



Notes on the tax process – Anti-taxation actions

Notes on Tax Proceedings – Anti-Enforcement Actions

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SUMMARY

This study analyzes the tax process, focusing on anti-taxation actions, which are legal measures filed by taxpayers to challenge illegitimate tax demands. Due to the absence of a Tax Procedure Code, the Civil Procedure Code and the Tax Enforcement Law apply subsidiarily. The main instruments include: Declaratory Action, Annulment Action, Writ of Mandamus, Motion to Stay Tax Enforcement (and their variations), Payment Assignment, and Action for Recovery of Undue Payments. These measures ensure adversarial proceedings, full defense, and tax justice, preventing abuse and illicit enrichment of the State.

Keywords: Tax process. Anti-taxation actions. Taxpayer defense.

ABSTRACT

This study examines tax procedure, focusing on anti-enforcement actions, which are legal remedies filed by taxpayers to challenge illegal tax claims. Due to the absence of a Tax Procedure Code, the Civil Procedure Code and the Tax Enforcement Law apply. Main remedies include Declaratory Action, Annulment Action, Writ of Mandamus, Tax Enforcement Objections (and related forms), Payment-in-Deposit Action, and Tax Refund Claim. These measures ensure due process, the right to defense, and tax justice, preventing abuses and the unlawful enrichment of the State.

Keywords: Tax procedure. Anti-enforcement actions. Taxpayer defense.

1 INTRODUCTION

Before we analyze the actions in kind, we need to consider that there is no Tax Procedure Code, legal operators must use the Tax Procedure Code. Civil Procedure to resolve any doubts that are not covered by scattered laws or in the Civil Procedure Code itself. National Tax Code, we also pay attention to the Tax Enforcement Law which provides guidance to be followed regarding the tax process, a highly valued and important topic, especially in tax disputes, whether judicial or administrative. Any conflict necessarily needs a direction, a path to be followed until its solution, with the With substantive law we get the answers, and with procedural law we find the way.

Doctrinally, we divide the tax process into two major classifications; exactional actions, this proposed by the State, aiming at its interest and obviously the interest of the collective, the physicist does not have the competence to simply appropriate the goods of the debtor, must use appropriate mechanisms to recover his debts, in this if the appropriate action is the tax enforcement action, regulated by law 6,830 of 1980, through it, the state will seek from the debtor's assets the necessary balance that was not paid in a timely manner,

either through voluntary payment within five days, or by appointing assets to guarantee it, running the risk of having your assets blocked, according to article 10 of the same law, let's see in the present I work on the forms of defense of the taxpayer against tax obligations.

Another measure initiated by the active subject is the fiscal precautionary measure, granted by law 8,397 of 1992, which was partially amended by article 65 of law 9,532 of 1997. They provide that the precautionary tax procedure may be instituted after the establishment of the credit, including in the course of the judicial execution of the Active Debt, of the States, the Federal District, the Municipalities and respective authorities, this action basically gives the tax authorities the opportunity to safeguard, in a precautionary manner, the tax authorities' assets for possible seizure in the execution process, as this is precautionary measure, it cannot be used in any case, its hypotheses are in the article according to the aforementioned law, in addition to it being essential that the tax authorities clearly demonstrate the proof of tax credit, in the case of a legal entity, should fall only on its assets permanent, and may affect the administrator's assets. The tax authorities will also always have the right within two years after the final decision that benefited the taxpayer requests the rescission action, according to article 966 of the Code of Civil Procedure, recently, according to opinion PGFN/CRJ-1.087 of 2014, the national treasury attorney's office supports the possibility of the annulment action of an administrative decision favorable to the taxpayer, has suffered great criticism, due to its lack of logic and legal sense.

Having seen this quick introduction, we can now delve into the object of this work, without the intention of exhausting the topic, we will approach it in a substantial manner and from the perspective the best doctrine is the actions initiated by the taxpayer, called anti-taxation actions, that will be proposed in defense of your tax interests, against possible errors or irregularities committed by the tax authorities.

2 THEORETICAL FRAMEWORK

2.1. ANTI-EXACTIONAL ACTIONS

These are actions initiated by the taxpayer of the tax obligation. After the launch of the tax credit, the taxpayer is often dissatisfied with the taxpayer's demands or with the imposition of a certain penalty, in this case, as assistance, there is the ability to promote the tax process in the judicial sphere.

Well, these actions are of the taxpayer's own nature, it is up to him to fight for his right, mainly due to the fact that the tax authorities, like any entity of public administration, enjoy presumption of truth granted to their acts, in the words of Hugo de Brito Machado:



The process of knowledge in tax matters is always initiated by the taxpayer, because the decision in the administrative process is always made by the tax authorities, and there is therefore no reason for the tax authorities to seek judicial control of the legality of such decisions (tax law course, 39th edition, p. 473)

The taxpayer, therefore, has several options to promote his defense, respecting, thus your constitutional right to judicial control, adversarial proceedings and full defense, right to jurisdiction. By respecting the deadlines, the taxpayer will always have the right to seek assistance from doors of the judiciary, for Cezar Britto and Marcus Vinicius Coêlho:

The legal diploma, a corollary of the right to defense and a consequence of the rule of law, proclaims the freedom of citizens to defend themselves against authoritarianism, arrogance, persecution, bad faith, incompetence, or simple state error. It affirms the prevalence of human rights in opposition to the discourse of intolerance. (2011, p. 4-5, The Inviolability of the Right to Defense. 3rd ed. Belo Horizonte: Del Rey, 2011.)

2.2 DECLARATORY ACTION

It concerns the knowledge process and follows the ordinary procedure. The action declaratory request is made for the declaration of the existence, non-existence or mode of being of a legal relationship, is provided for in article 19 of the Code of Civil Procedure.

Art. 19. The author's interest may be limited to the declaration: I - of the existence, non-existence or mode of being of a legal relationship;
II - The authenticity or falsity of a document.

The doctrine has been stating that the hypothesis of article 19 is a pure declaratory action, occurs when the tax credit has not yet been issued, when the declaratory action is proposed after the launch, the taxpayer must add the request for cancellation of the act administrative launch, since the credit has already been constituted and the simple declaration of non-existence will not have the effect of deconstructing the release. It is important to mention, even without great practical effects that pure declaratory actions are imprescriptible, according to the Article 20 of the CPC, however the period for repair or repetition normally expires.

TAX. INCOME TAX. PRESCRIPTION. DECLARATORY REQUEST. SUBJECTION TO PRESCRIPTION. PRECEDENTS. 1. "TAX. PRESCRIPTION PERIOD FOR THE REPETITION OF UNDUE PAYMENTS IN TAXES SUBJECT TO ASSESSMENT BY APPROVAL. ART. 3, OF LC 118/2005. INITIAL TERM. INCOME TAX WITHHELD AT SOURCE - IRPF SOURCE. DATE OF WITHHOLDING (ADVANCE) VS. DATE OF PAYMENT AFTER SUBMISSION OF THE DECLARATION. INCOME NOT SUBJECT TO EXCLUSIVE / DEFINITIVE TAXATION

2. A pure declaratory action is imprescriptible, but when there is also a claim for condemnation, restitution of undue amounts, it is subject to the phenomenon of prescription. 3. The time lapse for filing an action for restitution of amounts unduly collected as PIS is characterized as prescriptive. (Case: 5001101-79.2018.4.04.7219. TRF4SC Decision Date: 06/27/2019)



It is important to emphasize that in the administrative sphere we have the possibility of carrying out the formal consultation, an act completely different from the declaratory action, both should not be confused, in the consultation we do not have a concrete situation, the taxpayer is just asking information to the tax authorities about tax transactions you intend to carry out. In the declaratory action, passive subject goes to court seeking legal and conclusive certainty about the existence or not of a certain tax obligation, such as, for example, knowing whether a certain law is or is not constitutional, or seek confirmation of a right of credit, James Marina summarizes the action declaratory in:

“(...) the improper anti-taxation action, of ordinary procedure, filed by the taxpayer against the Public Treasury or against an entity that exercises parafiscal functions, with the purpose of having the existence, form (positive declaration) or non-existence (negative declaration) of a certain legal-obligatory bond of a tax nature judicially recognized (declared) with the aim of promoting the settlement of the tax relationship tainted by uncertainty.” (MARINS, James. Brazilian Tax Processual Law (Administrative and Judicial). 3rd ed. São Paulo: Dialética, 2003, p. 397.)

2.3. ACTION FOR ANNULMENT

This action aims to cancel the tax debt. After the launch, taxpayer may defend himself administratively based on article 151 III of the CTN, or on the judicial sphere promote annulment action, aiming to cancel the launch, making the Auto of Infringement loses its purpose, its filing implies waiver of the administrative sphere, according to the Physical Execution Law:

Art. 38 - The judicial discussion of the Public Treasury's Active Debt is only admissible in execution, in accordance with this Law, except in the cases of a writ of mandamus, an action for recovery of undue payment or an action for annulment of the act declaring the debt, this being preceded by the preparatory deposit of the amount of the debt, monetarily corrected and increased by interest and late payment fines and other charges.

Sole Paragraph - The filing, by the taxpayer, of the action provided for in this article implies waiver of the power to appeal in the administrative sphere and withdrawal of the appeal if filed.

The action follows ordinary procedure, and consequently requires preparation, but its proposition does not prevent the Public Treasury from judicially distributing the Tax Enforcement action, whose ownership belongs to it, unless it requests urgent protection based on the article 300 of the Code of Civil Procedure or that the judgment is guaranteed.

A very big controversy in the doctrine is about the competence to judge this process, when we have a tax execution, since if they were judged separately we would run the risk of contradictory judgments, according to precedents of the STJ the tax enforcement judge is competent to judge the annulment action.

According to Professor Cláudio Carneiro, we can summarize the annulment action as follows:

“(…) is of a de-constitutive or negative constitutive nature, as it aims to annul through judicial means the existence of a tax debt, that is, of the tax assessment, hence it is presumed that for the admissibility of the annulment action it is necessary that the assessment has been carried out.” (CARNEIRO, Cláudio. Tax process: (administrative and judicial). 3rd Ed. Rio de Janeiro: Lumen Juris, 2012, p.316)

2.4. WRIT OF MANDAMUS

It was introduced into the Brazilian legal system as of the 1934 constitution, It is currently regulated by 12,016 of 2009, with its legal provision in article 5, item LXIX and LXX of the constitution, bringing the taxpayer a series of advantages, considered by some scholars, such as the tax action, may, excellence, require proof of clear and certain right, since the Writ of Mandamus, commonly called simply MS, will not have a probationary phase, it will be judged with preference to all other actions, except *habeas corpus*.

A point that may be very relevant to the claimant is that there will be no conviction for succumbency, being interesting, since many tax processes have their extremely valuable losses, a Writ of Mandamus is accepted with the modality preventive or repressive, according to the first article of the aforementioned law:

Art. 1.-A writ of mandamus shall be granted to protect a clear and certain right, not covered by **habeas corpus** or **habeas data**, whenever, illegally or through abuse of power, any natural or legal person suffers a violation or there is a just fear of suffering such a violation by an authority, regardless of its category and regardless of the functions it exercises.

There is the possibility of an injunction in the Writ of Mandamus with only one exception provided in article 7, second paragraph, which is particularly relevant to tax law: “No a preliminary measure will be granted with the purpose of offsetting tax credits [...]”.

Its main function is to prevent illegality or abuse of power, it can be filed by both individuals and legal entities, including the possibility of filing of collective security order in accordance with articles 21 and 22 of the same law.

In tax matters, the coercive authority will be the Delegate of the Federal Revenue of Brazil in cases of federal taxes; Secretary of State Revenue in state taxes; and the Secretary of Municipal Revenue in cases of taxes under municipal jurisdiction. It is essential that we pay attention within the 120-day period for filing a writ of mandamus. Carlos Henrique Bezerra Leite summarizes the security order:

“[...] a guarantee, a remedy, of a constitutional nature, externalized through a special action, made available to any person (natural or legal, public or private), or depersonalized entity with procedural capacity, whose scope rests on the protection of individual or collective rights, one's own or of third parties, clear and certain, not covered by habeas corpus or habeas data, against an act of a public authority or of an agent of a legal entity under private law in the

exercise of powers of public power". (Carlos Henrique Bezerra Leite apud Remédio, José Antônio. Individual and Collective Security Warrant – São Paulo: Saraiva, 2002, p.136).

2.5. EMBARGOES TO TAX EXECUTION

This is a knowledge action in which the taxpayer, responsible or guarantor, offers a defense to the tax execution (already mentioned in the introduction) proposed by the treasury, it is distributed by dependence on the Tax Enforcement action, in which both will be judged in set. The defendant shall file an objection within 30 days, in compliance with Article 16 of Law Tax Enforcement, as a rule, do not have a suspensive effect, and may be granted if there is an express request from the appellant, relevance of the argument, risk of serious damage that is difficult or uncertain to repair and full guarantee of the judgment through the appointment of assets to attachment, deposit or security. Based on article 739A of the Code of Civil Procedure, for the law operator it is very important to comply with article 16 paragraph one which provides "The defendant's objections are not admissible before the execution is guaranteed." The guarantee of execution, for the amount of the debt, interest and late payment fines and charges indicated in the Certificate of Active Debt, the defendant may:

- I - Make a cash deposit, to the order of the Court, in an official credit institution, which ensures monetary updating;
- II - Offer a bank guarantee or insurance guarantee;
- III - nominate assets for seizure, in accordance with the order of article 11; or
- IV - Indicate assets offered by third parties and accepted by the Public Treasury for seizure.

The hearing for the instruction and judgment of the embargoes may be waived if the dispute is composed exclusively of documentary evidence, without guaranteeing execution and not named goods subject to seizure, what we call free seizure may occur, except for non-seizable goods.

This action is widely used and extremely democratic, as it guarantees the right to adversarial nature in tax enforcement. In the words of Hugo de Brito Machado Segundo:

[...] the defendant's objections represent an autonomous action of knowledge, but closely related to the execution. Its main objective is to obtain the invalidation, in whole or in part, of the executive title, and, consequently, to obtain the extinction of the execution prepared by it. (Machado Segundo, 2010, p. 326).

2.6 THIRD PARTY EMBARGOES

These are knowledge processes that aim to clarify that certain assets seized in tax enforcement are not part of the debtor's assets, therefore they must be exempted from the seizure, Leandro Paulsen argues that they are parties that were not cited as executed and yet remain affected by the execution. According to Humberto Theodoro Junior:

“the process consists of a legal relationship that links the plaintiff, the defendant and the State judge, so that the subjection to the effects of this relationship, evidently, should not be felt beyond the people who comprise it. Third party objections are a procedural remedy that the appellant uses to protect an autonomous, distinct and incompatible material legal position with that involving the original litigants” (THEODORO JÚNIOR, 2002, p. 278).

2.7 PRE-EXECUTION EXCEPTION

It is a procedural incident used to raise matters of public order, where there is no if a probationary delay is necessary and they can be judged ex officio by the judge, according to the summary 393 of the Superior Court of Justice “The pre-execution exception is admissible in the execution tax authorities in relation to matters that can be known ex officio and do not require a delay in the provision of evidence.”, because it is not necessary to guarantee the judgment as in the objections to execution, it is widely used in tax law (when you meet its requirements).

According to the doctrine, it can be offered at three times; within the period of article 8 of the Tax Enforcement Law, after the seizure and when strictly linked to matters of public order, such as prescription and forfeiture, for example, at any time. Because it is a procedural incident occurs within the main process, normally tax enforcement, not preparation is necessary, but its suspensive effect can be requested.

As judged:

“The pre-execution exception is an exceptional type of specific defense in the execution process, admitted, according to the Court's understanding, in cases where the nullity of the title can be verified immediately, as well as in relation to public order issues, pertinent to the procedural assumptions and the conditions of the action, provided that the evidentiary delay is unnecessary” (REsp 915,503/PR, rapporteur Justice HÉLIO QUAGLIA BARBOSA, FOURTH PANEL, DJ 11/26/2007).

2.8 PAYMENT CONSIGNMENT

Paying taxes is not only an obligation, but also a right, with little useful in tax law, it is used when the active subject for some reason refuses to receive the benefit, demands compliance with administrative requirements without justification legal, the same generating fact is required by more than one public law entity, according to the article 164 of the national tax code.

The judgment in favor of the payment consignment is one of the causes described by National Tax Code as the extinction of tax credits. This is the hypothesis provided for in article 156, section VIII of the CTN. It should not be used to discuss the legitimacy of the parties, being limited to the exhaustive list listed in article 164 of the CTN. Thus, it teaches the Professor Luciano Amaro:

“The assignment in payment of tax obligations is a legal action that aims to protect the right of the taxpayer to pay his debt and obtain discharge, in the



cases in which there is a refusal to receive, or subordination of this to the payment of another tax or penalty, or to the fulfillment of an accessory obligation (art. 164, I), as well as in the event in which the receipt is subordinated to the fulfillment of administrative requirements without legal basis (item II); it also protects the individual in situations in which there is a demand, by more than one legal entity under public law, for an identical tax, on the same taxable event.

2.9 ACTION FOR UNDUE REPETITION

When the taxpayer pays his tax due in excess, he has the right to repeat it, or that is, to receive back from the tax authorities the difference paid, this act must occur within the sphere administrative, which means that judicial recognition of the undue payment. Therefore, it is the legal action that the taxpayer seeks to bring against the power a conviction in court so that the active subject returns what was unduly paid or was overpaid, if the request is rejected at the administrative level, the taxpayer will have the 2-year prescriptive period to file a lawsuit. based on article 165 of the national tax code:

"The taxpayer has the right, regardless of prior protest, to a full or partial refund of the tax, regardless of the payment method, except as provided in § 4 of article 162, in the following cases:

- I - Collection or spontaneous payment of undue tax or tax in excess of that which is due in view of the applicable tax legislation, or the nature or material circumstances of the taxable event that actually occurred;
- II - Error in the construction of the taxable person, in the determination of the applicable rate, in the calculation of the amount of the debt or in the preparation or verification of any document relating to the payment;
- III - reform, annulment, revocation or rescission of a conviction"

Unlike undue payment in the private sphere, double reimbursement is not applicable. The value of the cause must be fixed at the amount that is sought to be recovered and there is a deadline for claim 5 years (prescription), counted from the undue payment. Only those who can request the refund is who actually paid, unless the other party is authorized by the legitimate payer. According to the doctrine, there is no provision for preliminary injunction.

Its main purpose is to promote justice, so that we do not run the risk of the State to enrich themselves unduly with taxpayers' money. As Lenadro explains Paulsen:

If an undue payment is made, the right to reimbursement arises. This is because, in tax matters, no one acts out of liberality, but strictly by force of law, and the undue payment implies unjust enrichment of the alleged creditor to the detriment of the alleged debtor. (PAULSEN, Leandro, 2012, p. 210).

FINAL CONSIDERATIONS

This work, although still very superficial, was extremely useful in resolving doubts about the tax process, especially regarding initiative actions



of the taxpayer, called exational actions, this article sought to show with the maximum depth possible the beauty of the tax process, but if any pretension exaggerated exhaustion of the topic, since there is no doubt about the immensity of our position, laws and jurisprudence on the subject explained.

Substantive law provides the legal basis for a better administration of justice, in tax sphere means better financial management of resources, whether for micro, small and large companies, clusters or even the individual taxpayer, who, faced with any illegality, injustice or even doubts, must be protected from actions that we analyzed in the present work.

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