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ANALYSIS OF THE EXTINCTION OF THE TAX CREDIT VIA TRANSACTION: CONFLICT OF HYPOTHESES AND TECHNICALITY OF THE TERM

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ABSTRACT

The present study aims to critically analyze, based on the theoretical and methodological basis of Logical-Semantic Constructivism, the normative and systemic limitations to the disposal of the tax credit by the institute of the transaction. The theoretical analysis of the relationships, and consequently of the legal relations, allows us to understand the tax credit as the object of the obligatory relationship of a provisional nature between the Tax Authorities and the Taxpayer, therefore a Credit Right that belongs to the Public Administration, thus, covered by the principle of unavailability of the public good. From this perspective, the text analyzes the tax credit and the tax transaction programs, making a critical interpretation of the institutes, concluding that a tax transaction can't exist, due to the absence of the requirement of mutual concessions, as well as the existing conflict with the institutes of remission, amnesty and payment, which are also causes of extinction and exclusion of the credit. and, therefore, of the tax legal relationship.

Keywords: Tax Transaction. Credit. Disposition. Unavailable.

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INTRODUCTION

Much has been seen, in the current legal scenario, the initiatives of the public authorities to provide alternative ways to extinguish the tax credit, a commendable initiative that, if well carried out, provides collection for the public coffers and security for the taxpayer's assets. Especially in what concerns the attempts to avoid entering the judiciary to resolve the conflict, to the same extent that an alternative is sought for the already existing tax conflicts, which demonstrate a high number of defaults and unresolved conflicts

The tax transaction is the most recent creation of the legislator for the extinction of the credit, provided for in article 156, III of the CTN[3], however, such institute has its origin in the field of private law, that is, it was not created and designed for public x private relations, a difficulty that is amplified in a rigid system such as the Brazilian tax system.

In this sense, to analyze the possibility of extinguishing the tax credit via tax transaction, and what this represents legally, it is necessary to make a brief digression to the study of the relations, so that a legal relationship and its object can be defined, weaving a methodological approach to the study of the object of tax relations. Thus, the focus is not to criticize the transaction itself, nor to determine it as ineffective, only to analyze whether the tax credit could be disposed of in such a way, as well as whether the term transaction, under the focus of mutual concessions, represents what occurs in this phenomenon.

Relationship is a bond between two terms, and there are, therefore, relationships of numerous natures, whether they are marital, family, amorous, friendship, hierarchical and those that interest this study; legal relations. As is well known, positive law is a normative system built by texts of legal language aimed at prescribing conducts for the social environment, the norm affects the environment by jurisdicizing the fact.

This is how legal relationships are, the result of the incidence of certain rules that establish the bond between the parties, that is, a legal bond. Aurora Tomazini de Carvalho (2023, p. 594) defines them as:

> 'Legal relationship' (stricto sensu) is defined as the abstract bond according to which, by normative imputation, a person, called an active subject, has the subjective right to demand from another, called a taxable person, the fulfillment of a certain service, the latter having the duty to perform it. Such a link is constituted as a result of individual norms, produced in the process of applying the law.

In this vein, Tax Law as a branch attached to the field of Public Law, is the normative set that prescribes and regulates the relations between an individual and the respective taxing entity, a system that necessarily regulates the activity of collection and state exaction

[3] "**Article 156.** The tax credit is extinguished: [...] **III** - the transaction [...]". (Brazil, 1966).

on the taxpayer. From this point, the nature of tax legal relationships can be inferred, which are obligatory legal relationships of a serviceal nature, that is, one is obliged to provide (understand by performing) an object to the other, called tax.

In other words, the tax relationship of exaction represents the bond established by a rule – Matrix Rule of Tax Incidence – which, when its hypothesis occurs in the factual plan, and there is the production of an individual and concrete rule under the terms of the RMIT, a relationship that has a twofold character will be established between two subjects of law, which are (i) the right of the taxing entity to collect the tax and, (ii) the taxpayer's duty to pay, and the right not to be charged in cash greater than expected.

The tax credit is, therefore, the object of this relationship between the Tax Authorities and the Taxpayer, which, when extinguished or excluded, ends the legal relationship between the parties. Thus, what is really of interest to this study is the focus on how the tax transaction extinguishes the credit.

UNAVAILABILITY OF PUBLIC INTEREST AND CREDIT RIGHTS

When we talk about tax law, more specifically the object of the service that represents the link between the poles of the relationship, we will be talking about a relationship that is necessarily based on principles of public law that regulate the acts of the public administration.

In this plan, therefore, there is the application of the principle of unavailability of the public good, which forces an analysis directed to the following question: should the right to receive the tax be seen as an asset, and therefore, unavailable? What are the hypotheses in which the taxing entity can "waive" this receipt, and how should such a provision be made?

This principle is based on the idea that the good does not belong to the public administration, and that it only manages what belongs to the primary source of power – the people. The doctrinaires Marcelo Alexandrino (2011, p. 186) and Vicente Paulo (2011, p.186) elucidate:

> Due to the principle of the unavailability of the public interest (the expression 'public interest' is used here, in a broad sense, covering all public property and all the immediate or mediate rights of the people in general, the sole holder of public property), any acts that imply the waiver of the rights of the public power or that justifiably burden society are true to the administrator.

We believe that this is the first normative obstacle that can be enforced against any administrative act that disposes of the state credit (tax), the unavailability of that interest, whose pecuniary expression does not belong to the Public Treasury, which is only

responsible for collecting what the other subjects of Public Law will manage, therefore, it is not personal to dispose of.

For this same principled reason, there is in the legal system the Complementary Law 101 of 2000, popularly called the Fiscal Responsibility Law, in line with the central thought that the Public Treasury, nor the taxing entity, have nothing to dispose, they only manage a right. Such an instrument in the legal system presents clear and exhaustive hypotheses as to the possibility of the political entity "waiving" the tax credit, which is called revenue waiver.

LC 101/2000 presents in its article 14[4] the understanding that the administrative measure that means waiver of revenues must contain (i) a fit consistent with the Budgetary Guidelines Law, without affecting expected revenue, and (II) contain compensation measures.

Therefore, even if it is a credit right, such as the tax credit, called tax and object of the installment relationship between the Tax Authorities and the TAXPAYER, its disposition cannot occur without an estimate in the current budget guideline and with a provision for compensation.

It should be noted that, even dealing with a generic condition, there is no formal impediment to the provision of the main obligation, which suggests a possibility that, through the appropriate institute, such a provision can be made. This is also what paragraph 1 of article 14 of LC 101/00 suggests when it provides for

> The waiver includes amnesty, remission, subsidy, presumed credit, granting of exemption on a non-general basis, change in the rate or modification of the calculation basis that implies a discriminated reduction of taxes or contributions, and other benefits that correspond to differentiated treatment (Brasil, 2000).

Therefore, to waive revenue arising from the main object of the tax relationship, as well as accessory obligations, there must be, in addition to the generic conditions already exposed, adequacy of the legal vehicle that does so, being respectively the institute of

[4] "Art. 14. The granting or expansion of an incentive or benefit of a tax nature from which revenue waiver arises must be accompanied by an estimate of the budgetary-financial impact in the year in which it should come into force and in the two following years, comply with the provisions of the budget guidelines law and at least one of the following conditions: I - demonstration by the proponent that the waiver was considered in the revenue estimate of the budget law, in accordance with article 12, and that it will not affect the fiscal results targets provided for in the annex of the Budget Guidelines Law; II - be accompanied by compensation measures, in the period mentioned in the *caput*, by means of an increase in revenue, resulting from the increase in rates, expansion of the calculation basis, increase or creation of a tax or contribution.§ 1º The waiver includes amnesty, remission, subsidy, presumed credit, concession of exemption on a non-general basis, change in the rate or modification of the calculation basis that implies a discriminated reduction of taxes or contributions, and other benefits that correspond to differentiated treatment" (Brasil, 2000).

amnesty and remission. Such institutes, as Paulo de Barros Carvalho (2023) teaches, differ in the following regard:

> By remitting, the tax legislator forgives the tax debt, giving up its subjective right to perceive it; When granting amnesty, however, the excuse falls on the act of infraction or on the penalty that was applied to him. Both retroact, operating in legal relationships already constituted, but of different natures: remission, in obligations of a strictly tax nature; amnesty, also in bonds of obligation, but of a sanctioning nature. And, in addition, the amnesty can reveal the forgetfulness of the infraction that caused the punitive measure to erupt, while the remission never focuses on the tax legal fact, deconstituting or erasing it by the express forgetfulness.

Given the professor's elucidation, combined with the previous considerations, it can be seen that the provision that forgives the debt/credit right, therefore, renounces tax revenue, in addition to the general provisions, as exposed above, differs into two institutes. The remission is the institute that forgives the tax debt, understood as the main obligation, and the remission reaches the fact itself, the event that led to the conflict, a situation in which the political entity forgives the penalty applied.

It so happens that, as provided for in the aforementioned article, this provision of the credit *(amnesty, remission, subsidy, presumed credit, granting of exemption on a non-general basis, change in the rate or modification of the calculation basis that implies a discriminated reduction of taxes or contributions, and other benefits that correspond to differentiated treatment)* has its forms and natures already foreseen and systematized in the legal system, which gives rise to the thought that a notice of transaction by adhesion, which proposes to extinguish the credit, is not, due to the technicality of the provisions in the CTN, extinguishing it, given that such a phenomenon is shown to be made possible by the use of amnesties and remissions, tax waivers that should be accompanied by studies on the economic impact, and the remaining amount is extinguished by payment, which leads us to understand that the credit is extinguished by the transaction, but by payment, which is already included as an extinguishing hypothesis.

TAX TRANSACTION PROGRAMS

At this point, it is again necessary to digress in the text to better conceptualize the pertinent institute. In theory, it is an institute aimed at the extinction of credit that is based on mutual concessions between active and passive parties to achieve the resolution of the conflict. This is also the reasoning found in article 171 of the National Tax Code, whose wording points to the need for mutual concessions, as follows:

> Article 171. The law may allow, under the conditions it establishes, the active and passive subject of the tax obligation to enter into a transaction that, **through mutual concessions**, results in the determination of litigation and consequent extinction of the tax credit.
> Sole Paragraph. The law will indicate the competent authority to authorize the transaction in each case (Brasil, 1966, emphasis added).

However, it is a matter created for the resolution of conflicts of a private nature, and only later was it transported to the field of Tax Law. In essence, the tax settlement is a method of conflict resolution based on concessions from both poles of the legal relationship to end the established relationship. This characteristic, elementary of the institute, cannot be underestimated or weighed when placed in the field of conflict between public and private, in the case of a duty of the state to collect the tax, and a right of the state to receive it, can the administration grant something in transaction? And also, what can the taxpayer grant, given that making the payment cannot be interpreted as a concession.

The transaction programs offer discounts on accessory cash, such as fines, interest and other charges according to the installment of the amount. However, as stated above, such a fact cannot be seen as a transaction, as it represents a different institute already existing in the field of tax law, the amnesty, and, in the same way and further aggravated by the unavailability of the public interest, what is called a tax transaction cannot reach the principal cash. In this sense, in his work "Legal Foundations of Incidence" Paulo de Barros Carvalho (2023, p.255) teaches:

> I cannot conceive that the waiver of the value of the tax should be included among the concessions, as it would constitute a hypothesis of remission or forgiveness of the debt, as well as the possibility of offsetting credits, extinguishing modalities that will be different from the transaction. In the same way, the exemption from amounts related to sanctions, punitive or moratorium, would fall under amnesty, which is an equally different institute.

In this sense, what is verified about transaction programs is the framing of tax amnesty by another name, allowing only an installment of the remaining amount to be paid by the taxpayer, which constitutes payment, an extinguishing hypothesis provided for in article 156, I of the National Tax Code. In other words, what has been called a tax transaction, with the concessions made, fits, in the practical field, into various institutes.

That said, let us analyze the recently launched tax transaction program provided for in the state of Goiás, called QUITAGOIÁS. The text of State Complementary Law No. 197/24 provides for ancillary charges and main charges, respectively:

> Article 14. The transaction may include, separately or cumulatively:
> I – the granting of discounts on fines, interest and other legal accruals related to credits to be transacted that are classified as irrecoverable or difficult to recover, according to criteria established in an act of the State Attorney General, under item V of article 13 of this Supplementary Law
> 3. The transaction may not:
> I – reduce the principal amount of the credit, thus understood as its original value, excluding the additions referred to in item I of the *caput* of this article;
> II – imply a reduction of more than 65% (sixty-five percent) of the total value of the credits to be transacted, except for the provisions of paragraph 4 of this article; and
> III – grant a period for the discharge of credits exceeding 120 (one hundred and twenty) months, except for the provisions of paragraphs 4 and 5 of this article (Brasil, 2024).

Note that the text put by the State Complementary Law presents precisely the reduction of accessory charges, which is not consistent with a transaction, but with debt amnesty, which must be by the Budgetary Guidelines Law, and, correctly, the text keeps the tax amounts untouched, which could only be disposed of by the taxing entity, if the intention was to pardon, it should be protected by a technical study that demonstrates the absence of damage to the foreseen public budget, via remission.

That said, it must be questioned; If the principal cannot be reached, and the provision of ancillary charges is already seen as amnesty, what does this institute consist of, can it be said that there is a tax transaction?

The legal scholar Eduardo Jardim (1998) argues that there is no place, within Tax Law, for the transaction[5], because nothing is being transacted in the strict sense, an amnesty is granted that extinguishes part of the amount due, and the rest is installment of the tax credit. Thus, the legal relationship between the Tax Authorities and the Taxpayer will only be extinguished when the last installment is made, effectively demonstrating that the extinction took place via payment, possibility of an installment plan.

The whole problem lies in the technicality of the term tax transaction, by listing it as a hypothesis of extinction, the legislator inserts in the system a hypothesis of extinction of the credit that will only be effective when the empirical verification of the other hypotheses of extinction occurs, as well as the occurrence, concomitantly, of hypotheses of exclusion of the tax credit. That is, the alleged extinction via transaction requires, at the same time, an amnesty and/or remission granted by the taxing entity, as well as an installment payment on the unforgiven portion, which will end the relationship when the last payment is verified. This demonstrates, pragmatically and technically, that what is called a tax transaction consists of a grouping of other extinguishing routes.

[5] "In the universe of tax law there is no place for the transaction, which is why it would be opportune to suppress it from the context of the National Tax Code". (Jardim, 1998).

WHAT DOES THE LEGAL RELATIONSHIP ENTAIL?

When dealing with legal relations, no bond can be eternal, there is no coherence in allowing a certain subject of law, even if it is the public administration, to hold an eternal right, given that the practical objective of law, as a prescriptive text, is to be realized in the factual plane. Law is a set of prescriptive texts that allow the mental construction of the legal norm, whose main intent is its realization in the factual world, for this very reason the legal world and its language is called *should-be*.

Not only from this angle, but also from an axiological perspective of Law, which stems from its normative plan, there is the principled conception that the legal system must conceive a safe environment, security that we can agree that it is "legal-security", a legal superprinciple, which directs all normative application, legislative and judicial activity and other demonstrations of legal activity of the system. Such institute refers to the predictability of the law, coherence in the interpretation and security of those who operate the legal system, that said, it is inconsistent with this principle that there is a relationship in the system that nothing ends, given the mutability of the medium and therefore of the prescriptive text that directs it, it is necessary to study the point that encloses the legal relations.

For these reasons, a simplistic analysis stating in vague terms that what puts an end to the legal relationship is the transaction is not enough. It is necessary to individualize the acts, determining at what moment the legal relationship is extinguished, that is, at what moment the credit is extinguished.

From the outset, the analysis of the legal materiality about the object allows the conception of two distinct moments, which in turn produce opposed conclusions of a legal nature, which are: (i) it ends with the adhesion to the transaction program or acceptance by the tax authorities of the taxpayer's proposal and, (ii) it ends with the final payment of the credit, of the last installment.

That said, it is necessary to analyze each one individually. The first hypothesis, if the legal relationship is carried out when joining the program, seems irrational to us, given that in the case of installment payment of the amount not redeemed or amnestied, how could there be an unrelated object? Is this a transmutation of the legal nature, requiring a civil debt as a result of the extinction of the tax relationship? As stated in the introduction of this study, the tax credit is the object of the tax legal relationship, therefore, with its extinction the relationship will also be extinguished, and, as a logical consequence, the extinction of the relationship presupposes the extinction of the credit.

Thus, by the logical influence of thought, only the second hypothesis is appropriate, in which the extinction of the tax relationship occurs only with the payment of the amount not redeemed or amnestied. However, conceiving such a visualization is precisely what invalidates the possibility of the existence of what is commonly called a tax transaction. This is because the extinction of the credit occurs via payment, hypothesis of item I, article 156 of the CTN[6], an extinguishing circumstance of the credit that is in no way to be confused with transacting.

This is what is commonly seen in adhesion programs, taking the QUITAGOIÁS program (LC 197/24) as an example, if not see: "Article 4 When the transaction involves a moratorium or installment payment, the provisions of items I and VI of article 151 of the CTN will be applied for all purposes" (Goiás, 2024).

Now, if the text of the LC that allows the transaction in the state of Goiás provides that the amounts that are paid in installments, that is, those not paid in a single installment, will have their enforceability suspended, it is implicit in the text that only extinguishes the credit the payment of the final obligation, and not the adhesion.

That said, it is necessary to reiterate the understanding exposed above and corroborated, as collated, by professors Eduardo Jardim and Paulo de Barros Carvalho that there is no place, in the national legal system, to transact tax credit, not even if there is a tax transaction.

Taxpayer's concession – What can be understood as such?

As stated above, the institute of the transaction is based on the resolution of the conflict through mutual concessions of the poles of the legal relationship. Thus, it was exposed in the first analysis what could be understood as a concession by the credit holder, the taxing political entity and its administration, concluding, in this first stage, that what is envisioned as a concession is, in essence, another legal institute (amnesty), which in itself already disqualifies the transaction as a hypothesis of extinction of the credit.

Even so, to promote a concrete analysis of the object, the same activity is necessary from the perspective of the one who is obliged to comply with the obligation, the taxpayer.

First, it should be noted that the application of the institute is beneficial to the taxpayer, with practical advantages, as explained by professors and jurists Paulo Cesar Conrado, and Fernanda Donabella Camano (2023, p. 71), if not see:

[6] **Article 156.** The tax credit extinguishes: **I** - the payment. (Brazil, 1966).

> The objectives that affect taxpayers at a truly individual level are detectable by the conjunction of aspects similar to those of the Tax Authorities, thus operating the duration of the process, the consistency of the jurisdictional response, the costs of maintaining the pendency **(especially when compared with the concessions granted in the public notice)**, but, at the end of the day, what remains (or should remain) in the taxpayers' retentive is the comparison between the possible success of the demand, the risk of defeat (with the consequent need for full payment of the credit) and the intermediate position provided by the transaction, involving the immediate payment, even if in installments, of a more or less reduced amount (according to the discount plan that may be given by the tender protocol). (Emphasis added).

It is clear that avoiding tax litigation, as well as extinguishing the obligation under a possibly lower amount, by an amnesty granted, are gracious advantages to the taxpayer, which must be weighed against the concessions to which they must submit to adhere to the transaction program.

The main concession made by the taxpayer, which can be found in practically all adhesion programs, is the impossibility of judicially contesting the collection when entering into the transaction, which, it is believed, encompasses the repetition of the undue payment, that is, the taxpayer waives from raising and taking to the exercise of jurisdiction any challenge to that exaction, under the guarantee of extinguishing the credit for a considerably lower amount and a deferral, in time, of payment. This is because the adoption of the proposed notice implies the confession of the debt.

Thus, there are concessions made by the taxpayer such as the condition of the debt and the waiver of jurisdictional activity. However, we insist on the idea that these concessions alone do not characterize the transaction, we do not fail to understand that the application of this phenomenon presents benefits for the tax authorities, as well as for the taxpayer, with the recovery of credits, higher income for the farms, greater funding of public activity, less judicialization, extinction of the obligation relationship, end of the risk of constriction of assets and more, We maintain our criticism regarding the use of the term as an extinctive hypothesis and analysis of the technicality of the phenomenon.

TAX TRANSACTION FROM THE PERSPECTIVE OF ISONOMY

The constitutional principle of tax isonomy is found among the limitations on the power to tax, which, as it should be demonstrated, are not rules available only to the establishment of a tax and its criteria, but also limit the acts of disposition of the credit. As a logical consequence, the one who holds the power to tax is also the bearer of the duty not to do so within the list of situations provided for, therefore, the limitations provided for in article 150 of the Magno Text must also be applied in the study of the transaction.

It is interesting to remember, when dealing with constitutional principles, the rationale put forward by Justice Celso de Mello, (Brasil. STF. Plenary of the STF, judgment 07.10.1992, DJU – 19.02.1993, p. 2032):

> The constitutional tax principles, therefore, represent an important political-legal achievement of taxpayers, constitute a fundamental expression of the individual rights granted to individuals by the state system. Since they exist to impose limitations on the State's power to tax, these postulates are exclusively addressed to the State power, which submits to the imperative of its restrictions.

In the system of this reasoning, the principle of Tax Equality is enforceable against the public administration, preventing it from having tax practices in the system that lead to a discrepancy between taxpayers. That is, the tax transaction ends up removing the competitive equality that is objective in the mercantile system.

That said, item II of article 150 of the Federal Constitution says "instituting unequal treatment between taxpayers who are in an equivalent situation, prohibiting any distinction due to professional occupation or function exercised by them, regardless of the legal denomination of the income, titles or rights", being one of the prohibitions expressed by the wording of the *caput* (Brasil, 1988).

It is important to emphasize the analysis in the context of the clause "instituting unequal treatment between taxpayers who are in an equivalent situation", the truth is that part of the market operates with default, using the amount equivalent to the unpaid debt as cash flow, while waiting for transaction programs to pay the amount with the benefit. Such practice, although gray, has been known for a long time, which forces us to consider the effects of such practice on free competition, considering that another substantial portion of the market is prohibited from operating with the absence of a CND (Negative Debt Certificate), which is why they do not enjoy the liberality to adopt the public notices, since they cannot remain in default status until adhesion.

In this context, it is important to ascertain whether the tax transaction programs would not be directly harming the isonomy of the tax system, providing a more beneficial condition to the detriment of another. This is because, by allowing taxpayer C1 to "transact" / or rather, pay its debt in a favored condition, considering that part was written off by tax remission/amnesty, while C2 is obliged to (i) settle the full debt with the accessory amount included, or (ii) question it in court via defense in Tax Foreclosure or Annulment Action of Tax Debt.

CONCLUSION

The infamous tax transaction can be seen as an atechnical term, whose expression in the factual field is given through other institutes already existing among the possibilities of extinction of the credit (payment), and hypotheses included in the list of exclusion of the tax credit (tax waiver, via amnesty and/or remission), coming to extinguish the credit and, in turn, the relationship, since there is no relationship without an object, for the payment of the debt (article 156, I of the CTN[7]), which is made possible by an installment plan.

Thus, from the point of view of the need for mutual concessions to extinguish the obligation, no matter how much some provisions demonstrate this element by the taxpayer, the same does not occur from the perspective of the Tax Authorities.

The concessions that the Public Treasury, whether federal, state or municipal, can grant in the Adhesion Plan are already found in other institutes of tax law, so that such regulation cannot be distorted, attributing it a new nomenclature and disregarding its previous nature.

Even if we consider the transaction as a wrapper that contains amnesty for punitive charges and an installment of the debt, see that everything contained in its body already exists in the past, has its legal nature, and the conclusion returns to the point where nothing was transacted, only part forgiven and another part, installments and paid.

Finally, it is understood from the analysis made above that there is no normative opening for the tax settlement in the Brazilian tax system, as it is an Institute for private conflict resolution, whose application in the system of Tax Law comes up against a confusion of technical concepts.

[7] **Article 156.** The tax credit extinguishes: **I** - the payment. (Brazil, 1966).

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