

Interpretation of tax standards: a comparative analysis of legal thought between systems of the civil law branch

Sarah Amarante de Mendonça Cohen¹

Abstract

This paper aims to discuss legal interpretation of tax standards inside the civil law branch, specifically between the French and the Brazilian legal systems. This should be done throughout a comparative analysis of legal thought and precedent in these two realms regarding how are tax standards conceived and interpreted by the judge and public administrator.

Both systems have in common a ‘fetish’ for principle of legality which, to some extent, should limit legal interpretation and restrict creativity of public actors in decision making. Tax law, in its own regard, is a specific branch of law in which the level of trust is low, which eventually also tends to point to restrictive interpretation.

French legal system is based on the duality of jurisdiction (judicial and administrative) that both share decision making in tax matters, and only recently has the possibility of constitutional review been introduced through the so called “QPC” (‘question prioritaire de constitutionnalité’), which may affect the limits of interpretation of legal tax standards.

The Brazilian legal system is also based on the constitutional European model (civil law branch), and has been influenced by German law, which could point to a greater possibility of creativity, even though the Brazilian constitution establishes a series of principles that are protective of the taxpayer, which could, thus, restrict legal interpretation.

Our aim is, thus, to compare and demonstrate how legal interpretation of tax standards in these two systems is conceived, and to find out if legal thought, that is, if the philosophical approach of interpretation streams in the same direction of the praxis of actual decision making by law courts, though the analysis of precedent.

KEYWORDS: TAX LAW – INTERPRETATION – LEGALITY – CIVIL LAW BRANCH – COMPARATIVE LAW

1. Introduction

Interpretation of tax standards is an important matter in legal study, since the way in which these standards are interpreted can lead to a greater or lesser amount of discretion by the judge and public administrator, culminating in more or less freedom

¹ Ph.D and masters in Tax Law obtained at Universidade Federal de Minas Gerais (UFMG, Belo Horizonte, Brazil). Tax Law professor at Escola Superior Dom Helder Câmara and Faculdades Milton Campos (Belo Horizonte, Brazil).

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2. The structure of the French legal system and the interpretation of Tax Law

The French legal system contains a number of features which should be highlighted and, given the history of the development of tax matters in France and the emergence of modern representative institutions and submission of tax to the rule of law, it can be said that France, given this tradition has, today, adopted the principle of legality in a strong manner, achieved through this long and hard historical process.

Thus, we must understand today how the French judicial system is currently structured.

The current French judicial system consists of two jurisdictions: the judicial jurisdiction and administrative jurisdiction, as for France adopts a dual jurisdiction system. Just as in many systems, the French judicial system is hierarchical, primarily made up of the first instance jurisdictions, a second instance composed by "Court of Appeal" (Cours d'Appel) and a third instance composed by "Court of Cassation" (Cours de Cassation). In the administrative jurisdiction, there is a first instance that consists of administrative courts, a second instance that consists of the "Administrative Courts of Appeal" (Cours administratives d'Appel) and a third instance composed of the "State Council" (Conseil d'État).

Today, there is a novelty in the French judicial system that emerged since 2008, which is the possibility to take demands to the Constitutional Council (Conseil Constitutionnel). Indeed, on July 23, 2008 there was a constitutional review, in which it became possible to claimants in an ongoing process, to submit to the Constitutional Court a 'question of constitutionality' of law, that is, judicial review was finally inserted in French Law. This system is commonly called QPC or 'question prioritaire of constitutionnalité'.

It is to be noted that, before the July 2008 review, the Constitutional Council could only do the previous review of the constitutionality of laws, and until that moment, the French system did not allow the possibility of judicial review done 'a posteriori'. With the introduction of the 'QPC', the French system has adopted judicial review in itself, in which the claimants in an ongoing process can submit to the court the 'QPC', and the judge should halt the process (there exceptions to dismissal when there are issues that demand urgent decision or in matters of deprivation of liberty) and submit it to the competent higher court (Court of Cassation or the Council of State), if the 'question' seems serious or plausible.

Once the question is submitted to the higher instance, it may trigger the Constitutional Council that ultimately may or may not declare the law unconstitutional. Therefore, there are two previous examinations for the acceptance of 'QPC' before the matter is submitted to the Constitutional Council (there may be exceptionally just one judgment of admissibility if the 'QPC' is raised before the Court of Cassation or the Council of State). Once the 'QPC' is admitted and sent to the Constitutional Council, the judge can decide that the law is according to the Constitution, in which case the process takes its normal course; or declare it unconstitutional, in which case it is repealed, with 'erga omnes' effects and the judge

may modulate the effects of the decision (that is, the exemption of the law may have immediate or delayed effects). There is also the possibility of constitutional declaration ‘with reservations’, ie restricting the interpretation of the legal text. A new era is thus established in France in the field of judicial review.

Understood in general terms this important change recently inserted in the French legal system, we will briefly discuss about the powers of the judicial and administrative jurisdictions, giving emphasis on competence in tax matters.

According to Bouvier (2012, p. 152-159), both jurisdictions apply in tax matters, with no exclusivity of one or another to trial in tax causes. The division between jurisdictions on tax matters is guided, in general terms, by dividing the ‘contentieux de l'assiette’ and the ‘contentieux du recouvrement’ and is determined by the nature the tax involved.

The administrative courts have jurisdiction to decide cases involving direct taxes and taxes on business value and shall be entitled to judge the totality of ‘contentieux de l'assiette’ in relation to taxes within their jurisdiction; they will also examine actions involving the State's responsibility for his actions, when related to these taxes. As for the ‘contentieux du recouvrement’, the administrative courts must examine complaints about the duty to pay, the amount and payment. The administrative courts must also judge matters on legality, that is, the litigation in which one aims to cancel a decision carried out by the tax administration.

Among the direct taxes, we can highlight income tax, corporation tax and local direct taxes. With regard to taxes on business value, we must stress out that VAT (Value Added Tax) falls into this category. Thus, the administrative courts are responsible for the judgment of approximately 80% (eighty percent) of tax litigation (BELTRAME, 2012, p. 126).

The judicial courts, on the other hand, are competent in the field of indirect taxes and registration taxes (droits d'enregistrement indirects et droits). Among these, we can highlight indirect consumption taxes, customs taxes, stamp tax (timbre de droits), registration taxes, solidarity wealth tax, tax on shows, among others. The judicial courts must, in addition, judge the ‘contentieux de l'assiette’, ‘contentieux du recouvrement’ and matters that involve responsibility related to taxes submitted to its jurisdiction. Nevertheless, the judicial jurisdiction must decide cases that oppose to the charging of direct taxes and taxes on business value (BELTRAME, 2012, p. 217-218).

Even though there is criticism against the duality of jurisdiction, especially concerning tax matters, the fact is that the dual jurisdiction exists and is in fully force.

We must also highlight the existence of the Community legal order of the European Union and its jurisdiction. From December 1, 2009, the Lisbon Treaty was enforced, which created the Court of Justice of the European Union (Cour de Justice de l'Union européenne - CJUE), made up of three courts: the Court of Justice, a court of first instance and specialized courts (BLUMANN; DUBOUIS, 2010, p 609-611), whose registered office is in Luxembourg. The Lisbon Treaty changed the name of the court before which was identified as 'Court of Justice of the European Communities' (CJCE).

Access to European jurisdiction is open to member states, although it is also possible that individuals or enterprises appeal to the Court in the case of disputes involving the European Union.

The Court of Justice of the European Union has the function of interpreting European legislation to ensure uniform application of the law in the member states.

Understood, therefore, in general, the powers of the administrative and judicial courts, and the court structure of the European Union, we must start to deal with the matter of the interpretation of tax law.

On the interpretation of French law, we will work mainly with the relevant and updated work of Julien Guez², who undertakes a rigorous study specifically on the interpretation of tax law in France.

The work of Julien Guez addresses the issue of interpretation of tax and is divided into two parts: the first, dedicated to fiscal interpretation and creation of law, subdivided into two more parts, namely: the prescriptive approach: the denial of the interpretative approach in tax law, and the descriptive approach: the existence of a creative interpretation in tax law; and the second part of the work which deals with the tax interpretation and mutation of law, also being divided into two subparts, namely: the interpretation and changing of tax rules, and the changing of tax interpretation and its limits.

The goal of Guez's work is precisely to discuss the role of interpretation in tax law, if it should have a creative role, in view of the principles of tax law (especially

² GUEZ, Julien. L'interprétation en droit fiscal. Paris: LGDJ, 2007.

the principle of strict legality) and, from the observed reality, to make an interpretative proposal for this branch of law seeking to combine theory with practice.

We can thus extract from the authors work, some points: Guez notes that there are two interpretative points of view: the positivist and realistic. On the positivist interpretation, the author ends up reducing it to the School of Exegesis, because he gives great emphasis on the issue of literal interpretation, arguing when interpretation can or should overcome this literalness, and he concludes that only in cases where the law has gaps or is unclear.

It should be stressed that although at one point the author highlights that strict interpretation is not synonymous with literal interpretation, the overall reading of the work suggests a great emphasis on the issue of literal interpretation and the clarity of the text as giving room for more or less open interpretation.

On the other hand, in response to this highly reductionist positivism in the author's view, he confronts it with legal realism that conceives law as social fact and preaches a wide freedom in matters of interpretation, according to the background and the judge's psychological influences.

In other words, while the author has a more limited view in terms of strict interpretation of Tax Law, reducing it to literal interpretation, on the other hand, when the text is "not clear enough", he calls for interpretation in the realistic fashion.

The author's reductionism reveals much about the doctrinal thinking on the interpretation of laws in France, showing the strength of the principle of legality in this country, as a result of history in which the separation of powers is a dogma. On the other hand, the Brazilian doctrine has not been talking about literal interpretation of Tax Law for a long time - at least with this emphasis and in the French fashion - with the exception of some very specific situations of tax dismissal or benefits.

Nevertheless, considerations of Guez on jurisprudence are interesting. The author concludes that the 'Court of Cassation' protects more the principle of strict legality than the State Council, which is probably related to the composition of each of them, since the State Council is part of the administrative justice and has, thus, less sensitivity to the tradition of strict interpretation. It is also interesting the statement of the author that there would be a mismatch between the doctrine of Tax Law and court practice, to the extent that legal thinking advocates strict interpretation, while in practice the courts have been more flexible in the interpretation - that of course, from

the point of view of French law that, as we have seen, it is rather strict in regard to the principle of legality.

Thus, in practice, courts would use the analogic interpretation technique 'but only when the regulation of the law is insufficient', disguising the analogical interpretation in the form of extensive interpretation (although courts verbally would condemn the technique of analogy). It is worth noting that, in our point of view, Guez's opinion on 'wide' interpretation seems a bit strict, because the French author will fit any argument that distances itself from literal interpretation of law as long as it is qualified as an 'analogical' argument, not making a difference, for example, about the circumstances in which this 'wide' interpretation is adopted.

In the example brought by Guez related to VAT (Value Added Tax or VAT – 'Taxe sur la valeur ajoutée'), the author indicates that the courts understood that, although the law provided for the incidence of this tax on commercial activities, this it should also focus on the liberal nature activity 'as long as it was exercised under the same legal form to a commercial activity'. We must recognize that the author is right when he says that it is not literal interpretation in the case. Nevertheless, understanding that a society of professionals when adopting legal form of commercial activity is subject to taxation does not seem to be a form of reasoning 'forbidden' by the application of principle of legality in tax matters. In other words, although Guez brings examples of judicial interpretation that deviate from the literal text (which, in certain cases, could even be desirable, to meet a constitutional purpose, for example), he does not bring examples of legal precedents that undertake a true analogical or economic interpretation of Tax Law.

It is interesting to note that Guez, from the jurisprudential analysis, comes to the conclusion that courts have not adopted a specific interpretation of Tax Law, not treating this field as 'autonomous' in the sense that it would need autonomous interpretation techniques. On the issue of mutability of Tax Law, the author is quite emphatic in the sense that the rules of Tax Law change enough and the constant change in society makes it proper for Tax Law to 'relax its mode of production and its legal regulation'. This point of view, in our opinion, cannot be applied to Brazilian law because, for instance, it already offers mechanisms of 'flexibility' in its mode of production where needed. In short, Brazilian Tax Law is already cast in order to observe the points in which any relaxation of the principle of legality is appropriate, therefore there would be no need to insert a greater amount of flexibilization in its

mode of production. Accordingly, this vague argument that 'the constant change in society' justifies the relaxation of the interpretation, does not seem enough to put in check constitutional guarantees - either in Brazilian law, whether in French law, dare we say, to the extent that the principle of legality, especially in this European country, has remote and solid origins and cannot be undermined simply by the 'need of constant change of society'.

In regard of this 'mutation need of society' and consequently of Tax Law, the author considers that interpretation of Tax Law plays an important role in the task of reform and 'conservation' of standards, with which we agree, at least in the latter part, that is, that Case Law is obviously a source of Law - an issue with which the author unnecessarily debates.

He concludes, thus, that there is a divorce between legal principles and material reality, that is, that judicial interpretation does not necessarily observe legal principles recognized by the legal thinking of Tax Law, and he proposes, therefore, be put an end to this gap, either by bringing the facts to the Law, or the Law to the facts (that is, the reformulation of Law to adapt to reality). In other words, Guez discusses whether it should be the case of applying the principles of Tax Law in a more forceful way, or revise them to adjust to reality.

In this context, the author points out that two solutions are possible (although both, in our view, do not seem fully satisfactory), which are: the first would be the strengthening of Legality, by strengthening the control exercised by the people, parliament or judge over administrative interpretation, causing the rule of law and other principles to be respected; the second solution in the reverse way, would be to admit the existence of a normative power of the administration or the creation of an independent administrative authority to interpret the tax laws.

Finally, in our view, the conclusion Guez's work and the proposed solutions to overcome this gap supposedly existing between legal thinking and reality seem superficial. This is because, in spite of the interesting research in which the author analyses legal thinking and jurisprudence in tax matters, and that concludes that doctrine is not consistent with the practice of courts, because courts' interpretation of Tax Law has been much more flexible than the conformation of the issue on a doctrinal level, the author suggests, finally, that, because of the circumstance of tax being extremely adaptable to the political, social and economic changes, the solution would be to 'recognize normative power to the administrative doctrine'- as a good

solution to resolve the conflict that arises between the need of adaptation of Law and the need to guarantee the principles of this branch of law. Nevertheless, the author, with respect to this last proposal, does not clarify how to ‘recognize normative power to the administrative doctrine’ and in what, exactly, this change would contribute to the strengthening of Legality.

In short, the work of Guez, though inconclusive, in our point of view, is enlightening from the perspective of showing a way of thinking of the French Tax Law and the problems involved in the question of the interpretation of Tax Law by the French courts.

Last but not least, in terms of jurisprudence, besides the cases mentioned by Guez, we can take as an example the case "Richard" judged by the State Council (Lebon 168, RJF 1978.5.150, Done. B. Martin-Laprade). This trial was about the "VAT" and on what would be the rate of tax applicable in sales of boats, the percentage valid at the time of billing of boats, or the rate prevailing at the time of the ‘delivering’ of goods.

The case was submitted to the State Council (Conseil d’État), and it interpreted the article 269 of the Internal Revenue Code that defines the taxable event for VAT, understanding that the ‘temporal aspect’ of the taxable event occurs at the time of "delivering the goods". The State Council interpreted the phrase ‘delivering the goods’ in accordance with private law, having accessed the definition of 'delivery' constant of articles 1604 and 1606 of the Civil Code which states that delivery occurs ‘or the real delivery, or the delivery of the keys of the buildings containing them, or even the simple agreement of the parties, if transport can not be done at the time of sale or if the buyer already had the asset in his possession due to another title’.

In this way, the court understood the Administration to be correct, to the extent that the simple invoicing of vessels or completion of hooves would not have the power to make happen the ‘taxable event’ and the charging of the Value Added Tax (VAT), since the real delivery of the assets would be necessary to generate the collection of VAT. In this context, the court reputed the assessment correct, and that the laws in force at the time of actual delivery should be applied, that is, between January 1, 1969 and January 1, 1970 and after January 1, 1970, the intermediary and normal rates should be applied.

Moreover, even though the Civil Code authorized parties to stipulate when the asset would be considered delivered but, in this case, the State Council understood

that there was no contractual stipulation to this effect, as to conclude that the general rule be applied as to consider the taxable event occurred only when there is the effective delivery of the goods, and thus interpreted the case according to private law.

In this context, the State Council validated the tax charging since it understood that the laws in force at the time of actual delivery were applicable. In short, it was understood that the concept of 'delivery' provided for in the Tax Law should be interpreted, or should have the same semantic content that the concept of 'delivery' provided for in civil law.

Finally, the description of Guez's ideas are representative of a way of thinking the French tax law and the precedent described also serves to demonstrate a certain tendency of interpretation of the French courts (in this case, specifically, of the administrative jurisdiction) in tax matters.

We therefore should now examine the interpretation of the Brazilian Tax Law, in order to finally proceed to the comparative analysis.

3. The structure of the Brazilian legal system and the interpretation of Tax Law

In the context of Brazilian law, legal thought is guided primarily on legislation to weave its considerations about the way in which Tax Law should be interpreted.

The Brazilian system has the Constitution of 1988 its higher source of law, with a detailed regulation of the national tax system in articles 145 to 162. The 1988 Constitution of the Federative Republic of Brazil like few other known Constitutions is home to fundamental principles in tax matters and exhaustively regulates the constitutional limitations on the power to tax.

Among these principles, we can mention the principles of Legality and typicity (article 150, I), 'prohibition of surprise' (art. 150, III , b and c), capacity of taxpaying and 'prohibition of confiscation' (art. 145, paragraph 1, and art. 150, IV), legal certainty and non-retroactivity (art. 5, XXXVI, and art . 150, III, the CF / 88), equality (art. 150, II, of CF / 88), among others. The Brazilian Constitution of 1988, therefore, unlike the French Constitution, which practically does not regulate tax matters, offers strong protection of the taxpayer freedom in face of State power.

Nevertheless, the Brazilian Constitution does not provide explicit rules on interpretation of legal statements. Brazilian legal thought recognizes, thus, that every interpretation of Tax Law must be conducted always having the Constitution and the

principles of tax law enshrined therein as a parameter, among which, the aforementioned principles, among others.

On the interpretation of rules, we must mention the Introductory Law to the Civil Code (Decree-Law no. 4657 of September 4, 1942, now called the Law of Introduction to the Brazilian Law Rules, with the wording provided by Law n. 12.376/2010), which provides general rules of interpretation of the law, among them those contained in its articles 4 and 5, which dictate that ‘when the law is silent, the judge will decide the case according to the analogy, customs and general principles of law’ and ‘in law enforcement, the judge will meet the social purposes to which it is addressed and the requirements of the common good’. There is also the Code of Civil Procedure, that rules in articles 126 and 127 that the judge cannot avoid sentencing by the allegation of gap or obscurity and, in case there is no applicable legislation ‘resort to analogy, customs and general principles of law’, and even that the judge should ‘only decide by equity in cases provided by law’ (TORRES, 2006, p. 11).

It is worth noting, though, that Brazil is a federal state, and that there are national rules that are of mandatory compliance by all federal entities, and serve as a system of standardization.

In this context, the National Tax Code (Law no. 5172 of October 25, 1966), brings explicit rules of interpretation of tax law, particularly in Chapter IV (articles 107 to 112). There are some other scattered articles in the National Tax Code that dictate rules of interpretation of Tax Law, like article 116, paragraph, that specifically raises the controversy about economic interpretation of the Tax Law, and article 118. It is worth mentioning also article 106 when in mentions interpretative law'.

That said, article 108 deals with integration of Tax Law and seems to indicate an order of interpretation methods to be adopted in cases where the integration of the law is required (when there is a gap), although this rule is criticized, because this order should not be rigid, and the judge does not have to rely on a succession of techniques of analogy, general principles of tax law, general principles of law and equity.

According to Torres, this 'hierarchy of criteria' had a direct influence of the Italian doctrine, however, that ‘there is no legal basis, logical or philosophical to the hierarchy of methods’ (Torres, 2006, p. 100-101) , since ‘are very little clear boundaries between each and globally because those methods can not be ordered by the rules of induction or deduction’ (Torres, 2006, p. 101).

In fact, although the device indicates analogy and equity as instruments that should be used by the interpreter 'in the absence of an express provision', there are important exceptions in paragraphs 1 and 2 of article 108 that, actually limit the use of analogy and fairness in tax law, whose interpretation is traditionally strict.

Thus, we should recognize that Brazilian law prohibits on use of analogy to charge a tax not regulated by law, and equity or fairness for exemption from payment of taxes.

The prohibition to use analogy to charge taxes not regulated by law is therefore a reflection of the principle of Legality and reflects the adoption by the Brazilian legislator of a particular technique of interpretation, namely the technique of strict interpretation, as allowing the interpreter to make use of analogy would imply, as evidenced, to implode the basis of the principle of Legality.

On the use of equity, the logic is similar, therefore, if the principle of Legality prevents the use of analogy to charge a tax not regulated by law neither should equity be allowed to soften the Law in order to achieve a fairer result and to waive the payment of the tax in the absence of an 'express provision'.

Article 111, on its turn, determines that interpretation must be 'literal' in the event of suspension or exclusion of the tax credit (including exemption of grant) and dismissal of compliance of accessory tax obligations. The aim of this provision is similar to that of article 108 and following paragraphs for the 'imposition' of literal interpretation regarding exoneration also assumes a respect to the principle of Legality and aims to prevent the interpreter through an extensive or analogical interpretation to create some 'not foreseen by law exemption 'or' new hypothesis of exclusion or suspension of the tax credit ', or, unprecedented situations of dismissal of accessory obligations.

Nevertheless, the provision that the interpretation must be 'literal' is submitted to critique of the Brazilian doctrine, because the technique of literal interpretation (which, as we have emphasized, is different from strict interpretation), or rather the imposition of literal interpretation as a hermeneutical method is non-recurring in our tradition, contrary to what was seen in relation to the French doctrine.

According to Misabel Derzi, our tradition, especially after the influence of the works of Betti and Gadamer, does not adopt a literal interpretation, or does not conceive the interpretation as a simple 'logical-deductive syllogism' in which to seek

merely to the aim of the legislator (unlike the trend of the French understanding, as we have seen).

Brazilian jurisprudence also goes in this direction, rejecting the adoption of literal interpretation, understanding it in a sense that it means that broad interpretation should be avoided, in numerous precedents (REsp n. 14.400/SP, j. 20.11.1991; REsp n. 163.529/MG, j. 04.10.2001, REsp n. 217.948/SP, j. 02.05.2000; RE n. 183.403-0/SP, j. 07.11.2000, in OLIVEIRA; MATOS; BOZZA in MACHADO, 2010, p. 365-366).

Articles 109 and 110 also provide important rules of interpretation of Tax Law. Article 109 rules that the general principles of private law will only be used to search the definition, content and scope of its concepts institutes and shapes, but not to define the related tax effects. That means that Tax Law incorporates institutes, concepts and forms of private law just the way there are conformed by private law.

Thus, this article states that these concepts of private law adopted by Tax Law should be interpreted according to the concept of private law.

In French Law precedent "Richard", analyzed above, judged by the French Council of State, it adopted interpretation according to the idea set in article 109, since they discussed the moment in which the taxable event happened, and the court concluded that VAT should be payed in respect to the law in force in the moment when when the delivery of the goods happened, according to concepts of private Law.

Article 110 has also great importance in the practice of tax law, since according to this article the legislator cannot extend the 'private law concepts' used by the Constitution to define federal competency or power. That is, if the Constitution adopts a certain 'private law concept' to define the taxing power of the federal entity - which it often does (when it adopts, v.g, the concept of income, import, export, industrial product, foreign exchange transaction, donation, real estate, services, gross revenue, et al) - it should be considered that the concept was adopted by the constitutional legislator with the same sense, that is, in the same meaning that it has in private law. That is, the legislator should not re-conceptualize the concept adopted by the Constitution in a different manner.

The most classic case of application of article 110 by the Brazilian courts was the case about the enlargement of the 'PIS/COFINS' (Social Security Contributions) tax base by art. 1 of paragraph 3 of the Federal Law n. 9.718 of 11/27/1988, which defined the term 'turnover' then used the Constitution of 1988 (art. 195, before the

Constitutional Amendment n. 20 of 15.12.1998) as a synonym of ‘gross revenue’, which is a much broader concept. The Supreme Court, on 09/11/2005 finally decided the dispute (RE’s n. 357.950/MG, 390.840, 358.273 e 346.084) and understood that the standard offended the Constitution, precisely because the legislator could not alter the private law term ‘turnover’ used by the Constitution to define the taxing competence or power of the federation.

Nevertheless, in terms of legal precedent, it is worth mentioning the RE n. 547 245/SC, Rel. Min. Eros Grau, in DJE. 05/03/2010, judged by the Supreme Court, which seems to signal in another direction. In this case, the discussion is about the possibility of charging ISS (‘Imposto sobre Serviços’, similar to VAT) on financial leasing transactions.

The central argument revolves around the legal nature of the financial leasing contract, to see if it is considered a ‘service’ and thus taxable by the ‘ISS’ provided that the Constitution adopts the term ‘service’ in the competency norm. The Supreme Court granted the extraordinary appeal, by majority, understanding for the possibility of charging ISS on financial leasing operations. The Court held, in summary, that in the financial leasing contract the element of ‘financing’ prevails over the element of ‘leasing’, and that ‘financing’ should be considered a kind of service, and that ISS should be charged.

That said, this precedent indicates a change in the position of the Supreme Court in the form of interpretation of Tax Law, since once they considered that ‘financing’ should be considered a kind of ‘service’, there was a breaking of the concept of service as it is held in private law, and there was a denial of applicability of articles 109 and 110 of the Brazilian tax code.

In other words, the interpretation adopted was not textual, and, in a certain way, violates the interpretative model adopted by the Brazilian legal system once the court adopted a different concept of service to understand that the financial leasing operations could be subject to the ISS.

Understood the issues involving the articles 109 and 110 of the Brazilian National Tax Code, there is one last controversial issue about the interpretation of Tax Law that must be mentioned, and it is about article 116, paragraph, of the National Tax Code, and the discussion about the introduction of economic interpretation in Brazilian Tax Law. This article gives the administrative authority the power to disregard acts or legal transactions done with the purpose of concealing the

occurrence of the taxable event or the nature of the constituent elements of the tax liability, subject to the procedures to be established in legal statutes.

Since this article was introduced in the National Tax Code, there has been controversy over the question about the adoption of the economic interpretation of Tax Law by the Brazilian legal system.

The economic interpretation of tax law, according to Misabel Derzi 'is to grasp the meaning of the rules, legal institutions and concepts, according to the underlying economic reality behind the legal forms' (in BALEEIRO 2002, p. 689).

In other words, in the economic interpretation of Tax Law, there is a contempt for the legal form adopted by the taxpayer in a specific operation, and a prioritization of the underlying economic content to this operation for tax purposes (KRUSE apud SEIXAS FILHO in MACHADO, 2010, p. 62).

Indeed, after the First World War, the idea of the economic interpretation of Tax Law gained strength, because of an alleged 'desire for economic development', in which there should be an abandonment of conceptualism in favor of the right design that would take into account the political, ethical and economic realities (BATISTA JUNIOR, 2002, p. 84).

The economic interpretation of Tax Law was inserted in the German RAO – Reichsabgabenordnung of 1919, with the aid of Enno Becker, and its paragraph 4 had the following wording: "paragraph 4. The interpretation of tax laws should take into account its purpose, its economic significance and evolving circumstances' (BATISTA JUNIOR, 2002, p. 84).

Also according to Batista Júnior, the introduction of this article in RAO found support in the Weimar Constitution, whose article 134 ruled about the 'need to consider in understanding Tax Law, the purpose of the provision, its economic reach and its relationship to the development of practical life situations' (BATISTA JUNIOR, 2002, p. 84).

Nevertheless, it is to be noted that the adoption of this interpretation is also historically linked to authoritarian moments of history and, in Germany, it later served to the Third Reich (DERZI in BALEEIRO, 2002, p. 689). Incidentally, Enno Becker, who had contributed to the inclusion of the standard in RAO in due course would recommend that the German Tax Law should be the expression of the German National Socialism (COELHO apud COHEN, 2005, p. 17).

Still, according to the author Heleno Torres, the economic interpretation of Tax Law was 'one of the biggest misconceptions that thrived in the western legal history', establishing 'hermeneutic' authoritarianism.

Regardless of this criticism, it is worth mentioning, nevertheless, that there is a current attempt to rehabilitate economic interpretation, and there are various methods of economic interpretation, such as 'the concept of 'abuse of rights' (France),' abuse of forms' (Germany, Portugal, Holland, Argentina), 'evasion of the law' (Spain) There is also "the use of specific rules (Italy and the UK) or business purpose test (US and UK) and similar' (Torres, 2003, p. 205-206). There is therefore a contemporary trend of adoption by states of anti-evasion general rules, as a way to curb such behavior by taxpayers.

Anyway, in Brazil, most authors agree that article 116 of the National Tax Code has not introduced in our legal system the economic interpretation of Tax Law, since the standard only authorizes the legal authority to disregard acts or legal transactions done with the purpose of concealing the occurrence taxable event, and the authority can thus requalify the act and tax it in accordance with the essence hidden by the taxpayer (Sacha Calmon, Misabel Derzi, Alberto Xavier, Souto Maior Borges, Ives Gandra da Silva Martins, among many others).

Note that there are scholars that disagree with this understanding. Among these, we highlight Marco Aurelio Greco and Ricardo Lobo Torres as representatives of understanding to the effect that the paragraph of article 116 of the National Tax Code does incorporate economic interpretation in our legal system.

We should mention, at last, that the administrative trials in Brazil involving tax planning end up analyzing cases in light of the existence of 'deception' in the considered operations and on the presence or absence of 'business purpose' to interpret cases.

Put these considerations about the interpretation of Brazilian Tax Law, based on legal thought and precedent, we are capable now of taking on our legal comparison between the systems.

4. Conclusion

Once we have seen the main aspects of the French and Brazilian legal systems, we can now compare and demonstrate how legal interpretation of tax standards in these two systems is conceived, and to find out if legal thought, that is, if the

philosophical approach of interpretation streams in the same direction of the praxis of actual decision making by law courts.

We can thus conclude that:

a) both in France and in Brazil there is a 'crisis of legitimacy' due to the complexity of both systems and a tendency to assign more power to administrative decision-making;

b) although the French Constitution is not rich in predicting informative principles of Tax Law, the French tradition attaches great strength to the principle of legality in taxation, because of its historical origins, which conforms the judicial system and the way of thinking of the doctrine; in terms of the French judicial system, the introduction of judicial review of laws, called the QPC (Question Prioritaire of Constitutionnalité) in 2008 alone, and the existence of a dual jurisdiction (administrative and judicial justice), are statements in an institutional level of the strength of principle of legality; on the level of legal thought, it is quite Cartesian, exegetical and somewhat anachronistic, by our standards, particularly as the issue of interpretation of Tax Law is placed from the perspective of convenience or not to adopt literal interpretation and from questioning about the creative role of jurisprudence; the Brazilian Constitution, on the other hand, contains a complete and detailed discipline of Tax Law, ensuring the taxpayer several guarantees, among which the compliance with many principles. On an 'infraconstitutional plan', the Brazilian system also has several rules that deal with the interpretation of Tax Law, that prohibits the use of analogical interpretation in favor of adopting restrictive interpretation of Tax Law, although not necessarily literal interpretation; the majority of the Brazilian legal thought agrees that interpretation of tax law should be restrictive, although there is an increasing trend of a greater amount of flexibilization and adoption of the economic interpretation of Tax Law;

c) on the plan of decision making by French courts in general, and even though the French doctrine discusses the issue of interpretation of Tax Law rather focused on whether or not a literal interpretation is necessary, the decisions in practice do not adopt necessarily a method of literal interpretation as heralded by the doctrine; neither, by our standards, do the French judicial precedents, especially those cited in the Julien Guez work drift into an unwanted adoption of analogical interpretation that is disrespectful of the interpretative tradition of Tax Law; with regard to the legal precedent case "Richard", judged by the State Council, it has adopted a more

restrictive interpretation of Tax Law, respecting the forms of private law, with little use of analogy; in the case of the Brazilian decision making by courts, the traditional trend has always been the adoption of restrictive interpretation of Tax Law, respecting the frames of the legal system, which highly limit the use of analogical interpretation in this 'branch' of law; we can find in the Brazilian jurisprudence several cases with similar arguments of those adopted in the case "Richard"; nevertheless, in the last decade, with the change in composition of the Supreme Court members, there has been a growing and gradual changing fashion trend of interpreting Tax Law; the case that involves the taxation of financial leasing operations by the municipal service tax (Imposto sobre Serviços – ISS), judged by the Supreme Court in recent years, reveals a way of thinking about Tax Law that abandons strict interpretation and disregards the forms of private law, making use of analogy and, above all, invoking arguments of moral nature (to justify the collection of taxes and the 'fundamental duty to pay taxes' (not without resistance, it is true, within a minority of justices); more than that, this interpretative tendency disrespects the frame of the constitutional system in place that does not open space for a more flexible and analogical interpretation of Tax Law; we can conclude, in short, that despite the criticism that we have made to the doctrine and method of the French thinking in Tax Law, the French and European jurisprudence remain more faithful to the traditional way of thinking about Tax Law interpretation, respecting to a greater extent the principle of strict interpretation, which should serve as a parameter for Brazilian judges when, on the pretext of adopting a 'modern' or 'postmodern' interpretation, tend to adopt flexible arguments concerning tax matters before a legal system that, more than the French or European, prohibits the use of these hermeneutical techniques.

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