

## THE PRINCIPLE OF LEGALITY AS A LIMIT TO THE POWER OF TAX

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*Angela Medeiros Ramos*

### SUMMARY

Dealing specifically with the limitation of the taxation power granted to federated entities, this work addresses the application of the principle of legality in tax law. In this context, this principle, expressly established by the Federal Constitution and the National Tax Code, is positioned as a limitation to the exercise of taxation, as all taxes must be established pursuant to a specific law on the subject.

**Key words:** Power of Taxation. Limiter. Principle of Legality.

### ABSTRACT

Dealing specifically with the limitation of the power of taxation conferred on federal entities, this paper addresses the application of the principle of legality in tax law. In this context, this principle, expressly established by the Federal Constitution and the National Tax Code, is positioned as a limiting to the exercise of taxation, because all taxes must be instituted by the provision in a specific law on the subject. **Keywords:** Power of Taxation. Limiter. Principle of Legality.

### 1. INTRODUCTION

Expressly defined in the constitutional text, taxes are payments compulsorily charged to taxpayers by the State. However, this charge does not operate in an absolute manner, as some limits imposed by the Federal Constitution itself must be observed, among them, the mandatory observance of the principle of legality (or legal reserve). The aforementioned principle establishes that the tax will only be required if its institution is expressly provided for by law, that is, except for some situations dealt with throughout this work, the creation, increase and extinction of taxes must be regulated by law published by the entity charge originator.

Regarding the methodology used, articles and doctrinal works that specifically dealt with the principles of tax law were initially analyzed, as well as

the study of articles of the Federal Constitution and the National Tax Code that provide information on the subject, in addition to examining the jurisprudence adopted in the Superior Courts.

## **2 THE POWER TO TAX**

As we know, due to its sovereignty and with the objective of serving the public interest, one of the greatest prerogatives granted to the State is its power to demand taxes. In this sense, federated entities need to raise revenue to carry out their functions. Taxes are classified as derived revenues, created by law, charged to people compulsorily, and must be paid in cash.

However, this prerogative granted to the Public Administration to demand these revenues from individuals is not absolute. The late professor Ricardo Alexandre highlights that the legal-tax relationship, as happens in every legal relationship, is guided by law and, due to the interference that the right to tax generates on the right to property, the original constituent legislator decided to highlight in the The 1988 Federal Constitution itself sets some limits to this power. (2017, p. 126).

In this context, we have as examples of limits imposed on the exercise of tax powers provided for in the Federal Constitution the principles and immunities, mostly provided for in its article 150, making up the chapter that regulates the National Tax System.

### **2.1 THE PRINCIPLE OF LEGALITY AS A LIMIT TO THE POWER TO TAX**

As already explained, the tax is a compulsory pecuniary benefit, requiring payment regardless of the will of the taxpayer. For this reason, such provision must fall within the section provided for in article 5, item II of the Federal Constitution, according to which “no one will be obliged to do or not do anything except by virtue of law”.

By simply analyzing the article transcribed above, we get the idea that a provision in law is necessary only with regard to the creation of the tax. However, Ricardo Alexandre points out that, with regard to tax matters, article 150, item I of the Magna Carta expressly prohibits federated entities from demanding or increasing taxes without a law that establishes it, that is, legal provision is necessary for the case of an increase in the amount charged. Furthermore, the

National Tax Code also expressly states the need for taxes to be established by law, let's see:

Art. 3 Tax is any compulsory pecuniary payment, in currency or whose value can be expressed therein, that does not constitute a sanction for an illicit act, established by law and charged through fully linked administrative activity. (BRAZIL, 1966).

It is also necessary to deal with the principle of parallelism of forms, which, according to much of the legal doctrine, is the need for the revocation or alteration of an act to take place in the same form and hierarchy as the act that originated it. In other words, applying this institute to tax law, not only must the creation of the tax be provided for in law, but also its respective extinction, as well as not only its increase must be legally foreseen, but also its reduction. In the same sense, it is also worth highlighting the provisions of article 97 of the National Tax Code, which establishes other matters subject to reservation of law:

Art. 97. Only the law can establish: I - The institution of taxes, or their extinction;  
II - The increase in taxes, or their reduction, except as provided in articles 21, 26, 39, 57 and 65;  
III - the definition of the event generating the main tax obligation, except as provided in item I of § 3 of article 52, and its taxable subject;  
IV - Setting the tax rate and its calculation basis, except as provided in articles 21, 26, 39, 57 and 65;  
V - The imposition of penalties for actions or omissions contrary to its provisions, or for other infractions defined therein;  
VI - The hypotheses of exclusion, suspension and extinction of tax credits, or of exemption or reduction of penalties.  
§ 1 The modification of its calculation base, which means making it more onerous, is equivalent to increasing the tax.  
§ 2º It does not constitute a tax increase, for the purposes of the provisions of item II of this article, the updating of the monetary value of the respective calculation base. (BRAZIL, 1966).

However, according to § 2 of the article described above, the provision in law is not necessary for the monetary value of the tax calculation base to be updated, as well as, according to consolidated jurisprudence in the Federal Supreme Court (STF), it is also not subject to the principle of legality to set the deadline for the respective collection:

SUMMARY: TAX. ICMS. MINAS GERAIS. DECREES No. 30,087/89 AND 32,535/91, WHICH ADVANCED THE TAX COLLECTION DAY AND DETERMINED THE INCIDENCE OF MONETARY CORRECTION FROM THEN ON. ALLEGED OFFENSE TO THE PRINCIPLES OF LEGALITY, PREVIORITY AND NON-CUMULATIVITY. The claim is unfounded, given that the determination of the due date of the tax obligation is not subject to the principle of strict legality and precedence; Having already established itself in the STF, on the other hand, the understanding that the monetary adjustment of the ICMS debt due does not contravene the principle of non-cumulativeness (RE 172.394). Resource no

known. (RE 195.218/MG, Rel. Minister ILMAR GALVÃO, FIRST PANEL, judged on 05/28/2002, DJ 08/02/2002).

Still with regard to exceptions to the principle of legality, Ricardo Alexandre highlights the recent understanding of the STF that admits the relativization of closed typicality in relation to taxes and parafiscal contributions. For the Supreme Court, in these cases it would be possible to stipulate by law a maximum ceiling for the value of the tax, with the power to establish its real value being attributed to an infralegal normative act, which was called “opening of tax types” (typicality open). According to the STF, this would be possible because fees and parafiscal contributions have a consideration nature, with the institution responsible for collection being closer to the taxed reality. (2017, p. 137 and 138). In this sense, the STF established the following thesis:

The law that, by prescribing the ceiling, allows the infra-legal normative act to set the fee value in a reasonable proportion to the costs of state action, a value that cannot be updated by an act of the supervisory board itself in a higher percentage, does not violate tax legality. to the legally stipulated monetary correction indices. [RE 838.284, vote of the rel. min. Dias Toffoli, j. 19-10-2016, P, DJE of 22- 9-2017].

## FINAL CONSIDERATIONS

In summary, the prerogative granted to federated entities to compulsorily institute and collect taxes from their administrators is limited by the principle of legal reserve. Therefore, with the exception of cases specifically provided for in the Federal Constitution and other infra-legal provisions, it is necessary for the institution, increase and extinction of taxes to operate via specific legal provision, thus establishing one of the hypotheses of limitation to the power of taxation .

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