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TAXATION OF ILLEGAL ACTS AND THE PRINCIPLE PECUNIA NON-OLET

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ABSTRACT

This study aimed to analyze the doctrinal conflict present in the possibility of taxation of illicit acts, from the perspective of the Pecunia Non Olet tax principle. By outlining goals to achieve the proposed objective, the aim is to highlight the concept and purpose of taxes in a national scenario. Next, the form of taxation adopted by the National Tax System is clarified. Next, the doctrinal understanding regarding the Pecunia Non-Olet principle is highlighted, emphasizing the positions that admit its admissibility and inadmissibility in the national tax system. Finally, the jurisprudential understanding, guided by the Superior Courts, is demonstrated. To achieve the proposed objective, bibliographic research was carried out, using a qualitative approach, in November 2024. Therefore, the objective of the study was achieved by explaining the doctrinal conflict regarding the possibility of illicit taxation in a national scenario, following the perspective of the Pecunia Non-Olet principle. In support of the centrality of the topic, the concepts and purposes of taxes in Brazil were highlighted, in addition to elucidating the form of taxation adopted by the National Tax System. Next, the doctrinal understanding regarding the arguments of admissibility and inadmissibility of illicit taxation was highlighted, followed by the jurisprudential positions adopted in the country, guided by the Superior Courts.

Keywords: Taxes. Principle of Pecunia Non Olet. Illicit Taxation.

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INTRODUCTION

The history of taxation dates back to the earliest civilizations, in which mandatory contributions were required from citizens to finance society's needs. For example, taxation in Ancient Egypt stands out, with agricultural products supporting the power of the pharaoh and financing major public works, such as temples and irrigation canals. Years later, during feudalism, peasants and serfs were required to pay a series of taxes to feudal lords in exchange for protection and the right to cultivate the land. Thus, it is worth noting that taxes supported the aristocracy and maintained social order, revealing the obvious relevance of taxes as a constant in sustaining power and economic organization.

With the consequent evolution of societies, taxation became not only a source of resources but also an instrument of economic and social policy, through which States regulate the distribution of wealth and promote the well-being of the population. In the contemporary context, it is clear that taxes are crucial for financing public services such as health, education, security, and infrastructure, which ensure the development and stability of society.

In this context, the capacity for effective and fair collection allows the State to fulfill its essential functions and meet social demands, ensuring fiscal justice and equity in the distribution of the tax burden. In order to achieve this objective, it is important to emphasize that the duty to pay taxes in society is not universal, and is controlled by limiting mechanisms, such as immunities, powers, and, focusing on the theme of this study, principles that guide the taxation of legal acts.

Among the main principles limiting tax activity, the principle of prohibition of confiscation stands out, provided for in Article 150, item IV, of the Federal Constitution, which is used to prevent taxes from being used as a way to confiscate taxpayers' assets or income, ensuring that taxation is reasonable and proportional. This principle aims to protect citizens' assets and ensure fiscal justice, preventing the tax burden from hindering the exercise of fundamental rights or compromising the taxpayer's economic subsistence.

Given this concept, the tax capacity and the prohibition of the use of taxes as a form of confiscation are essential to understanding the illicit taxation provided for in art. 118 of the National Tax Code, which makes us understand that, for tax law, taxation of criminal acts does not have the character of a sanction, but follows the duty established by the State, under the principle of pecuniary nonviolent, or rather, "money has no smell".

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Thus, this study has the exposed question: Does the legal system adopt the possibility of illicit taxation?

Given the exposed problem, this study has as its central objective to analyze the doctrinal conflict present in the possibility of taxation of illicit acts, from the perspective of the tax principle of Pecunia Non-Olet. To achieve the proposed objective, the aim is to highlight the concept and purpose of taxes in the national scenario. Next, the form of taxation adopted by the National Tax System is clarified. Next, the doctrinal understanding regarding the Pecunia Non-Olet principle is highlighted, emphasizing the positions that admit its admissibility and inadmissibility in the national tax system. Finally, the jurisprudential understanding, guided by the Superior Courts, is demonstrated.

The methodology used in this study was based on the bibliographic research technique, with a qualitative approach. Information from books, academic articles, periodicals, and consultations of databases available on the internet, as well as the study of scientific works, were analyzed with the aim of achieving a comprehensive understanding of the topic, during the month of November 2024.

THE CONCEPT OF TAX IN BRAZILIAN LEGISLATION

Since taxation has been present since ancient civilizations, taxes have historically emerged as essential tools for the constitution of organized States, consolidating themselves in the power structures to support the social needs and security of their citizens.

In the national context, the concept of tax is regulated by the National Tax Code (CTN), where article 3 clarifies that tax is "any compulsory pecuniary payment, in currency or whose value can be expressed in it, that does not constitute a sanction for an unlawful act, instituted by law and collected through fully linked administrative activity" (BRASIL, 1966, Online). This concept is broken down into distinct characteristics that form the legal nature of the tax and determine its implications.

Firstly, it is known that the tax represents a mandatory payment, of a compulsory nature, independent of the will individual nature of the taxpayer. Furthermore, the tax contribution must be demanded in cash, which ensures its liquidity and facilitates compliance with the tax obligation. However, art. 156 of the CTN allows the tax obligation to be settled in other assets, such as real estate, in exceptional circumstances, but the amount of the tax will be expressed in national currency.

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In addition, another essential aspect of the concept of tax is its non-punitive nature. The tax is not, and cannot be, constituted as a sanction for an unlawful act, and cannot be confused with a penalty or fine. Taxes and sanctions are distinct concepts because if there were a punitive intention, the charge would lose its nature as a tax and would be characterized as a penalty.

Given this, it is clear that there is a widely consolidated link between taxes, in the national legal system, and the principle of tax legality, which determines that no tax can be created or increased without a law previously establishing it. In this regard, one can also mention the principle of legality in the strict sense, brought by the Constitutional Charter. Regarding the legality adopted for the tax scenario, provided for in Article 150, item I, of the Federal Constitution, it denotes the guaranteed legal certainty for taxpayers, ensuring that any tax obligation is supported by a legislative norm. This legal nature confers predictability and transparency to the tax system, preventing arbitrary charges and protecting taxpayers from exactions imposed without due legislative process.

In this regard, taxes have the essential purpose of providing the State with the financial resources necessary to fulfill its functions and promote social well-being, supporting the government structure and enabling the implementation of public policies aimed at developing infrastructure, funding essential services, and guaranteeing basic rights to the population, such as education, health, and security. Thus, the importance of taxes goes beyond mere collection, as they constitute one of the main instruments through which the State performs its regulatory role and promotes development. Thus, to complement the understanding of taxes, it is worth highlighting the types of tax collection, which can be classified as fiscal, extra-fiscal, and parafiscal. As explained by Oliveira (2021, p. 6), tax collection is mainly aimed at maintaining general state activities, covering taxes whose main function is to finance public administration and services offered by the State. Extrafiscality, on the other hand, gives taxes a regulatory function, allowing the State to intervene in the economy and promote social changes by inducing or discouraging specific behaviors that benefit the common good. For example, higher taxes on polluting products discourage the consumption of items that are harmful to the environment, encouraging sustainable alternatives.

In turn, Oliveira (2021, p. 6) explains that parafiscal collection involves the delegation of authority so that entities other than the State, such as autarchies and professional councils, can collect certain taxes. These resources, managed directly by the

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tax-collecting entities, finance specific activities, such as the regulation of professions and the development of strategic sectors of the economy. In this way, this delegation expands the State's capacity to act, while allowing for more specialized management of resources in areas that require greater attention and direct supervision.

In Brazil, the Constitution stipulates that taxing authority be distributed among the Union, States, Federal District, and Municipalities, organizing and limiting the taxing power of the federative entities. With this, the Constitution recognizes, in Article 145, three main types of taxes: taxes, fees, and improvement contributions, which are defined by their function and nature (BRASIL, 1988, online). Although the Constitution adopts the tripartite division, the Federal Supreme Court (STF) adopts the quinquipartite classification of taxes, including, in addition to taxes, fees, and improvement contributions, compulsory loans and special contributions (Oliveira, 2021, p. 6).

In this context, it is clear that the concept and purposes of taxes in the Brazilian legal system demonstrate the relevance of tax practices for the proper functioning of the State, in addition to meeting the needs of society. The tax structure must guarantee fiscal justice and promote an equitable distribution of the tax burden, reflecting the principle of equality and taxable capacity.

TAXATION ADOPTED BY THE NATIONAL TAX SYSTEM

The Brazilian national tax system is a structure composed of rules, principles, and guidelines that guide the institution and collection of taxes, ensuring that the State has the resources necessary to perform its essential functions. This system, established by the Federal Constitution of 1988 and regulated by the CTN, organizes the distribution of tax powers among the federative entities – Union, States, Federal District, and Municipalities – ensuring autonomy for each of them in the institution and management of their taxes.

In addition to financially supporting public policies and services that benefit society, the tax system acts as an instrument of economic and social policy, allowing the State to intervene in the economy to correct inequalities and promote sustainable development. Thus, taxes are distributed in a way that respects the principle of taxable capacity, to demand from each citizen a contribution according to their economic capacity, and the principle of equality, which ensures equal treatment among taxpayers. Furthermore, the STN is guided by basic principles of tax relations, such as legality, prior notice, and non-retroactivity, ensuring that no tax is instituted or increased without due legal provision and

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that its application observes the time and due legal process. These guarantees aim to protect taxpayers against arbitrary actions and promote transparency and predictability in tax relations, reinforcing public confidence in the tax administration.

In this way, the system seeks not only to collect resources but also to carry out fair and balanced taxation, which is fundamental for the development and stability of society.

To understand the form of taxation adopted by the STN, it is necessary to make comments about tax powers, as well as constitutional divisions. The first type, tax power, is the constitutional attribution given to the federative entities (Union, States, Federal District, and Municipalities) to institute and collect taxes. This power is exclusively attributed to legal entities under public law and is therefore non-delegable and non-transferable. This means that each federative entity has the autonomy to establish and administer taxes on certain economic bases, as established by the Supreme Rule. Even if an entity chooses not to exercise its tax power, it cannot transfer it to another entity or delegate it to third parties, thus preserving federative autonomy.

Despite this autonomy regarding the establishment and collection of taxes, the original legislator left very limited room for these entities to exercise legislative power in tax matters. Thus, the Brazilian tax system is considered rigid, since the 1988 Constitution established detailed and detailed rules on the types of taxes and the incidence limits for each entity, restricting the room for maneuver to create new taxes or change existing ones.

> In contrast to the French, Italian, or American constitutional tax systems, for example, the Brazilian constituent exhausted the discipline of tax matters, leaving the law, simply, the regulatory function. No discretion and an extremely limited sphere of discretion were granted to the ordinary legislator. Tax matters are exhaustively dealt with by our Constitution, and our tax system was entirely modeled by the constituent himself, who did not allow the law the slightest possibility of creating anything – unless expressly provided for – or even introducing variations not previously and explicitly contemplated. Thus, the law cannot contribute anything to the shape of our tax system. Everything was done and finished by the constituent. (MIGUEL, 2020, p. 22).

The rigidity present in the constitutional text, reflected in the tax scenario through the STN, aims to ensure uniformity and legal certainty, avoiding conflicts between entities and protecting taxpayers from an excessive and disorderly tax burden. However, by limiting the ability to adapt to regional economic realities, this structure can sometimes hinder the implementation of more flexible tax policies aligned with local needs.

By distributing tax powers among the federative entities in a clear and precise manner, the Constitution aims to limit fiscal power and avoid overlapping taxes, ensuring

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that each sphere of government has its specific field of action. Subconstitutional legislation, such as the CTN, complements these provisions, detailing the limitations and obligations of each entity when establishing and administering taxes.

The second type relevant to understanding the study is the tax legal relationship, which is the link established between the State (active subject) and the taxpayer (passive subject), based on the occurrence of the event generating a tax, which results in the tax obligation. For this relationship to exist, three essential elements must be present: the active subject, the passive subject, and the taxable event. The active subject of the tax obligation is the public entity (Union, State, Federal District, or Municipality), which has the power to demand compliance with the obligation. The passive subject is the taxpayer, who is required to pay the tax.

In the field of tax law, the taxable event is the element that makes the tax obligation collectible, being the specific event referred to in the tax rule as a condition for the collection of the tax. The CTN, in its article 114, defines it as "the situation defined by law as necessary and sufficient for its occurrence" (BRASIL, 1966, Online). Oliveira (2021, p.10), adds:

> The taxable event is a material situation described by the legislator: acquiring income, providing services, importing foreign goods, etc. Therefore, it is said that acquiring income is the taxable event for income tax (an elliptical phrase to express the event that gives rise to the obligation to pay income tax) (OLIVEIRA, 2021, p.10).

Thus, it is noted that this element is an objective event or situation that, once realized, implies the obligation to collect the tax due. Furthermore, the CTN also provides that, to characterize this term, the legal regularity of the action is not considered, but rather the occurrence of an economic capacity that becomes enforceable by the State.

The analysis of the highlighted element involves an objective aspect so that the validity or legality of the act in itself is not relevant for tax purposes. Thus, even illicit activities, when they provide an increase in assets or economic gains, are subject to taxation, since they present signs of taxable capacity. Therefore, it is clear that the STN has the necessary rigidity for taxation, divided into aspects of the tax capacity of the entities, as defined by the constitutional division, so that the original legislator made it impossible to create flexible taxes outside the relevant legislation, in compliance with the basic principles, such as legality and prior notice, enabling fair and balanced taxation.

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THE PECUNIA NON OLET DOCTRINE

As a principle elucidated by doctrine, the Pecunia Non-Olet principle, translated from Latin as “money has no smell”, has a relevant function in tax law, especially about the taxation of income of illicit origin. This principle is based on the premise that when establishing and collecting taxes, the State should not question the licit or illicit origin of the resources, but rather ensure compliance with the tax capacity. Thus, it can be said that the principle establishes that the indication that a resource was obtained through illegal means does not make it immune to the incidence of taxes, since what matters to tax law is the existence of a real increase in assets.

The origin of the principle dates back to Ancient Rome, during the reign of Emperor Vespasian (69-79 AD), where it is recognized that the emperor instituted a tax on the use of public latrines, which aroused indignation in his son, Titus. In response to the criticism, Vespasian, holding a coin obtained from the aforementioned tax, stated that “money has no smell” (Pecunia Non-Olet), suggesting that the usefulness of money for the State was what mattered, regardless of its origin (Oliveira, 2021, p. 9).

From this event, the idea was consolidated that money, once in the hands of the State for public purposes, is not contaminated by the acts that originated it. For contemporary law, this principle was adopted as a normative guideline, through doctrinal understanding, which authorizes the collection of t taxes on income from illegal activities, provided that the taxpayer's economic capacity is established.

In the early days of its use as a principle by the doctrine, we have the presence of the German doctrinaire Albert Hensel, who, in his consideration, explains: “Precisely the principle of equality of taxation does not allow the taxpayer to be allowed to open the doors of the tax haven through immoral or illicit activities” (Helsen, 2002, p. 45).

In Brazil, the Non-Olet principle also has normative support in the CTN, specifically in articles 3 and 118, standardizing the principle previously used by doctrinaires in interpretations of the norm. Article 3, when defining the tax, makes explicit reference to the separation between the first and the sanction, reinforcing its applicability, since, when taking into consideration that the tax does not serve as punishment for the practice of an unlawful act, it is concluded that it functions as a way of expressing the contributory capacity demonstrated by the increase in assets. Furthermore, article 118 complements the guidance by establishing that the interpretation of the legal definition of the taxable event must be abstracted from “the legal validity of the acts practiced by the taxpayers” (BRASIL,

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1966, Online). In other words, the tax law disregards the level of legal validity and the lawful or unlawful nature of the acts that originated the said event, confirming that the focus of tax law falls on the concrete economic effects. In this sense, Non-Olet plays a fundamental role in avoiding unequal treatment between those who obtain income from illicit sources and those who obtain it from legal sources, because if there were a distinction between income, illicit gains could grant unfair economic advantages to offenders, in comparison to citizens who comply with their legal obligations, which would violate the principle of tax equality, provided for in article 150, item II, of the Constitution. In this way, when taxing illicit income, the State maintains neutrality about the origin of the resources, ensuring that everyone contributes based on their economic capacity. From a doctrinal perspective, the Non-Olet principle is supported by the majority of doctrines, in terms of admissibility, as stated by Ricardo Lobo Torres (2009, p. 372), who states:

> If a citizen engages in illicit activities with economic consistency, he must pay tax on the profits obtained, so as not to be treated unequally compared to people who are subject to tax on earnings from honest work or legitimate property (TORRES, 2009, p. 372).

Other scholars also observe the admissibility of the principle, to guarantee the preservation of tax justice, by preventing tax evasion and violation of criminal legislation from resulting in an economic advantage for the offender. The application of this principle, therefore, reinforces the autonomy of this branch of law about others, especially criminal law, since its focus is exclusively on the incidence of the manifestation of wealth, without this implying legitimacy of the activity originating the resources.

Thus, the dilemma of taxation of income arising from illegal acts involves two main schools of thought. On the one hand, there is the school of thought that defends the inadmissibility of charging taxes on such acts, arguing that this would imply an indirect legitimization of illegality and would contravene fundamental principles of criminal law, being the minority doctrine. On the other hand, there is the school of thought currently used in Brazil, which considers the taxation of illegal income as admissible, based on the principle of Pecunia Non-Olet and the need to maintain tax equality and the ability to pay. Both schools of thought are widely debated, with the latter being the majority about the former, reflecting the complexity of defining the limit between the punishment of the illegal act and the tax obligation arising from the increase in assets. To understand the dilemma, it is clarified that the understanding supported by the doctrine in favor of the taxation of illicit

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income is based mainly on the insertion of Non-Olet in the national scenario, in addition to the application of the concept of tax capacity, explained above in this study. For Non-Olet, what matters for the incidence of the tax is the existence of an increase in assets and, consequently, of economic capacity, and it is unnecessary – it should be emphasized, for tax law – whether the resources are of a lawful or unlawful origin. From this perspective, when it is verified that the taxpayer has obtained an enrichment, the State has the right to demand its contribution to the financing of public activities, regardless of how this increase was obtained.

Presented by the modern and economic interpretation of the Tax Code, the tax law taxes a certain economic situation, so that when this occurs, the tax is due, regardless of the legal circumstances that created it. (Suzana, 2020, p. 144).

This line of thought clarifies that tax burdens do not fall on the unlawfulness of the action itself, but rather on the economic effects resulting from this action, that is, on the increase in assets, which forms the taxable event of the tax obligation. This argument is also supported by art. 116 of the CTN, which describes the taxable event as the "situation defined by law as necessary and sufficient for its occurrence" (BRASIL, Online), with the taxable event being an objective economic situation, that is, a consequent increase in assets, and not the legal nature of the act, which necessarily gave rise to the increase in question.

In this line of understanding, art. 113 of the CTN establishes that the main tax obligation arises with the occurrence of the taxable event, while the accessory obligation refers to the administrative duties of keeping records and facilitating inspection. Thus, the collection of taxes is levied on the asset accession itself, constituting the main obligation, while the conduct that gave rise to the income — whether lawful or unlawful — is not relevant to the tax obligation. Article 114 of the code also reinforces this perspective, defining the taxable event as the concrete event that generates the tax obligation. In this way, the CTN explicitly separates the analysis of tax law from moral or criminal judgments on the origin of the resources, focusing only on the economic manifestation of the taxpayer. Alfredo Becker (2020, p. 146) emphasizes that the abstract taxable event is presupposed by an economic fact or human act, considered in its factual reality, abstracted from its legal nature (lawful or unlawful). Therefore, if the unlawfulness occurs in that economic fact or human act, it does not prevent the occurrence of that fact or act from realizing the concrete taxable event. The law must only observe the occurrence or not of the facts foreseen as a

triggering event of the tax obligation, leaving aside social, moral, or legal issues (whether illegal or not).

Since the incidence of illegality is dispensable for the configuration of the tax obligation, it is possible to state that tax law acts neutrally regarding the aspect of the origin of the resources, necessarily focusing on the economic effect, specific to taxation. Although the interpretation gives room for opposing ideas, it is emphasized that the State is not legitimizing the illegal practice, but simply fulfilling its role of demanding a contribution proportional to the economic capacity demonstrated by the increase in assets.

Imbued with the same feeling, even if dissociated from the economic interpretation of the triggering event, Aliomar Baleeiro states that “from a moral point of view, it seems to us that it is worse to leave them immune from the taxes required for lawful, useful and ethically accepted activities” (SUZANA, 2020, p. 146). Regarding art. 118 of the CTN, the scholar explains that the tax obligation arises from the practice of a legal act or the execution of a business transaction that the law established as a taxable event, and does not cease to exist, from a tax standpoint, due to nullity or annulment.

In this vein, the current of thought also argues that charging taxes on illicit income is a matter of tax justice and equality. By subjecting illicit earnings to taxation, the State prevents offenders from having an economic advantage over taxpayers who obtain lawful income and comply with their tax obligations. Failure to tax such income could create a scenario in which those who become rich through illicit practices would have an unfair advantage, which would be contrary to the constitutional principle of tax equality. In his argument for the gaps in illicit taxation, Sabbag (2009, p. 105) states:

> The incidence of taxes on illicit activities is far from contradicting or distorting the conceptual device of taxes. It is presented as a political rule to discourage criminal activity, as a reaction of the tax rule to behavior that is due but not carried out. The State, by charging these taxes on such activities, is not seeking illicit enrichment, nor is it offering protection for criminal activity. On the contrary, the State initiative aims to discourage interest in engaging in irregular activities, attacking the core of the recalcitrant interest - the profit from the activity, which will be reduced (SABBAG, 2009, p. 105).

In short, the admissibility of charging taxes on illicit income is argued in the neutrality of tax law about the nature of the acts, evidencing the purpose of the tax, which is intended to capture a portion of existing patrimonial increases, whatever their origin, reinforcing both the taxable capacity and tax justice. In this way, the State ensures that all taxpayers, if any

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exceptions, contribute according to the increase in their assets, maintaining balance and equity in the tax system.

On the other hand, the doctrinal current that considers the collection of taxes on illicit acts inadmissible is based mainly on the separation between tax and criminal law, as well as on the value of the legality of obligations with the State. Thus, the doctrinaires who support this argument argue that the collection of taxes on illicit income could generate an effect of indirect legitimization of the illicit activity. By allowing the State to collect taxes on the proceeds of criminal acts, it would be implicitly granting these activities a status of economic normality, which would contradict the principle that the legal system should not benefit, in any way, those who practice illicit conduct.

Mary Elbe Queiroz (2020, p. 152) emphasizes that tax sanctions cannot constitute a sanction for an unlawful act, as she understands that taxing the proceeds of crime would ultimately represent the State's acquiescence in the criminal act, which would be allowed to benefit from part of the proceeds of crime through the collection of taxes. Thus, the most appropriate procedure would be the confiscation or seizure of the assets and values acquired illicitly, after due conviction in the criminal sphere (with the adversarial system and full defense).

In addition, the argument highlights the role of criminal law as a branch of law, whose function is to combat and punish illicit activities, ensuring public order and legal certainty. From this perspective, the resources obtained from criminal acts should be fully confiscated and reverted to the State as a form of sanction, without being considered a source of tax revenue. Thus, unlike tax law, which is concerned with tax collection and fiscal balance, criminal law aims to curb conduct that is harmful to society and prevents new offenses. Allowing tax law to act on illicit income would dilute this distinction, granting the offender the right to keep part of the proceeds of the illicit practice, even if taxed.

From a comparative perspective, in Spain, Silvina Bacigalupo Saggese understands that the State would be converted into a recipient of the illicitly obtained fruits when the correct effect to prevent the criminal from enjoying the product obtained by his act would be confiscation, and not taxation (Suzana, 2020, p. 153). The doctrine also points out that the collection of taxes on illicit profits violates the principle of administrative morality, enshrined in Article 37 of the Federal Constitution, as it could be seen as a way for the State to "profit" from activities that are contrary to the public interest and the common good. Therefore, the aforementioned collection not only contradicts administrative morality but also

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compromises the concept of tax justice, since it treats income from legal and illegal practices as equivalent, ignoring the unethical and harmful nature of criminal conduct.

However, this perspective has limitations in practical scenarios. The possibility of full confiscation of assets of illicit origin, defended by the current approach, is not always viable in procedural terms, especially in systems that require a final court decision for the definitive loss of assets. The inadmissibility of the principle does not create obstacles for illicit resources to circulate in the economy, creating a gap that can be taken advantage of by illicit activities to hide assets.

Therefore, this explains why the majority of doctrine adopts the interpretation of the admissibility of Non-Olet, since, by committing an unlawful act and failing to pay taxes on the profits obtained, the individual violates the social commitment twice – breaking the law and failing to contribute to the costs of society. Thus, the taxation of illicit income also seeks to mitigate this double transgression, requiring that the offender participate proportionally in the state's costs, just like other taxpayers. In this way, the principle fulfills an essential function within the tax system, by ensuring that all taxpayers, regardless of the source of their income, participate in the cost of state activities in proportion to their wealth.

POSITION OF THE HIGHER COURTS

Given the concepts and dilemmas presented, we move towards evidencing the understanding applied in repeated court decisions, guided by the Superior Courts of Justice. Based on the definition established by the National Tax Code, the second panel of the Superior Court of Justice admits that it is in favor of the taxation of unlawful acts, which takes into account the application of the taxable event based on the abstraction of validity and incidence. See:

> CIVIL PROCEDURE – ABSENCE OF VIOLATION OF ARTICLE 535 OF THE CPC – ABSENCE OF PRE-QUESTIONING – SUMMARY 211/STJ – TAX – IMPBUDGETING OF USED VEHICLES SUPPORTED BY A LATER REVOKED COURT DECISION – ILLEGAL OPERATION – IPI PAYMENT – APPLICATION OF FORFEITURE PENALTY – CUMULATION – POSSIBILITY – EXEGESIS OF ARTICLE 118 OF THE CTN. 1. There is no violation of art. 535 of the CPC alleged by the National Treasury since the jurisdictional provision was given to the extent of the claim made, as can be inferred from the analysis of the appealed decision. 2. The necessary examination of the issue was not complied with by the contested decision, capable of enabling the appellant's appeal, even though the statement of clarification was accepted, for preliminary questioning. 3. It is not a contradiction to state the lack of prior questioning and to reject the indication of a violation of Article 535 of the Code of Civil Procedure, since the judgment can be duly founded without, however, having decided the case in light of the legal precepts desired by the claimant, since the judge is not obliged to do so. In this sense, see: EDcl in

> REsp 463380, Rel. Min. José Delgado, DJ 13 June 2005. 4. Illegal operations or activities are taxable since the legal definition of the taxable event is interpreted without taking into account the legal validity of the acts performed by the taxpayers, responsible parties, or third parties, as well as the nature of their object or effects (art. 118 of the CTN). 5. IPI is levied on illegal imports since the mere occurrence of the taxable event provided for by law gives rise to the tax obligation. The special appeal of the National Treasury was admitted in part and granted. The special appeal of the Federal Public Prosecutor's Office granted (STJ - REsp: 1050408 PR 2008/0086801-3, Rapporteur: Justice HUMBERTO MARTINS, Judgment Date: 05/20/2008, T2 - SECOND PANEL, Publication Date: DJ 06/02/2008 p. 1)

In the same line of understanding, the first panel of the STJ also admits the taxation of illicit acts, arguing that in the national scenario the legitimacy of the collection of taxes obtained from illicit operations or activities was already recognized, supported by the form of conception of the taxable event, as we can see:

> INTERNAL APPEAL IN THE SPECIAL APPEAL. TAX AND CIVIL PROCEDURAL. REPERCUSSION OF THE CRIMINAL ACQUITTAL DECISION. NON-OCCURRENCE. INCOME TAX. CALCULATION BASIS. AMOUNTS OBTAINED AS A RESULT OF ILLEGAL ACTIVITY. LEVY OF TAX, PROVIDED THAT THE OCCURRENCE OF THE GIVING RISE IS ACKNOWLEDGED. INTERNAL APPEAL OF THE PRIVATE PARTY DISMISSED. 1. Despite the independence of the proceedings in the criminal sphere about the civil or administrative sphere, the case law of this Court admits the exceptional repercussion of the acquittal in the criminal sphere in other spheres, when this is based on the denial of authorship or the non-existence of the fact. This is not the case in the present case. In this case, the acquittal in the Criminal Action was due to the recognition of the atypical nature of the conduct, a circumstance different from the finding of its non-existence, so that the result of the criminal proceedings, in principle, would not have any reflections or repercussions in the administrative-tax sphere. 2. This Court's case law is firm in recognizing the legitimacy of taxation on illicit transactions or activities, resulting from the interpretation without considering the legal validity of the acts performed by the taxpayer, their object, or their effects, in the legal definition of the taxable event (art. 118 of the CTN). Precedents: REsp. 1,050,408/PR, Rel. Min. HUMBERTO MARTINS, DJe 2 June 2008; HC 68,244/MG, Rel. Min. MARIA THEREZA DE ASSIS MOURA, DJe 18 May 2009; HC 83,292/SP, Rel. Min. FELIX FISCHER, DJ 18 February 2008; REsp. 182,563/RJ, Rel. Min. JOSÉ ARNALDO DA FONSECA, DJ 23 November 1998. 3. Internal Appeal of the Private Party dismissed. (STJ - AgInt in REsp: 1328837 RR 2012/0122309-6, Rapporteur: Minister NAPOLEÃO NUNES MAIA FILHO, Judgment Date: 02/18/2019, T1 - FIRST PANEL, Publication Date: REPDJe 02/26/2019 DJe 02/25/2019)

Furthermore, the case was explained in the Supreme Court, the Supreme Federal Court, through Habeas Corpus No. 94,240/SP (BRAZIL, Online), whose subject was the collection of taxes on proceeds from the illicit activity of “jogo do bicho”. The petitioner alleged, among other arguments, that it was impossible to collect taxes on amounts obtained illegally since the existence of a lawful activity is a prerequisite for collecting taxes, which would not fit the situation at hand.

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However, the Supreme Federal Court supports the understanding that taxes must be collected on the aforementioned activity, since the presence or lack of lawfulness in the activity that generated the revenue does not prevent taxation, taking into account the fiscal effect that must meet collective needs, generating the prevalence of the public interest. By the way:

> HEADNOTE: HABEAS CORPUS. CRIMINAL. CRIMINAL PROCEDURAL. CRIME AGAINST THE TAX ORDER. ARTICLE 1, SUBJECT I, OF ACT NO. 8,137/90. DISCLASSIFICATION TO THE TYPE PROVIDED FOR IN ARTICLE 2, SUBJECT I, OF THE INDICATED ACT. THEY ARE NOT ANALYZED BY THE SUPERIOR COURT OF JUSTICE. SUPPRESSION OF INSTANCE. INADMISSIBILITY. PRECEDENTS. ALLEGED ATYPICALITY OF THE CONDUCT BASED ON THE CIRCUMSTANCE THAT THE AMOUNTS MOVED IN THE PATIENT'S BANK ACCOUNTS WOULD COME FROM A CRIMINAL MISDEMEANOR. ARTICLE 58 OF DECREE-LAW Nº 6.259/44 - GAME OF ANIMAL GAME. LEGAL POSSIBILITY OF TAXATION ON AMOUNTS ORIGINATING FROM ILLEGAL PRACTICE OR ACTIVITY. PRINCIPLE OF TAX LAW OF NON-OLET. PRECEDENT. ORDER PARTIALLY KNOWN AND DENIED. 1. The intended disqualification of the type provided for in Art. 1, item I, to Art. 2, item I, of Law No. 8,137/90 was not analyzed by the Superior Court of Justice. Its analysis in this case would constitute, in line with precedents, a true suppression of the instance, which is not admissible. 2. The Court's case law, in light of art. 118 of the National Tax Code, has established the understanding that it is possible to tax income obtained as a result of illicit activity since the legal definition of the taxable event is interpreted without taking into account the legal validity of the act practiced, as well as the nature of its object or its effects. Principle of nonolet. See HC No. 77,530/RS, First Panel, Rapporteur Justice Sepúlveda Pertence, Official Gazette of 9/18/98. 3. Order partially acknowledged and denied (STF - HC: 94240 SP, Rapporteur: Min. DIAS TOFFOLI, Judgment Date: 08/23/2011, First Panel, Publication Date: DJe-196 DISCLOSED 10/11/2011 PUBLISHED 10/13/2011 EMENT VOL-02606-01 PP-00026).

Given this, it is clear that both doctrine and case law support the taxation of illicit activities in the national scenario since the objective is not centered on the legitimization of criminal activity, but rather aimed at not establishing distinctions between taxpayers, implementing the tax equality provided for by the Constitution, explained by the relationship between tax law and the branch of economic law.

The interpretation of the taxable event, for case law, is a key factor in the analysis of these situations, interpreted without taking into account the legal validity of the act performed, as the nature of the object in question and its effects. Therefore, the Non-Olet principle, despite having minority criticisms regarding its admissibility, is highly relevant for national taxation.

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CONCLUSION

In Ancient Rome, during the reign of Emperor Vespasian, the thesis that has long been applied worldwide originated, consecrated by the maxim “money has no smell”, suggesting that the usefulness of money for the State was what really mattered, regardless of its origin. This idea underpins the use of the current principle entitled “Pecunia Non Olet”.

Since this event, the application of this thought has divided opinions, being used first in doctrine, until it was consolidated into a rigid rule, through national legislation. However, despite the broad admissibility of illicit taxation, it is possible to understand the arguments that defend the fact that Non-Olet subtly encourages illicit practice, interfering in areas other than taxation, such as criminal law.

However, according to the purpose of this study, it is noted that this is not the idea conveyed by the admissibility of the Pecunia Non-Olet principle. For contemporary law, by taxing the income of illicit origin, the State fulfills the function of guaranteeing fiscal justice and equality, which are fundamental principles for tax organization. Taxation on such income reinforces the neutrality of tax law about the origin of the increase in assets and ensures that all taxpayers, regardless of their source of income, share the duty to contribute to the cost of public expenses.

Therefore, the proposed objective was achieved by explaining the doctrinal conflict regarding the possibility of illicit taxation in a national scenario, following the perspective of the Pecunia Non-Olet principle. In support of the centrality of the topic, the concepts and purposes of taxes in Brazil were highlighted, in addition to elucidating the form of taxation adopted by the National Tax System. Next, the doctrinal understanding regarding the arguments of admissibility and inadmissibility of this principle was highlighted, followed by the jurisprudential positions adopted in the country, guided by the Superior Courts.

This research did not aim to exhaust all the scenarios of illicit taxation adopted in Brazil. Only those aspects that, in my study, I considered most relevant were addressed. However, the topic is very rich and can still be explored in countless ways. In general terms, the aforementioned article constitutes a source of initial information regarding this complex topic, providing the reader with a basic understanding of the topic and encouraging the continuation of the research according to the need and interest of this.

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REFERENCES

1. BRASIL. (1966). Lei nº 5.172, de 25 de outubro de 1966. Dispõe sobre o Sistema Tributário Nacional e institui normas gerais de direito tributário aplicáveis à União, Estados e Municípios. Brasília, DF: Presidência da República. Available at: https://www.planalto.gov.br/ccivil_03/leis/l5172compilado.htm#art218. Accessed on: October 21, 2024.

2. BRASIL. (1988). Constituição da República Federativa do Brasil de 1988. Brasília, DF: Presidência da República. [2023]. Available at: https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: October 21, 2024.

3. BRASIL. Supremo Tribunal Federal (1ª Turma). (2011). Habeas Corpus nº 94240/SP. Habeas corpus. Penal. Processual penal. Crime contra a ordem tributária. Artigo 1º, inciso I, da Lei nº 8.137/90. Desclassificação para tipo previsto no art. 2º, inciso I, da indigitada lei. Questão não analisada pelo Superior Tribunal de Justiça. Supressão de instância. Inadmissibilidade. Precedentes. [...]. Pacte(s): César Antônio Muzetti. Impte.(s): Antônio de Pádua Faria e outro(A/S). Relator: Min. Dias Toffoli. Available at: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628534. Accessed on: October 28, 2024.

4. BRASIL. Superior Tribunal de Justiça (1ª Turma). (2019). Agravo Interno no Recurso Especial n° 1328837/RR. AGRAVO INTERNO NO RECURSO ESPECIAL. TRIBUTÁRIO E PROCESSUAL CIVIL. REPERCUSSÃO DA DECISÃO DE ABSOLVIÇÃO CRIMINAL. INOCORRÊNCIA. IMPOSTO DE RENDA. BASE DE CÁLCULO. VERBAS OBTIDAS EM DECORRÊNCIA DE ATIVIDADE ILÍCITA. [...]. Agravante: Washington Wanderley de Farias Junior. Agravado: Fazenda Nacional. Relator: Ministro Napoleão Nunes Maia Filho. Available at: https://jurisprudencia.s3.amazonaws.com/STJ/attachments/STJ_AGINT_RESP_1328837_1aa6d.pdf?AWSAccessKeyId=AKIARMMD5JEAO67SMCVA&Expires=1730772931&Signature=ANtZhoZ6EhV1um5nw4MwEPhbhCM%3D. Accessed on: October 28, 2024.

5. BRASIL. Superior Tribunal de Justiça (2ª Turma). (2008). Recurso Especial nº 1.050.408/PR. PROCESSUAL CIVIL – AUSÊNCIA DE VIOLAÇÃO DO ART. 535 DO CPC – AUSÊNCIA DE PREQUESTIONAMENTO – SÚMULA 211/STJ – TRIBUTÁRIO – IMPORTAÇÃO DE VEÍCULOS USADOS SUPORTADA POR DECISÃO JUDICIAL POSTERIORMENTE CASSADA[...]. Recorrentes: Ministério Público Federal e Fazenda Nacional. Recorrido: Cristovam Dionisio de Barros Cavalcanti Junior. Available at: https://jurisprudencia.s3.amazonaws.com/STJ/IT/RESP_1050408_PR_1264815540205.pdf?AWSAccessKeyId=AKIARMMD5JEAO67SMCVA&Expires=1730773755&Signature=TMbjpT%2Fdp4nwKw7KxJSq5C%2B%2BQ7o%3D. Accessed on: October 28, 2024.

6. Helsen, A. (2002). In A. de A. Falcão. Fato gerador da obrigação tributária (6th ed., p. 45). Rio de Janeiro: Forense.

Revista ARACÊ
ISSN: 2358-2472

7. Miguel, B. D. (2020). A Tributação de Atos Ilícitos e Aspectos Processuais Relevantes. São Paulo: Pontifícia Universidade Católica de São Paulo. p. 22. Available at: https://tede2.pucsp.br/handle/handle/23028. Accessed on: October 23, 2024.

8. Oliveira, L. S. S., & Coutinho, R. C. (2021). Tributação Sobre os Atos Ilícitos Direito Tributário. Betim: Centro Universitário Una. p. 6-10. Available at: https://repositorio.animaeducacao.com.br/handle/ANIMA/27549. Accessed on: October 21, 2024.

9. Sabbag, E. (2009). Manual de Direito Tributário (1st ed., p. 105). São Paulo: Saraiva.

10. Suzana, L. H. (2020). Limites à tributação dos atos ilícitos pelo imposto sobre a renda: prejudicialidade do processo penal à tributação. São Paulo: Universidade de São Paulo. p. 152-146. Available at: https://doi.org/10.11606/D.2.2020.tde-06052021-010356. Accessed on: October 23, 2024.

11. Torres, R. L. (2010). Curso de Direito Financeiro e Tributário (17th ed.). Rio de Janeiro: Renovar.