ICMS and constitutional dialogue between Judicial Power and Legislative Power

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Abstract: The work examines the various hypotheses of interactions occurring between the Legislative Branch and the Judiciary in the solution of relevant themes related to ICMS.

Keywords: ICMS; constitucional dialogue.

1. Introduction

In Brazilian tax law, especially in recent decades, interactions between the Legislative Branch and the Judicial Branch to define highly relevant tax issues are quite common. The fact that the 1988 Federal Constitution (CF) regulates the National Tax System in great detail makes this interaction common.

Sometimes, such interaction between the Powers occurs due to disagreement expressed by the Legislative Power in relation to the decision adopted by the Federal Supreme Court (STF) regarding the interpretation of some constitutional provision that governs tax matters. This gives rise to the phenomenon termed by Torres (1993, p. 108) as legislative correction of case law, whereby the legislator enacts a legal norm contrary to judicial precedent.

Along similar lines, Correia Neto (2021, p. 21), examining the hypotheses of legislative reactions to decisions handed down by the Judiciary, mentions that one of the possible reactions is overcoming, by which the Legislative Branch establishes a higher-ranking rule (constitutional amendment), with content contrary to the STF decision, overriding what was decided in the constitutional jurisdiction.

However, in other cases, case law ends up directly influencing the work of the legislator. As Mello (2008, p. 67) points out, it is not uncommon for legislators to seek inspiration from case law to improve and update existing normative statements. In fact, there are several situations in tax matters in which the understanding adopted by the STF is incorporated by the legislator, who modifies the normative statements according to the parameters established by the judicial decision itself.

In this sense, Torres (1993, p. 107) clarifies that case law can also “anticipate legislative solutions” in order to provide theoretical basis for the “rationalization of tax law”, thus incorporating tax case law by the legislator, in a hypothesis indicated by the author as legalization of case law. As an example, the author highlights that the discipline of the National Tax Code regarding the recovery of undue tax was clearly inspired by the case law of the STF.

In a similar sense, Rosa Junior (2001, p. 194) highlights that Brazilian case law has often anticipated the legislator in establishing various principles and concepts of tax law, such as the taxable event, calculation basis and repetition of undue payment regardless of proof of error.

Correia Neto (2021, p. 21) also highlights the possibility of the Legislative Branch's reaction to the court decision occurring through coordination, in which the legislator issues a new act, considering the grounds presented by the Judiciary, it being understood that such a hypothesis does not necessarily mean the legislator's consent to the decision handed down, but an attempt to adapt the legislation in order to adopt legal discipline similar to that which was rejected by the court, without incurring the defects that would have been recognized by the Judiciary.

The objective of this paper is to examine the hypotheses of interaction between the Legislative and Judicial branches that have led, in recent years, to the development of tax issues related to ICMS, especially with regard to the provisions of LC No. 87/1996 (Kandir Law), which establishes general rules regarding the state tax. As will be indicated, a significant portion of the modifications made to the aforementioned complementary law occurred in response by the National Congress to decisions adopted by the STF.

Such hypotheses confirm the existence of an authentic constitutional dialogue between the Legislative Branch and the Judicial Branch to regulate major issues related to ICMS. In Brazilian constitutional law, as highlighted by Brandão (2022, p. 394), the theme of constitutional dialogue is often included in debates about the limits of the exercise of the Judicial Branch in constitutional jurisdiction and the possible reactions of the Legislative Branch to judicial decisions, especially in situations involving the constitutional clauses enshrined in the Federal Constitution.

In tax matters, Oliveira (2020, p. 90) highlights that, in addition to the hypotheses of legislative corrections of case law, which manifest situations revealing constitutional dialogue in tax law, there are hypotheses in which, given the consecration of jurisprudential understanding on constitutional matters, the Legislative Branch can accept the judicial interpretation through constitutional amendments or changes to infra-constitutional normative statements.

As can be concluded from the examples referenced below, the current ICMS discipline in Brazil is the result, in important matters, of the constant interaction between decisions of the Judiciary in terms of constitutionality control and the actions of the derived constituent and the complementary legislator.

2. EC n. 33/2001

The STF, when ruling on RE 203,075 (DJ 10/29/1999), established the understanding that art. 155, § 2º, IX, a, of the CF did not authorize the levy of ICMS on the importation of goods carried out by an individual. The prevailing thesis was that the provision would be directed only to individuals who are habitually engaged in commerce, and, therefore, would be inapplicable to individuals and non-taxpayers of ICMS, who would not engage in acts of circulation of goods. Furthermore, requiring ICMS in the event of importation by an individual or non-taxpayer would make it impossible, according to the STF, to apply the constitutional principle of non-cumulativeness.

Constitutional Amendment No. 33/2001, seeking to regulate the issue in a manner different from that recommended by the STF, changed the wording of the provision under review to establish that the ICMS will be levied on the entry of goods or merchandise imported from abroad by an individual or legal entity, even if they are not regular taxpayers of the tax, whatever their purpose. For Torres (2007, p. 319), the hypothesis of legislative correction of the case law was justifiable, considering the prevalence of the country of destination principle in the taxation of foreign trade, so that the incidence of ICMS on imports maintains an equalizing function and is linked to the last stage of the

international circulation of the merchandise, regardless of the person who is the recipient of the goods.

The acceptance, by the STF, of the legislative correction of the case law made by EC n. 33/2001 was admitted during the judgment of the general repercussion in RE 439.796 (DJ 17/3/2014), with the establishment of the thesis on Theme 171: "After Constitutional Amendment n. 33/2001, the incidence of ICMS on import transactions carried out by an individual or legal entity that is not habitually engaged in trade or the provision of services is constitutional" (Brazil, 2014b).

In the same judgment, it was decided that the validity of the ICMS charge, in the case brought by Constitutional Amendment No. 33/2001, would depend on the enactment of a state law subsequent to the modification of LC No. 114/2002, which adapted the Kandir Law to the terms of Constitutional Amendment No. 33/2001. This observation was of outstanding relevance, since several states did not wait for the modification of the Kandir Law by Constitutional Amendment No. 114/2002 and modified their local laws immediately after Constitutional Amendment No. 33/2001, enacted on December 11, 2001. Thus, in several situations, at the time of the modification of the state laws, Constitutional Amendment No. 114, of December 16, 2002, which adapted the Kandir Law to Constitutional Amendment No. 33/2001, had not yet been enacted. Therefore, several lawsuits were filed with the thesis that the state laws were born with a defect of unconstitutionality due to their incompatibility with the complementary law of general ICMS rules in force at the time of their enactment, and that such defect could not have been validated with the subsequent edition of LC No. 114/2002.

However, in the judgment of RE 917,950 (DJ 5/12/2017), the Second Panel of the STF considered that State Law No. 11,001/2001, of the state of São Paulo, enacted before LC No. 114/2002, would remain with its effectiveness suspended until the enactment of LC No. 114/2002, which modified the Kandir Law, producing effects only after the enactment of the aforementioned complementary law in 2002. In the case in question, it was understood that the states could have exercised the authority of art. 24, § 3, of the CF, which allows the enactment of a state law in the absence of a federal law of general standards.

After divergent decisions by the First and Second Panels, the matter returned to the consideration of the Full Court of the STF in 2020, in the judgment of General Repercussion Theme 1,094. At the time, although reinforcing the thesis of the constitutionality of the incidence of ICMS on import transactions carried out by non-taxpaying individuals or legal entities only after Constitutional Amendment No. 33/2001, the court admitted the validity of state laws enacted after Constitutional Amendment No. 33/2001 and before LC No. 114/2002, with effects only after the validity of LC No. 114/2002, according to the following thesis:

> Topic 1.094 I – After Constitutional Amendment 33/2001, the incidence of ICMS on import transactions carried out by an individual or legal entity that is not habitually engaged in trade or the provision of services is constitutional, and such taxation must be provided for in a federal complementary law; II – State laws enacted after Constitutional Amendment 33/2001 and before the entry into force of Complementary Law 114/2002, with the purpose of imposing ICMS on said transaction, are valid, but produce effects only as of the validity of LC 114/2002. (Brazil, 2020b)

As can be seen, the matter relating to the incidence of ICMS on imports, in cases involving individuals and non-taxpayers of the state tax, was only resolved after a long history of interactions between the Legislative Branch and the Judicial Branch, which involved the publication of a constitutional amendment, a complementary law and two decisions adopted by the STF in terms of general repercussion.

3. LC n. 204/2023

Under the terms of art. 146, III, a, of the Federal Constitution, it is the responsibility of the federal Legislative Branch to issue general rules on tax legislation, especially regarding the definition of taxes and their types, as well as, in relation to the taxes specified in the Federal Constitution, the respective taxable events, calculation bases and taxpayers. In exercising this function, the supplementary legislator may adopt options that are questioned in light of the material limits to the power to tax enshrined in the Federal Constitution. In such a scenario, the Judicial Branch may be called upon to, in the exercise of constitutional jurisdiction, verify the compatibility of the option adopted by the supplementary legislator with the Federal Constitution.

In relation to the ICMS taxable event, this situation was verified. Part of the doctrine, such as Torres (2007, p. 244) and Costa (1978, p. 93), considered that the incidence of ICMS would be characterized if a relevant event occurred in the evolution of the merchandise in the economic chain towards consumption, even if there was no legal transfer of ownership of the merchandise in the transaction, thus consecrating the so-called "economic circulation thesis".

The Kandir Law, in its original wording, clearly opted for the economic circulation theory, considering that the taxable event occurred upon the departure of the goods from the taxpayer's establishment, even if to another establishment of the same owner (art. 12, I). However, case law has traditionally adopted the legal circulation theory, recognizing that there is no incidence of state tax on the transfer of goods between establishments of the same owner, as expressed by the Superior Court of Justice in Summary 166, as well as when judging Repetitive Appeal Topic 259 (REsp 1.125.133/SP, DJe 10/9/2010).

The STF also ended up consecrating the thesis of legal circulation for the configuration of the ICMS taxable event. This was its decision during the trial of General Repercussion Theme 297, which defined the non-incidence of ICMS on the entry of goods through international leasing, except in the case of a purchase option (RE 540,829, DJ 11/18/2014). Along the same lines, the decision was adopted in General Repercussion Theme 1,099 (ARE 1,255,885 RG, DJ 9/15/2020).

However, although practically unanimous in case law, the thesis of legal circulation encountered much resistance in state treasuries, especially due to the circumstance that it was not supported by the text of the Kandir Law. Thus, in order for taxpayers to be able to question the collection of ICMS in transactions involving the circulation of goods between establishments of the same owner, it was necessary to propose legal measures.

In such a scenario, ADC 49 was filed in 2017 by the governor of the state of Rio Grande do Norte. The action aimed to declare the constitutionality of art. 12, I, of the Kandir Law, which was not being observed by case law. On April 19, 2021, the Plenary of the STF unanimously dismissed the request made in ADC 49, declaring the unconstitutionality of arts. 11, § 3º, II, 12, I, in the section "even if for another establishment of the same owner", and 13, § 4º, of the Kandir Law.

Although the decision adopted in ADC 49 merely ratified an already settled case law understanding, there was the peculiarity of having been said decision adopted in the context of abstract review of constitutionality. Thus, under the terms of art. 102, § 2, of the Federal Constitution, the decision should produce "effectiveness against all and binding effect, in relation to the other bodies of the Judiciary and the direct and indirect public administration, at the federal, state and municipal levels" (Brasil, [2024]). Therefore, even the bodies of the Executive Branch, at the state level, would be mandatorily subject to the decision adopted by the STF, despite the fact that state laws mostly follow

the terms of the Kandir Law on the subject, considered unconstitutional by the STF.

On the other hand, considering the constitutional principle of non-cumulativeness, of immense importance in ICMS, especially in relation to interstate transactions, the incidence of the tax on transactions between establishments with the same ownership ended up being accepted by the taxpayer. If ICMS is deducted at the exit, the right to tax credit is ensured in the destination establishment, preserving the non-cumulativeness of the tax. Therefore, the normative statement of art. 12, I, of the Kandir Law, in its original wording, which was considered unconstitutional by the STF, did not have the sole function of delimiting the ICMS taxable event, but also of ensuring full compliance with the constitutional principle of non-cumulativeness.

Therefore, considering the STF's decision in ADC 49, the federative units could understand that the appropriation of tax credits would be prohibited, or, even, that the taxpayer should promote the cancellation of the credit related to previous transactions, by force of art. 155, § 2º, II, of the CF. In interstate transfers, the federative unit of destination of the goods could deny the right to the credit, even giving rise to a new type of tax war, which would cause situations of serious legal uncertainty, as highlighted by Oliveira (2024, p. 7) and Carneiro and Machado (2021, p. 84).

In this scenario, the STF, in the judgment of the declaratory appeal filed in ADC 49, accepted the request to modulate the effects of the declaration of unconstitutionality. The vote of the rapporteur, Justice Edson Fachin, prevailed, indicating that the decision would be effective as of the 2024 fiscal year, with the exception of the administrative and judicial proceedings pending completion until the date of publication of the minutes of the judgment of the decision on the merits. There was also the reservation that, if the deadline expired without the states regulating the transfer of ICMS credits between establishments with the same owner, the right of taxpayers to transfer such credits would be recognized. Claiming the need to regulate the effects of ADC 49, the Tax Policy Council (Confaz) issued ICMS Agreement 178/2023.

However, the scenario of legal uncertainty in this matter ended up persisting, considering the lack of adequacy of the provisions of the Kandir Law with the parameters adopted in the STF decision and the uncertainty regarding the need to modify the state laws that govern the ICMS. The fact is that, only with the enactment of LC No. 204/2023, which modified the Kandir Law, the effects of ADC 49 could be coordinated by the Legislative Branch, which established more explicit rules regarding transactions involving establishments of the same owner and the discipline of credits.

Art. 12, § 4, of the Kandir Law, with the new wording determined by LC No. 204/2023, confirmed the non-incidence of the tax on the departure of goods from one establishment to another with the same ownership, maintaining the credit related to previous transactions and services in favor of the taxpayer, including in the case of interstate transfers in which the credits will be ensured: a) by the destination federative unit, through credit transfer, limited to the percentages established under the terms of item IV of § 2 of art. 155 of the CF, applied to the value attributed to the transfer transaction carried out; b) by the federative unit of origin, in the event of a positive difference between the credits pertinent to previous transactions and services and that transferred in the form of the previous hypothesis.

Paragraph 5 of art. 12 of the Kandir Law, included by LC No. 204/2023, was initially vetoed, but the National Congress ended up rejecting the veto, and the aforementioned normative statement was enacted. According to the provision, at the taxpayer's option, as an alternative to the provisions of paragraph 4 of art. 12, the transfer of goods to an establishment belonging to the same owner may be equivalent to a transaction subject to the occurrence of the taxable event, in which case the

following will be observed: a) in domestic transactions, the rates established by law; b) in interstate transactions, the rates set under the terms of item IV of paragraph 2 of art. 155 of the CF.

Thus, the publication of LC No. 204/2023, which modified the Kandir Law, was fundamental so that the consequences of the STF's judgment in ADC 49 could be coordinated in a uniform manner, with application to all state federative units, which can promote the adaptation of their laws based on better defined parameters, a circumstance that should contribute significantly to the reduction of legal demands involving the topic.

4. LC n. 190/2022

In its original wording, the Federal Constitution established that ICMS was due in full to the state of origin of the sales transaction made to the end consumer located in another state, when the recipient was not an ICMS taxpayer (art. 155, § 2, VII). In 1988, when the provision was enacted, it was unimaginable that electronic commerce of goods would represent such a large volume. Considering that remote sales companies are mostly established in the country's major economic centers, the other states of the federation, where consumers were located, complained that the rule would produce tax injustice, as it would deepen the concentration of tax revenue from electronic commerce in a few states of the federation.

In 2011, nineteen states approved Confaz Protocol 21, ensuring that the state of destination of the goods receives a share of the ICMS revenue. When called upon to rule on the matter, the STF ruled, in the judgment of ADI 4628 (DJ 11/24/2014), that Confaz Protocol 21 was unconstitutional, declaring the manifest conflict between the protocol rules and the Federal Constitution. It is interesting to note that, in the vote of the rapporteur minister, Luiz Fux, there was reference to the circumstance that, even if there were an allegation of the existence of a scenario of regional inequalities, due to the application of art. 155 § 2º, VII, of the Federal Constitution, the correction of such distortions could only emerge through the enactment of a constitutional amendment. The minister also highlighted that at the time, proposals for amendments to the Constitution on the subject were being processed in the National Congress:

> The existence of several proposed constitutional amendments aimed at resolving this fiscal war hypothesis, PEC No. 56/2011, PEC No. 103/2011 and PEC No. 113/2011, currently being processed by the National Congress, corroborates the unconstitutionality of the aforementioned diploma. (Brazil, 2014a, p. 29)

With the enactment of Constitutional Amendment No. 87/2015, it was established that the state of destination of the goods would be responsible for the tax corresponding to the difference between the internal tax rate of the recipient state and the interstate tax rate (Difal), even if the recipient was not an ICMS taxpayer. In the same year, Confaz issued the ICMS Agreement 93/2015, which sought to regulate the constitutional innovation.

However, taking into account the constitutional reserve of complementary law for the discipline of general rules on the tax (art. 146, III, CF), as well as the fact that the Kandir Law did not undergo adaptations for the collection of the differential of rates in the new system, several lawsuits were filed, questioning the constitutionality of ICMS Agreement 93/2015.

In 2021, in the judgment of ADI 5,469 and Theme of General Repercussion 1,093, the thesis of the unconstitutionality of the provision of the differential in rates prevailed in the STF, without the enactment of the complementary law of general rules on the matter. At the same time, the modulation

of the effects of the decision was approved, so that it would only produce effects as of 2022, except for ongoing legal actions on the matter.

Only with the enactment of LC No. 190/2022 was the regulatory gap that had been pointed out by the STF filled, in order to adapt the provisions of the Kandir Law to the terms introduced into the constitutional discipline of the subject by EC No. 87/2015, enabling the collection of the differential rate of the state tax.

In this regard, the Kandir Law included § 2 of art. 4, establishing that the following would be taxpayers of the tax on transactions or services that provide goods, assets and services to end consumers domiciled or established in another state, in relation to the difference between the internal tax rate of the destination state and the interstate tax rate: a) the recipient of the goods, assets or services, in the event of a taxpayer of the tax; and b) the sender of the goods or assets or the service provider, in the event that the recipient is not a taxpayer of the tax.

However, although the complementary bill was approved by the National Congress in 2021, the law was only published in 2022. Considering that art. 3 of LC No. 190/2022 established that the production of effects of the law would observe the provisions of art. 150, III, c, of c, CF, several taxpayers argued that the collection of Difal, in compliance with the principle of prior notice, would only be applicable as of the 2023 fiscal year. The matter was decided by the STF in the judgment of ADI 7,066 (DJ 6/5/2024). The thesis prevailed that the institution of the rate differential would not correspond to the institution or increase of tax, so that it would not attract the incidence of the rules related to tax prior notice.

5. LC n. 176/2020

Regarding ICMS, the original wording of the Federal Constitution established that it would not be levied on industrialized products, excluding semi-finished products as defined in a complementary law. The Kandir Law extended the immunity to all primary and semi-finished products, which was ratified by Constitutional Amendment No. 42/2003, which recognized broad ICMS immunity. In order to compensate the states for the loss of ICMS revenue resulting from the broad exemption from exports, Constitutional Amendment No. 42/2003 added art. 91 to the ADCT, with provision for the enactment of a complementary law so that the Union could compensate for these losses.

In the judgment of Direct Action of Unconstitutionality by Omission 25, the STF recognized the Union's omission in issuing the complementary law, having subsequently approved an agreement made between the Union, states and the Federal District, with forwarding to the National Congress for the appropriate deliberations:

> Points of order in the direct action of unconstitutionality due to omission. 2. Complementary Law provided for in art. 91 of the ADCT. 3. Successive requests for extensions of deadlines made by the Union (first request, in 2.2019) and by most States (second request, in 2.2020). 4. Supervening facts that justify the relaxation of the deadline set in the judgment on the merits. Technical-operational circumstances. Granting of the requests in part. Precedents. 5. Referendum of decisions. 6. Agreement reached between the Union and all State and District Entities. Approval. 7. Forwarding to the National Congress for appropriate deliberations. (Brazil, 2020a)

With the approval of the agreement signed in the ADO 25 proceedings, LC No. 176/2020 was enacted, providing for the delivery by the Union to the states, Federal District and municipalities, in the period from 2020 to 2037, of mandatory transfers, in order to comply with the provisions of art. 91, § 2, of the ADCT.

6. LC n. 194/2022

When deciding on General Repercussion Theme 745 (RE 714,139, DJ 3/15/2022), the STF considered that, once the selectivity technique in ICMS has been adopted by the state legislator, the adoption of rates on operations with electricity and telecommunications services at a higher level than that of operations in general is unconstitutional.

LC No. 194/2022, which came into force on the date of its publication, included art. 32-A in the Kandir Law, prohibiting states from setting rates on operations related to fuels, natural gas, electricity, communications and public transportation at a higher level than that of operations in general:

> Art. 32-A. Transactions related to fuels, natural gas, electricity, communications and public transportation, for the purposes of levying the tax referred to in this Complementary Law, are considered transactions involving essential and indispensable goods and services, which cannot be treated as superfluous.
>
> § 1º For the purposes of the provisions of this article:
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> I – it is prohibited to set rates on the transactions referred to in the caput of this article at a level higher than that of transactions in general, considering the essential nature of the goods and services;
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> II – the competent federative entity is authorized to apply reduced rates in relation to the goods referred to in the caput of this article, as a way of benefiting consumers in general; and [...] (Brazil, 2022a)

It is worth noting that, in General Repercussion Theme 745, the STF assessed the selectivity of tax rates in relation to transactions involving electricity and communications. However, inspired by the STF decision, LC No. 194/2022 expanded the list of essential goods and services to include transactions involving fuels, natural gas and public transportation.

In the justification of Complementary Bill (PLP) No. 18/2022 (deputy Danilo Forte – PSDB/CE), which gave rise to LC No. 194/2022, there was express reference to the decision by the STF in RE 714,139:

> Thus, considering that energy, fuels, communications and public transport are used by various citizens and legal entities, their excessive taxation, through the application of ICMS rates higher than the ordinary ones, flagrantly violates the Federal Constitution.
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> In fact, according to the aforementioned tax principle, it would be up to the competent federative entity to define, in addition to the general rate established for the tax, reduced rates aimed at achieving tax justice – reducing social inequalities, eradicating poverty, among others –, as well as increased rates for superfluous goods in general.
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> Therefore, there is no doubt that the definition, in relation to electricity, fuels, communications and public transport, of rates similar to those levied on superfluous goods violates the principles of tax equality and ICMS selectivity based on the essentiality of the taxed goods and services (art. 150, item II, and art. 155, § 2, item III, of the Federal Constitution), to the extent that the criterion for graduating taxation levels imposed by the constituent legislator has not been observed.
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> In this sense, we clarify that, for the reasons set out above, the Supreme Federal Court recently recognized, in the judgment of Extraordinary Appeal RE 714.139/SC, the taxpayer's right to collect ICMS on electricity and telecommunications services, at the ordinary rate of 17%, removing the higher rate that was levied on such goods and services.
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> For these reasons, we present this bill, which aims to make the constitutional command of selectivity more effective, adopting the Supreme Court's understanding on the subject. (Brazil, 2022b, p. 2-3)

Shortly before the enactment of LC No. 194/2022, LC No. 192/2022 had already been enacted, which established criteria for the so-called "single-phase taxation" of fuels by ICMS, establishing the criterion for taxation with ad rem rates, so that, as a rule, with regard to the fuels indicated in the law, taxation would not occur based on the application of a rate in relation to the price of the merchandise, but rather per unit of measurement.

Due to LC No. 192/2022 and LC No. 194/2022, the STF ended up being prompted to decide, in a short period of time, regarding the constitutionality of the legislative measures adopted by the National Congress. There was the filing of ADI 7.191 by some state governors, questioning the constitutionality of provisions of LC No. 192/2022, especially in light of the autonomy of subnational entities ensured by Brazilian fiscal federalism. There was also the filing of ADPF 984 by the President of the Republic, with the objective of challenging state laws that set ICMS rates levied on fuels at levels higher than the general rates. In addition, there was the filing, by some state governors, of ADI 7.195, challenging provisions of LC No. 194/2022, under the main justification of violation of the autonomy of the states to regulate the ICMS.

Within the scope of the STF, there was participation of the federative entities involved in the constitutional controversies explained in ADI 7.191 and ADPF 984, reported by Justice Gilmar Mendes, in the search for a consensual solution for the federative issues addressed in the lawsuits. In conclusion, the Court, carrying out the joint judgment of the two lawsuits, unanimously approved the agreement signed between the Union and all state and district entities to be forwarded to the National Congress for the appropriate measures to improve the legislation of Complementary Laws No. 192/2022 and No. 194/2022, with the Union being responsible for presenting the corresponding PLP, for the purpose of complying with the agreement in the two approvals of the agreements. In this line, the summary issued in ADI 7.191 deals with the following:

> Agreement in Direct Action of Unconstitutionality and Allegation of Non-Compliance with Fundamental Precept. 2. Discussion on the constitutionality of Complementary Laws 192/2022 and 194/2022, in view of art. 155, §§ 2nd, 4th, IV, and 5th, of the Federal Constitution, among others. 3. ADI 7.191. Single-phase, uniformity and ad rem rate of ICMS on fuels (art. 3, items V, a, b and c; art. 6, §§ 4th and 5th; art. 7; art. 8, all from Complementary Law 192/2022). 4. ADPF 984. Debate on the essentiality of fuels, electricity, telecommunications, and transportation for the purposes of collecting ICMS, in the state and district laws of the 27 (twenty-seven) federative units. 5. Unfolding of the conciliation/mediation approved by this Court on 12/15/2022, in this ADPF 984 Agreement, under my reporting, Plenary, E-DJ 12/19/2022. Working group among the federative entities, as a self-compositional negotiation technique, formed in the proceedings. Proposal for a solution to the federative impasse. 6. Agreement formally ratified by the Union and by all state and district entities. Judicial approval, with explanations and conditions. 7. Forwarding to the National Congress for appropriate deliberations. 8. Monitoring of compliance by this Court. (Brazil, 2023b)

In his vote, Minister Gilmar Mendes highlighted that the agreement reached during the processing of the indicated legal actions should be understood based on a "political-constitutional dialogue":

> Such a measure cannot be interpreted, in any way, as disrespect for the actions of the Legislative Branch, but as an understanding of the complementary bill to be sent by the Union, within a period of up to thirty days (in compliance with the two agreements in these proceedings), as a political -constitutional dialogue, built on a federative self-composition, approved by the Supreme Federal Court, which intends to return to the political arena the final solution, within the exact limits of what remained transacted and in accordance with the settled case law of this Court, when dealing with a subject that involves a constitutional legislative process.

> The political-legal agreement reached in the proceedings, approved unanimously by the federative entities, and now ratified by the Supreme Federal Court, in two concentrated control actions, now has erga omnes effectiveness and binding effect, in the exact terms set out therein, in an effort to provide legal certainty to all public agents, in the broad sense, involved in its consensus-building process and to taxpayers in general. (Brazil, 2023b)

In the National Congress, the Executive Branch presented PLP No. 136/2023, with the aim of giving materiality to the agreements signed within the scope of the constitutional actions in progress at the STF, as highlighted in the Explanatory Memorandum 00085/2023, from the Ministry of Finance:

> [...] 4. In view of this scenario, the Union, the states and the Federal District discussed, under the auspices of the Supreme Federal Court itself, the terms of a federative agreement aimed at resolving the impasse, in order to include all states and the Federal District and put an end to the legal discussion.
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> 5. Thus, this proposal was prepared, which aims to comply with the provisions of the Agreement signed between the Union and the states and the Federal District on March 31, 2023, within the scope of Direct Action of Unconstitutionality 7,191, approved by the Supreme Federal Court on June 2, 2023, which provides, in its Clause Four, that "the Executive Branch of the Union will forward, within thirty days from the approval of this Agreement, a Complementary Bill that will authorize the amendment to the debt refinancing contracts signed with the Union and will create a temporary transfer, under the terms of Clause Two, including observing the financial aspects and accounting records and tax statistics defined in the aforementioned Clause.
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> [...]
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> 8. I also include in this proposal for a Complementary Bill the fulfillment of the provisions of Clause One, Paragraph One of the Agreement signed between the Union, states and the Federal District and approved by the Plenary of the Supreme Federal Court, in the records of ADPF 984, on December 15, 2022, through which it is concluded that it is feasible to refine and make legislative progress on the rules put up for debate, taking into account the demands and expectations presented by the states and the Federal District. [...] (Brazil, 2023a)

After the processing of PLP No. 136/2023 in the Chamber of Deputies and the Federal Senate, LC No. 201/2023 was enacted, in order to specifically establish the compensation owed by the Union to the states and the Federal District under the terms of arts. 3 and 14 of LC No. 194/2022.

7. LC n. 157/2016

LC No. 157/2016, by modifying the list of services attached to LC No. 116/2003, regulated important cases of conflicts of jurisdiction involving ICMS and ISS.

Under the terms of art. 146, I, of the Federal Constitution, it is up to the complementary law to resolve conflicts of jurisdiction in tax matters. The conflict involving ICMS and ISS, in our tax system, has always been a difficult issue to resolve. This conflict has been severely exacerbated by the growth of the digitalization of the economy, which has made the boundary between the circulation of goods/communication services and services of any nature even more tenuous.

In defining the criteria necessary to resolve the conflict indicated, the role of the complementary legislator and the case law of the STF was fundamental. As Torres (2007, p. 368) highlights, since the ICMS and the ISS were separated in the text of the Federal Constitution, only the complementary law and the case-by-case work of the case law could lead to the closure of the constitutional concept of the two materialities of taxes, which reveals yet another clear hypothesis of necessary interaction between the Legislative Branch and the Judicial Branch in the improvement of the ICMS.

The STF itself, when examining hypotheses of conflicts of jurisdiction involving ICMS and ISS, also highlighted the relevance of the role of the complementary legislator in indicating objective criteria capable of resolving such conflicts, as occurred when judging the issue related to software taxation (ADI 5,659, DJ 20/5/2021).

The new wording of subitem 13.05 of the list of services attached to LC No. 116/2003, conferred by LC No. 157/2016, can be considered a clear hypothesis of incorporation of tax case law into the legal text, having been relevant to resolve a case of conflict of tax jurisdiction between ICMS and ISS.

In this case, the new wording of the legal provision indicated the incidence of the municipal tax on graphic composition, including the production of graphic prints, photocomposition, cliché, zincography, lithography and photolithography, except if intended for subsequent commercialization or industrialization, even if incorporated, in any way, into other goods that must be subject to subsequent circulation, such as leaflets, labels, tags, boxes, cartridges, packaging and technical and instruction manuals, when they will be subject to ICMS.

The new wording was introduced after significant controversy over the incidence of ISS or ICMS on graphic composition activities, including in relation to packaging, based on the interpretation of the term "graphic composition", indicated in subitem 13.05 of the list of services in LC No. 116/2003, in its original wording. In the STJ, the case law prevailed that ISS was only applicable to the aforementioned activity, considering the provision in the list of services, as understood in Summary 156.

However, state farms and taxpayers argued that the situation should be subject to ICMS when the production resulted in goods that would be used as inputs or packaging for goods that would be put into circulation, since, in such a situation, the incidence of ISS would be unreasonable, since the recipient of the graphic service would not be the final recipient of the activity in the production chain. Furthermore, the incidence of ISS, instead of ICMS, did not authorize the taxpayer to use the right to credit specific to the non-cumulative mechanism of the state tax.

The understanding that ICMS should be levied, under the terms indicated, was ultimately accepted by the STF, when judging the precautionary measure in ADI 4,389 (DJ 05/25/2011). At the time, an interpretation in accordance with the Constitution was given to subitem 13.05 of the list of LC No. 116/2003, to recognize that ISS would not be levied on manufacturing operations by order of packaging, intended for integration or direct use in a subsequent manufacturing process or circulation of goods, so that, provided the constitutional and legal requirements are met, ICMS would be levied in the situations indicated. These parameters of the court decision were clearly incorporated by the complementary legislator when issuing LC No. 157/2016 and when giving new wording to subitem 13.05 of the list of services attached to LC No. 116/2003.

The same LC No. 157/2016, by including, in the list of services of LC No. 116/2003, subitem 17.25, indicating as a generating fact of the ISS the insertion of texts, drawings and other advertising and publicity materials, also consisted of an undeniable attempt by the complementary legislator to seek the solution of yet another conflict involving the ICMS and the ISS.

When LC No. 116/2003 was enacted, subitem 17.07, which referred to services of "dissemination and dissemination of texts, drawings and other advertising and publicity materials, by any means", was vetoed. Given the absence of this activity in the list of services in the complementary law that establishes general rules for the ISS, several state treasuries argued that ICMS should be levied in the

hypothesis in question, by characterizing the activity as a communication service, a theory that was reinforced by ICMS Agreement No. 45/2014.

However, the aforementioned position, expressed by the state treasuries, was rejected by a significant portion of the tax doctrine, which concluded that there was no communication service subject to taxation in the case, as highlighted by Machado (1997, p. 39), Carrazza (2015, p. 261) and Ávila (2010, p. 164).

The inclusion of subitem 17.25 in the list of services attached to LC No. 116/2003, carried out by LC No. 157/2016, reinforced the thesis that ICMS is not levied in cases of advertising in any medium. Along these lines, the State Treasury of Santa Catarina, in Consultation 17/2018, considered that, after the enactment of LC No. 157/2016, the rental of outdoor space would not be subject to ICMS. The statement considered that, although there was well-founded doubt about the incidence of ICMS or ISS in the hypothesis considered, such discussion would have been overcome by the complementary legislator, in accordance with the rule of art. 146, I, of the CF.

However, the Attorney General's Office of the State of Rio de Janeiro (Opinion GUB 1/2017) concluded that the insertion of subitem 17.25 in the list of LC No. 116/2003 by LC No. 157/2016 was unconstitutional, as the activity would be characterized as a communication service, subject to ICMS. There was a recommendation to file a direct action of unconstitutionality by the state governor, which ended up occurring by ADI 6,034 (DJ 03/21/2022), which was dismissed, affirming the constitutionality of subitem 17.25. In other words, the STF agreed with the solution to the conflict of jurisdiction that was addressed by the complementary legislator.

8. Conclusion

Examples of interactions between the Judiciary and the Legislative Branches, involving controversial ICMS issues, reveal the existence of constant constitutional dialogue between the Branches, with the publication of constitutional amendments, complementary laws and judicial decisions.

In several situations, the simple judgment of the controversial matter by the STF, in the exercise of constitutional jurisdiction, was not sufficient to resolve the issue, requiring subsequent action by the supplementary legislator. On the other hand, in several cases, the action of the supplementary legislator ended up being complemented by the action of the constitutional jurisdiction exercised by the STF, reinforcing the notion that dialogue between the Powers is constant.

The activity of the Legislative Branch to promote changes in tax legislation, according to parameters outlined by the STF in constitutional jurisdiction, is of manifest relevance to ensure greater legal certainty for taxpayers and taxing entities, who will be able to plan their actions based on the normative acts in force, without the need to file lawsuits.

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