Anais – VIII Congresso Brasileiro
de Direito Tributário Internacional

Novos Paradigmas da Tributação Internacional e a Covid-19

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INSTITUTO BRASILEIRO
DE DIREITO TRIBUTÁRIO
Mestrado Profissional em Direito Tributário
Internacional e Desenvolvimento

FACULDADE DE DIREITO
UNIVERSIDADE DE SÃO PAULO
Departamento de Direito
Econômico, Financeiro e Tributário

São Paulo – 2020

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Dados Internacionais de Catalogação na Publicação (CIP)
(Câmara Brasileira do Livro, SP, Brasil)

Congresso Brasileiro de Direito Tributário Internacional (8 : 2020 : São Paulo, SP)

C759 Anais [recurso eletrônico] / 8º Congresso Brasileiro de Direito Tributário Internacional : novos paradigmas da tributação internacional e a COVID-19, 16, 17, 18 de setembro de 2020 em São Paulo, SP. Coordenadores: Luís Eduardo Schoueri, Luís Flávio Neto, Rodrigo Maito da Silveira – São Paulo, IBDT, 2020.

502 p.; 23 cm.

ISBN 978-65-86252-01-9
ISBN e-PUB 978-65-86252-02-6

1. Direito Tributário Internacional 2. COVID-19 3. Evento 4. Brasil 5. Instituto Brasileiro de Direito Tributário I. Instituto Brasileiro de Direito Tributário II. Luís Eduardo Schoueri III. Luís Flávio Neto IV. Rodrigo Maito da Silveira V. IBDT VI. Título.

DORIS 341.39105

Índice para catálogo sistemático:

1. Direito Tributário Internacional : Brasil
2. Tributação Internacional : Brasil
3. COVID-19

Revisão: Carolina Massanhi / Lilian Mendes Moreira. *Editoração*: Nelson Mitsuhashi
Impressão e acabamento: Edições Loyola

The Exportation of Services from Brazil: Different Taxes, Same Justification and the Need for Consistency

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Abstract
The exportation of services in Brazil is exempt from the local tax on services and from the social contributions (PIS/Cofins). However, the criteria for the characterization of an "exportation" are quite different. This paper argues that the justification for such exemption is the destination principle. Thus, there must be coherence in the system and consistence between the criteria for determining what an exportation of services is. This is a claim of the Equality Principle.
Keywords: international trade, services, exportation, justification, destination principle, equality principle.

1. Introduction

The importation of services in Brazil is taxed under two social contributions, usually jointly mentioned as "PIS/Cofins" and under the local tax on services ("ISS" – Imposto sobre Serviços). On the other side, the exportation of services is exempt from both PIS/Cofins and the ISS. This last tax is assigned to municipalities by the Constitution and the mentioned social contributions are assigned to the federal level of government.

Even though they are assigned to different levels of tax power (local and federal) they have very similar taxable events. One could even say that economically speaking they are levied on the same base. The local tax has "rendering services" as its taxable event and its tax assessment base is the service's price. The federal social contributions have the importation itself as the taxable event, defined in terms of time by the payment of the fee due to the service[1]. Its tax assessment base is such fee (gross, therefore, before income tax withholding) plus the local tax on services and the own social contributions.

So, except for the gross-up on the price of the service in case of the social contributions, both local and federal charges are levied on the fee paid to the foreign service provider. Both were not charged until some years ago and the new

[1] Such contributions have at least two different taxable events: 1) revenue, for the sake of domestic transactions; 2) importation of services and goods, concerning international transactions. This essay focuses on the second taxable event, since it deals with the problem of the definition of "services' exportation".

tax incidence was clearly justified on the destination principle[2], but one can also argue that neutrality and the equality principle justify such rules. As a matter of fact, if services' providers in Brazil are subject to both taxes (at origin and destination), their foreign competitors would be in great advantage before them, besides that they would not be treated in accordance to their ability to pay in comparison to such competitors (in case one considers that such taxes are levied on the firm's ability to pay).

Besides that, as a general principle of international trade and fiscal policy, States usually do not tax their exportations, assuming that their services and goods would be taxed in their destination. Thus, if they were taxed at origin, such exporters would not be in conditions to compete with local providers (in the Estate of Destination), since the local players would be subject only to the State of Destination's taxes and the foreigners would be subject to both the State of Destination's and the State of Origin Taxes[3].

Coherently with the taxation of service importations, Brazil exempts the exportation of services. If Brazilian services' providers were taxed at origin and at their destination, they would be taxed twice, while the local providers would be taxed only by their own States, the Destination of Brazilian exported services. However, since services in Brazil are subject to federal and local taxation, problems arise in identifying an "exportation" of services.

Differently from what occurs to goods and merchandise, services are not tangible nor subject to customs clearance or any other procedure that can characterize its "entrance" in a market or economic order and the same difficulties arise concerning its exit from a market or economic order. Thus, it is quite expected that legislators have some hard work on defining an "exportation of services" for the sake of exempting it.

This essay does not discuss the correctness of any criteria for the definition of "service exportation", rather the existence of very different criteria in the federal and local tax legislations. The core of the case is a constitutional claim for internal consistency on defining services' exportation derived from the equality principle.

2. The equality principle as a claim for justification

There is some consensus about the formal nature of the equality principle. A very repeated formula abstracts its requirement for everybody who are equal being treated equally and everyone who is different being treated differently, in

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[2] SCHOUERI, Luís Eduardo. O ISS sobre a importação de serviços do exterior. *Revista Dialética de Direito Tributário* v. 100, n. 39, 2004, p. 45.

[3] SCHOUERI, Luís Eduardo. O ISS sobre a importação de serviços do exterior. *Revista Dialética de Direito Tributário* v. 100, n. 39, 2004, p. 40-41.

proportion to such differences. This sets a formula, but not its factors. It is a formal norm, because it does not contain itself the criteria for determining who is equal and who is different[4].

There are many explanations for it, but here one of them will be focused: no one is absolutely equal to other one. Thus, equality is relative. It is even better defined if one claims for equal treatment for people or facts in *equivalent* (not equal) situations[5]. Because people and facts can be equivalent one to another concerning one criterion and completely different one from another concerning another criterion[6]. Mickey can be equivalent to Donald concerning their gender, but they can be completely different concerning their intelligence.

Thus, as a formal principle, equality needs substantial criteria for defining who is equivalent and who is not[7]. One can only search for comparison patterns having in mind what such rules are set for[8]. For example, depending on what ends one have in mind comparing Mickey and Donald according to their gender can be suitable and according to their intelligence not. This is so because also "suitable" is a relative predicate. Something is only suitable to an end. There is no suitability to everything.

Depending on the ends of a rule or a legal regime, some criteria can be suitable and others not. However, searching for the ends of a rule or regime can lead to endless discussions about what exactly they are, what exactly they can be and how to assess them[9]. Thus, this essay assumes that ends are not the objectives of a government or the intentions of legislators, rather the justifications that can be attributed. Any criterion for differentiating taxpayers or taxable events needs to be justified as a claim of the principle of equality[10].

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4 ÁVILA, Humberto. *Teoria da igualdade tributária*. São Paulo: Malheiros, 2008, p. 135.

5 TIPKE, Klaus. *Die Steuerrechtsordnung. Band I*. 2 Auf. Köln: Dr. Otto Schmidt, 2000, p. 313-312.

6 SCHOUERI, Luís Eduardo. *Normas tributárias indutoras e intervenção econômica*. Rio de Janeiro: Forense, 2005, p. 273-274. ÁVILA, Humberto. *Teoria da igualdade tributária*. São Paulo: Malheiros, 2008, p. 40-41.

7 TIPKE, Klaus. *Die Steuerrechtsordnung. Band I*. 2 Auf. Köln: Dr. Otto Schmidt, 2000, p. 316-317.

8 RODI, Michael. *Die Rechtfertigung von Steuer als Verfassungsproblem (Dargestellt am Beispiel der Gewerbesteuer)*. München: C. H. Beck, 1994, p. 40-41, 75-76. SCHOUERI, Luís Eduardo. *Normas tributárias indutoras e intervenção econômica*. Rio de Janeiro: Forense, 2005, p. 273-274. ÁVILA, Humberto. *Teoria da igualdade tributária*. São Paulo: Malheiros, 2008, p. 40-41.

9 VOGEL, Klaus. Der Abschichtung von Rechtsfolgen im Steuerrecht. Lastenausteilungs-, Lenkungs- und Vereinfachungsnormen und die ihnen zurechnenden Steuerfolgen: ein Beitrag zur Methodelehre des Steuerrechts. *StuW* Nr. 2 (1977/97), p. 103-107.
VIEIRA DA ROCHA, Paulo Victor. *Teoria dos direitos fundamentais em matéria tributária*: restrições a direitos do contribuinte e proporcionalidade. São Paulo: Quartier Latin, 2017, p. 129-143.

10 TIPKE, Klaus. *Die Steuerrechtsordnung. Band I*. 2 Auf. Köln: Dr. Otto Schmidt, 2000, p. 326. VIEIRA DA ROCHA, Paulo Victor. *Teoria dos direitos fundamentais em matéria tributária*: restrições a direitos do contribuinte e proporcionalidade. São Paulo: Quartier Latin, 2017, p. 119-122.

One can only say two taxpayers are in equivalent situations and thus need to be treated equally if the criteria for assessing such equivalence is defined. So the search for equality is a search for justifications[11]. The justification of taxes was attributed to different substantial principles in their History, but currently the ability to pay principle is not only assumed as the primary criteria for comparing taxpayers, but in some cases explicitly prescribed by some Constitutional orders, like in Brazil, Italy and Spain[12].

Many other criteria can "concur" with taxpayers' ability to pay in order to define who must be equally or differently treated by tax legislations. The only conditions for such parallel criteria being adopted by legislators is that they are constitutionally justified, for example for promoting market fails corrections, environmental protection etc.[13]. The destination principle is somehow a claim of the global free trade of goods and services and a claim of the neutrality principle (import neutrality in this case)[14].

One should note that the application of other comparison criteria among taxpayers or taxable events implies a mitigation of the ability to pay principle[15]. Since two subjects are compared and their treatment is differentiated according to their ability to pay, but also according to another criterion, the first one gets somehow mitigated. An example can help understanding this.

Suppose two companies are first compared only according to their ability to pay and they both have a hundred thousand dollars of profits. They would be in equivalent situations concerning ability to pay and thus must pay the same amount of corporate tax, which can be assumed as fifteen thousand dollars, under a hypothetic fifteen percent rate.

In case a new rule sets forth a ten percent rate of corporate tax for companies which accomplish with certain environmental requirements, they won't be subject to the same taxes. One of them will be liable to a fifteen thousand dollars corporate tax, while the other will be subject to a ten thousand dollars corporate tax, even though they have the same one hundred thousand dollars profit. They will still be differentiated according to their ability to pay, but in a "mitigated way", since such criteria will be concurring with the environmental criteria, since in

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11 SCHOUERI, Luís Eduardo. *Normas tributárias indutoras e intervenção econômica*. Rio de Janeiro: Forense, 2005, p. 228-330. VIEIRA DA ROCHA, Paulo Victor. *Teoria dos direitos fundamentais em matéria tributária*: restrições a direitos do contribuinte e proporcionalidade. São Paulo: Quartier Latin, 2017, p. 119-122.

12 VIEIRA DA ROCHA, Paulo Victor. *Teoria dos direitos fundamentais em matéria tributária*: restrições a direitos do contribuinte e proporcionalidade. São Paulo: Quartier Latin, 2017, p. 175-176.

13 REIMER, Ekkehart. Die sieben Stufen der Steuerrechtfertigung. In: GEHLEN, Boris; SCHORKOPF, Frank (Hrgs). *Demokratie und Wirtschatft*. Tübingen: Mohr Siebeck, 2013, p. 113-141 (133).

14 SCHOUERI, Luís Eduardo. O ISS sobre a importação de serviços do exterior. *Revista Dialética de Direito Tributário* v. 100, n. 39, 2004, p. 40-41.

15 VIEIRA DA ROCHA, Paulo Victor. *Teoria dos direitos fundamentais em matéria tributária*: restrições a direitos do contribuinte e proporcionalidade. São Paulo: Quartier Latin, 2017, p. 173-183.

terms of vertical equality, the "shares" of equality will be narrower for they are defined by more criteria[16].

In terms of taxing the revenues from rendering services or the price of services, two companies that bill five thousand dollars for rendering a certain service, are in equivalent situations, specially if they provide exactly the same service. Of course, the ability to pay can play a role on their comparison in case one exports the service and the other does not, since there is here a potential economic double taxation arising from both origin and destination taxation.

However, concerning the ability to pay these two taxpayers show to their origin State, they are in equivalent situation, since their State itself will be treating them equally and the inequality will arise from the other State's taxation combined. Neutrality is much more directly affected by such double taxation, since this is assessable by the origin State by itself.

This is so because of the general character of the destination principle and because it is majorly adopted by countries[17]. As a general principle of international trade and tax policy, it can be implemented by the origin State itself exempting the exported services. It will also be somehow violated by the origin State itself in case such State taxes this exportation. Ability to pay, however shall not be unilaterally implemented, since there is not symmetry between the States concerning this.

Thus, the exemption of services exportation is justified much more by neutrality then by equality itself and for the sake of neutrality it doesn't matter if the exemption or the taxation is under the federal or local rules. The principle of destination, as a claim of neutrality, is the justification for both local and federal exemptions. If equality imposes a search for justifications and justifications imply comparison criteria, the *same* justification must imply the *same* criteria, for both local and federal taxes.

One could argue that it is possible that two different comparison criteria promote the same end or justification. But this suitability must be demonstrated, otherwise the justification as an end will be promoted with no consistency, what means, with no equality, as it will be argued as follows.

3. The equality principle as a claim for consistency

Besides claiming for substantial comparison criteria derived from the justification (*Rechtfertigung*) of each rule, the equality principle claims for consistency,

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[16] AMARAL, Antônio Carlos Rodrigues do. *Imposto sobre o valor agregado – IVA. Value Added Tax – VAT.* Bilingual version. São Paulo: Rumo, 1995, p. 167. BORBA, Carlos Alberto. *El impuesto al valor agregado – IVA.* Curso básico. Montevideo: FCU, 2001, p. 86-87. SCHOUERI, Luís Eduardo. *Normas tributárias indutoras e intervenção econômica.* Rio de Janeiro: Forense, 2005, p. 281.

[17] SCHOUERI, Luís Eduardo. O ISS sobre a importação de serviços do exterior. *Revista Dialética de Direito Tributário* v. 100, n. 39, 2004, p. 40-42.

on the search for justification and on the adoption of criteria. These are not the same claims. They are very closely connected though. Thinking about taxation, from one side, each comparison criteria must be constitutionally justified. The only comparison criteria which is presumably valid is the taxpayer's ability to pay, since the main justification of tax rules is to share among the taxpayers the burden concerning the support the general expenses of a State. This is the so-called "burden-sharing function" (*Lastenausteilungsfunktion*) of tax rules[18].

So every criteria adopted in tax legislation which is not the ability to pay must be justified on the promotion or protection of a constitutional good, usually inserted in the Economic Order (like market-failure corrections). Thus, comparison criteria must be justified. Exporting services is a criterion for differentiating taxpayers and defining which of them are exempt. This is justified on import neutrality, what is derived from the generally adopted destination principle for international trade taxation.

Even though two service providers render the same service for the same price, one of them shall be exempt because his service is exported (and will be taxed at destination accordingly). They demonstrate the same ability to pay. They are in equivalent situations under the perspective of ability to pay. On the other side, they are not equivalent concerning the destination of their services. However, what are the proxies according to which an exportation is characterized is not an easy question.

One knows that an exportation is a valid criterion for differentiating taxpayers or their services. But one can have serious doubts about what defines an exportation. Because the substantial criteria of tax equality can have different elements or proxies[19]. For example, ability to pay can be measured by income, consumption or wealth. In a similar way, exportations can have many different evidences: the place where the service activities are performed, the place where the services are consumed, the place where the results of the service are useful, the place where the fee for the services come from and so on.

This essay does not intend to point out what should be (or should have been) the elements of the definition of exportation for the sake of local legislations about services tax and of the federal legislation about the social contributions on services' importations (PIS/Cofins). The core of the case here is that no matter which of them is correct – the local or the federal – they shall not be different, since the equality principle not only claims for justification of the comparison criteria but it also claims for coherence in the definition of such criteria.

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[18] VOGEL, Klaus. Der Abschichtung von Rechtsfolgen im Steuerrecht. Lastenausteilungs-, Lenkungs- und Vereinfachungsnormen und die ihnen zurechnenden Steuerfolgen: ein Beitrag zur Methodelehre des Steuerrechts. *StuW* Nr. 2 (1977/97), p. 107.

[19] ÁVILA, Humberto. *Teoria da igualdade tributária*. São Paulo: Malheiros, 2008, p. 47-63.

If the comparison criterion is only one – exportation, and if the justification for such criterion is only one – the destination principle, then the definition of the criterion must – at least in principle, be only one. There should be no two (very) different definitions of "exportation or services" on two different taxes, since the exportation is a comparison criterion justified on the same reason: the destination principle.

I am not sustaining that it is logically impossible that two different definitions of "exportation" implement both the destination principle, at least not in this essay. But there is a very intense reasoning burden against the adoption of two different definitions of the very same criterion. If the goal of exempting the exportation of services in order to promote the destination principle, there is a very reasonable presumption in favor of a unique definition for it.

The adoption of a certain substantial criterion of equality by the legislator raises a presumption in favor of such criterion. Notwithstanding other criterion shall be adopted, there is a need for a justification for doing so, in order to warrant consistency. If "ends" as "justifications" drive the equality criteria, they must be coherently pursued or justified, otherwise the promotion of one will jeopardize the other with no reason. This explain Tipke's[20] assertion according to which, in very simple words, the equality principle claims essentially values consequence or coherence (*der Gleichheitssatz wesentlich wertungsmäßige Konsequenz oder Folgerichtigkeit*).

Thus, if the justification for the exemption rules is the destination principle, there is a need for consistency on implementing it. If one chooses a criterion for implementing it and defines such criteria, the criterion must also be consistently implemented, otherwise its implementation by one side shall be jeopardized by the other. This can be better addressed assessing the implementation of the destination principle by means of exportation as a comparison criterion.

According to the destination principle, goods and services which are the object of international trade, should be taxed at their destination on the same way the local goods and services are taxed[21]. But the goods and services provided domestically are taxed once. If exported goods and services are taxed at their destination, the same way as the locally provided ones, but they are also taxed at origin, they'll be double taxed, what would put them in a very hard condition to compete with the domestically provided goods and services. This would affect import neutrality.

Thus, implementing the destination principle means to ensure that services which will be taxed by a State (destination) which is not the State where the pro-

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[20] TIPKE, Klaus. *Die Steuerrechtsordnung. Band I.* 2 Auf. Köln: Dr. Otto Schmidt, 2000, p. 326.

[21] FAUTO, Domenicantonio. L'Impozizione Sul Valore Aggiunto Nell'Unione Europea. In: TORRES, Heleno Taveira (coord.). *Comércio eletrônico internacional*. São Paulo: Quartier Latin, 2005, p. 197-222 (204-205).

vider is established will not be taxed by this last State (the origin). Then, one needs to look at the common standards of taxation of international services in order to assess which services are considered "imported" and thus taxed accordingly at destination. These services are to be in the counter-definition of exported services by the State of origin.

The only hypothesis in which two different definitions of exportation should implement the same destination principle is the adoption of different and contradictory standards by different countries in order to define the taxation of imported services. If there was significant evidence that such common standards did not exist, so there would be good reasons for Brazilian local legislations and federal legislation adopting so different definitions of exportation. This implies the mentioned reasoning burden against different definitions of exportation.

On the other side, if there is no evidence of such absence of common standards, then such burden is not superseded and there is no reason to support different definitions of exportation as a comparison criterion for the sake of the substantial implementation of the equality principle. The adoption of such different definitions, thus, has no coherence nor consistency with the justification that underlies the criterion itself and makes it valid and the equality principle shall not be equally applied if it is applied with no coherence between its substantial criteria and their justifications.

Conclusion

The adoption of different definitions of exportation for the sake of exempting exported services faces a very strong reasoning burden and it does not supersede it. Since exportation is a comparison criterion for differentiating taxpayers with the same ability to pay, it must be justified.

The justification for such criterion is the destination principle. A single justification, as an end, should be implemented in a coherent and consistent way. If the goal end is to ensure only at taxation at destination State, one can only define exportation considering the standards for taxing services as imported. If there is no evidence of the inexistence of such standards, one can assume they exist and, if this is so, two different and opposite criteria shall not match with such hypothetical standards.

If such international standards exist at one side and if the origin State adopts two (or more) definitions of exportation which are opposed one to the other on the other side, but and one of them matches with the common standards, it can be very reasonably assumed the other definition will not.