law" (Becho, 2021), which we will discuss in the next section.

3. Is the Brazilian Legal System Migrating from Civil Law to Common Law?

It is impossible to deal with judicial precedents as a source of law and not address Common Law, since precedents historically play a much more relevant role in this system than in Civil Law.

However, Civil Law and Common Law are two systems with very different cultural roots. Historically, Common Law grew out of a peaceful relationship between Parliament and the Judiciary; while Civil Law stemmed from a troubled relationship between the two powers (Marinoni, 2016).

The different historical roots of the two systems make it difficult to compare Civil Law and Common Law, because there are barriers that are difficult to overcome, such as the language, history and culture, for example, of such different countries (Becho, 2021).

Concerning the present work, we verified that the Civil Procedure Code of

2015 (CPC/15) introduced the system of precedents, which we understand allows for a plausible comparison to that common law.

The intersection of these two systems (Civil Law and Common Law) at this specific point, therefore, does not authorize the simplistic conclusion that the Brazilian legal system is migrating to Common Law. Even at this point there are substantial differences between the ways these two systems consider precedent as a source of law, as we will demonstrate in the next topic.

4. The Formation of Judicial Precedent in Tax Law: A Brief Comparative Analysis between the English System and the Brazilian Precedent System

Before dealing specifically with the topic proposed in this chapter, it is important to clarify the difference between precedent and judicial decision. Precedent and judicial decisions are not confused. For a judicial decision to substantiate a precedent, it is necessary that there is a convergence of understanding on a certain matter of law, which must be analyzed in order to contemplate the main aspects of the quaestio juris, and may serve as a parameter for the solution of other cases involving the same matter.

The judicial precedents capable of producing this normative effect in Brazil is that arising from the Upper Courts in a reiterated and uniform way (Becho, 2021).

If there remains a divergence of interpretation, there is still no precedent formed, in the same way that a decision that lacks provisions and final observations cannot be considered a precedent. So much so that Section 1 of art. 927 of CPC/15 determines that "Judges and courts shall observe the provisions of art. 10 and in art. 489, Section 1, when they decide based on this article.", which refer, precisely, to the duty to give provisions and final observations for judicial decisions.

This way, for a precedent to be formed it is necessary that the reasoning of the decisum exhausts all relevant aspects of the debated matter (Nunes, & Bahia 2010).

In Brazil, "the precedents emanate exclusively from the Supreme Courts and are always mandatory—that is, binding. Otherwise, they could be confused with simple examples" (Mitidiero, 2021).

The aforementioned author also makes an important observation in the sense that, in Brazil, "the precedents authority stems from the fact that it embodies the interpretation that is assigned by law to the Federal Supreme Court and the Superior Court of Justice. That is to say: the authority of the precedent is the very authority of the interpreted law and the authority of the one who interprets it." (Mitidiero, 2021).

Arts. 927 and following of the Civil Procedure Code of 2015 (CPC/15), in fact, reveal that, in Brazil, decisions are already born as precedents if and when rendered by the Federal Supreme Court, in general repercussion, and by the Superior Court of Justice, under the system of repetitive appeals.

On the other hand, in English law, decisions are not born as precedents and, at this point, there is an important difference between our system and the one adopted by England (Panutto, 2017).

According to Júlio Rossi, "we have created a Brazilian precedent, a way of resolving conflicts through judicial precedents (either reiterated or not; constitutional or infra-constitucional matter) that will serve as a normative parameter" (Rossi, 2012).

This peculiarity of the Brazilian system of precedents makes it possible for a decision to be elevated to the level of a precedent, just because it is issued under the systems of general and repetitive repercussion, within the scope of the Federal Supreme Court (STF) and the Superior Court of Justice (STJ), respectively, even if there has not been an in-depth debate before the lower Courts on the relevant aspects of quaestio juris.

The system of precedents is provided for in arts. 927 et seq. of CPC/15 establishes that if a certain matter is invoked by the Federal Supreme Court (STF) or the Superior Court of Justice (STJ) for judgment under the systems of general and repetitive repercussion, the other cases dealing with the same quaestio juris must remain on hold, and must follow the same conclusion as be reached by the Superior Courts.

The judicial decision rendered in this context, therefore, assumes a binding normative role, just like an act or a statute. However, as stated at the beginning of this article, accepting judicial precedents as a primary source of Brazilian tax law, that is, elevating it to the same level as a law, is not something as simple and natural as it seems to be for English law.

For the English, for example, the answer to the question "Why do capital gains and losses fall outside the income tax?" naturally seems to be "because our courts followed the concept of income in the British income tax law", as explained by Peter Harris (Harris, 2006), which highlights the preponderant role of judicial precedents in relation to the Law, within the scope of tax law.

In a diametrically opposite direction, the principle of strict legality prevails in Brazilian tax law as a limiting element for the Judiciary's performance. As Tereza Arruda Alvim Wambier explains, "Innovations in this branch of law should not be done through judicial 'creativity'. The evolution of law must take place by law." (Wambier, 2012).

There are situations in Brazilian tax law, however, for which the Law is not sufficient to resolve conflicts, such as, for example, with regard to the confiscatory nature of the punitive fine imposed by the Tax Authorities. On the subject, the Brazilian Judiciary will provide their last response in a binding Extraordinary Appeal (RE 1,335,293), following the system established by the Civil Procedure Code of 2015, which denotes a certain flexibility of the principle of strict tax legality in our legal system.

We do not intend to explore this topic in this article. Our intention in citing this example is simply to demonstrate that the Judiciary's performance in tax matters in English law is much more natural than what occurs in Brazilian tax

law, and that the approximation of the Civil Procedure Code of 2015 to the precedent system, typical of common law countries, does not imply the invalidity of the principle of strict tax legality that should govern the tax matters in Brazil.

5. The Relevance of Brazilian System of Precedents to Reduce the Tax Lawsuits

Since the system of precedents was introduced in Brazil, according to research carried out in 2022 by National Council of Justice (CNJ)—a public institution that aims to improve the work of the Brazilian Judiciary—there has been a significant reduction of the tax lawsuits under analysis by the Supreme Cout and Superior Court of Justice in Brazil.

According to this research "from 2019, the acceleration of the judgement of repetitive appeals coincided with the significant reduction of the tax lawsuits under analysis by the Superior Court of Justice in Brazil". Regarding to tax lawsuits under analysis by Supreme Court, the research concluded that "the reduction of the tax lawsuits remained stable from 2017 to 2020".[1]

Another important piece of information provided by this research is that the National Treasury Prosecutor's Office, mostly, is respecting the binding precedents from Supreme Court and Superior Court of Justice in Brazil and, according to allowed in art. 19, of Act n. 10,522/2002, does not contest, presents counterarguments and lodges appeals against to these decisions.

Despite all these advances, there is still a cultural barrier to overcome in Brazil. "Historically, judges in Brazil do not pay much attention to judicial precedents. However, more than this, there is a greater cultural problem: judges, from all levels, are not concerned about the inconsistencies in the decision-making processes among them and other judges." (Becho, 2020)

This cultural problem—judges in Brazil do not pay much attention to judicial precedents—was revealed by the same research carried out in 2022 by National Council of Justice (CNJ)—in its conclusion that there was not the same reduction of the tax lawsuits under analysis by the Regional Courts.

In order to improve the culture from respect to precedent, the National Council of Justice (CNJ) edited in 2022 the resolution n° 134, by which it recommends to judges to apply the binding precedents from STJ and STF "to ensure the uniformity of solutions given to controversial issues".

Finally, it is important to note that the Taxpayers, as well, do not like to respect the binding precedents, especially when they go against their interests.

According to CNJ, "The culture of litigation is responsible for a relevant financial cost to Brazilian society", harming the development of the Brazilian economy.

6. Conclusion

As demonstrated throughout this work, judicial precedents have been increa-

[1]https://www.cnj.jus.br/wp-content/uploads/2022/08/sistematizacao-do-diagnostico-do-contencioso-tributario-nacional-v-eletronica.pdf, pp. 58-59.

singly consolidated as a primary source of tax law in Brazil, especially after the system of precedents was consolidated by the Civil Procedure Code of 2015 (CPC/15).

The intersection of these two systems (Civil Law and Common Law) at this specific point (system of precedents), therefore, does not authorize the simplistic conclusion that the Brazilian legal system is migrating to Common Law.

It appears that contrary to what happens in English law, accepting judicial precedents as the primary source of Brazilian tax law, that is, elevating it to the same level as a law, is not something so simple and natural in Brazilian tax law.

This is because, in the Brazilian tax system, the principle of strict legality prevails, which limits the creative activity of judges to decide tax issues.

Since the system of precedents was introduced in Brazil, according to research carried out in 2022 by National Council of Justice (CNJ) there has been a significant reduction of the tax lawsuits under analysis by the Supreme Cout and Superior Court of Justice in Brazil.

Despite all these advances, there is still a cultural barrier to overcome in Brazil: judges in Brazil do not pay much attention to judicial precedents and the Taxpayers, as well, do not like to respect the binding precedents, especially when they go against their interests.

This resistance to respect binding precedents in tax matters harms the Brazilian economy, especially due to the high financial costs arising from tax litigation.

Conflicts of Interest

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

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