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COURTESY WITH SOMEONE ELSE'S HAT, WHO CAN?[1]

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ABSTRACT

This article deals with fiscal federalism, with emphasis on competences, direct and indirect revenue sharing to guarantee the financial autonomy of its entities. Analyzing the decisions rendered by the Federal Supreme Court in RE 572.762/SC and RE 705.423/SE, on the motto of the unconstitutionality of the withholding by the State of ICMS installments belonging to the Municipalities and the constitutionality of the calculation of the FPM is based on the proceeds of the collection. The objective is to identify what led the Supreme Court to issue different judgments in cases with similar cause of action. Explanatory documentary research was used with a qualitative approach, through searches on websites, books, periodicals, the Constitution and Supreme Court judgments. It was noted that our fiscal federalism is distorted from that desired by the 1988 Constituent Assembly. It was concluded that "courtesy with someone else's hat" can even be done, depending on who does it.

Keywords: Fiscal federalism. Municipality. Financial autonomy. Revenue sharing.

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INTRODUCTION

The Constitution of the Federative Republic of Brazil of 1988 inaugurated tripartite federalism, in which the Union, States and Municipalities are endowed with political, administrative and financial autonomy. To this end, it attributed to each entity tax competences, distribution of direct revenues and in order to correct any disparities in the collection of decentralized entities, it created indirect transfers, through partition funds. In order to protect the transfers of mandatory revenues from undue conditions of the entities obliged to pass them on, the constituent created a retention clause in article 160, thus seeking to guarantee the financial autonomy of subnational entities.

Despite all this importance, in two cases judged by the Federal Supreme Court, RE 572.762/SC – the State of Santa Catarina postpones the transfer of the ICMS portion belonging to the Municipalities due to the granting of tax exemptions to private companies – and RE 705.423/SE – the Federal Government grants exemptions in IPI and IR causing the transfer of less than the installments of the Municipal Participation Fund – in view of such judgments, the following questions are asked: why did the Federal Supreme Court, faced with similar causes of action, reach diametrically opposed decisions?

To answer this question, we started from a study of the articles of the Brazilian Constitution of 1988 that deal with direct and indirect tax competencies and revenues, as well as the lessons of Rocha (1997), Coelho (1999), Conti (2001), Oliveira (2011), Catarino and Abraham (2018), Afonso and Junqueira [2008], Pamplona (2014, p.16) and others that proved necessary. In addition to searches on the STF website selecting the cases with the greatest repercussion, research in Capes Journals, books and articles from electronic journals on the focus of the article.

The structure of this text initially comprises an approach to fiscal federalism in its essential aspects stamped in the 1988 Constitution. Next, an analysis of the judgments of RE 572.762/SC and RE 705.423/SE in their most relevant grounds. Subsequently, the differentiation of direct and indirect tax revenues is made.

BRAZILIAN FISCAL FEDERALISM AND THE GUARANTEE OF FINANCIAL AUTONOMY

Fiscal federalism is the pillar of support of the Federal State, which according to Oliveira (2011) focuses on the distribution of taxes among the entities of the Federation, seeking to guarantee the necessary resources for the fulfillment of the constitutionally

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established competences, attributions and objectives. For Catarino and Abraham (2018), it is based on the distribution of constitutional and fiscal competences among the federated entities, so that each of them can manage its public and financial reality autonomously to the extent of its financial capacity.

The origin of fiscal federalism, in the lesson of Conti (2001), dates back to the creation of the Federal State in 1787, with the promulgation of the Constitution of the United States of America, consisting of the union of at least two spheres of government, endowed with political, administrative and financial autonomy, with competencies distributed among their entities, in an indissoluble and express way in a constitution.

Thus, it can be said that federalism is a form of State that arises from the union of its entities, in an indissoluble way, preserving political, administrative and financial autonomy, sharing the same national territory, with its competences divided among the different levels of government that exist, enshrined in a constitution. Fiscal federalism is the guarantee of the functioning of every Federated State, regardless of the form and degree of autonomy established for its entities.

Having overcome the concepts of federated state and fiscal federalism, we move on to the study of the Brazilian Federation, which throughout its history, according to Afonso and Junqueira [2008], has been constituted by pendulum phases, of centralization and decentralization, the first of which occurred between 1891 and 1930, in which an expansion of the state's autonomy was sought to the detriment of past centralization. The federation continued its pendulum trajectory until reaching the apogee of the concentration of resources in 1983, during the period of the Military Government, when 70% of the available tax revenues were concentrated in the hands of the central government.

With the decline of the Military Government from the 70s onwards, in the lesson of Afonso and Junqueira (idem), there was a strong pressure for redemocratization, having as one of its pillars the fiscal decentralization as a promoter of popular representativeness in the decisions of the State, which was crystallized in the Constitution of the Federative Republics of Brazil of 1988.

In the current phase, the 1988 constitution, according to Conti (2001), innovated in its federative structure by creating a tripartite State, establishing in its Article 1 that the Federative Republic of Brazil is constituted by the indissoluble union of the States, Federal District and Municipalities, endowed with political, administrative and financial autonomy, which in the lesson of Catarino and Abraham (2018, p.189) is "manifested by the capacity

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for self-organization, self-government and self-administration, inserted, in the latter, the necessary financial autonomy".

Pamplona (2014), in turn, teaches that, in order to ensure decentralization through the financial autonomy of subnational entities, an increase in their revenues was established through the granting of tax powers to federated entities and intergovernmental transfers from the Union to the States, Federal District and Municipalities and from the Member States to the municipalities.

The financial autonomy of subnational entities, in turn, is an inseparable element in the federated State, which can be organized in different ways, but will never exist without the financial autonomy of decentralized entities. In this same vein, Cantizano (1969) states that the sharing of revenues is indispensable to a Federation, since it is formed by several levels of government and state and municipal autonomy, undoubtedly focus on the availability of resources necessary to meet the purposes for which they were created.

Thus, the current CRFB established the horizontal distribution of revenues, giving the Federal Government the power to institute taxes on imports (II), income (IR), industrialized products (IPI), exports (IE), financial operations (IOF) and rural territorial property (ITR) in its Article 153[3]. In addition to the Extraordinary taxes of article 154 of the CRFB/1988 and the power to institute compulsory loans and the contributions in general of arts. 148 and 149 of the CRFB/1988.

The States and the Federal District established the competence to create taxes on causa *mortis transmission* and donation (ITCMD), the ownership of motor vehicles (IPVA) and operations related to the circulation of goods and transport and communication services (ICMS), in Article 155[4] of the CRFB/1988.

As for the Municipalities, the CRFB/1988, established the competence to institute taxes levied on the *inter vivos* transfer of real estate (ITBI), urban real estate and territorial property (IPTU) and services of any nature (ISS), in its article 156[5].

[3] Article 153. It is incumbent upon the Union to institute taxes on: I - importation of foreign products; II - export, abroad, of national or nationalized products; III - income and proceeds of any nature; IV - industrialized products; V – credit, exchange and insurance operations, or related to securities or securities; VI – rural territorial property; VII - large fortunes, under the terms of a complementary law.
[4] Article 155. It is incumbent upon the States and the Federal District to institute taxes on: I - transfer causa mortis and donation, of any assets or rights; II - operations related to the circulation of goods and on the provision of interstate and intermunicipal transport and communication services, even if the operations and services begin abroad; III - ownership of motor vehicles.
[5] Article 156. It is incumbent upon the Municipalities to institute taxes on: I - real estate and urban land property;

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In order to ensure the financial autonomy of decentralized entities, the 1988 Constituent Assembly defined direct vertical transfers to the [6]Member States and the Federal District as follows: a) the proceeds of the collection of the Federal Government's income tax, levied at source, on income paid in any capacity by them, by their autarchies and by the foundations they establish and maintain**; b)** 20% of the proceeds of the collection of the tax that the Union institutes under the residual competence in accordance with article 157**;** and, C) 30% of the IOF revenue levied on gold as a financial asset, pursuant to article 153, paragraph 5, I.

To the Municipalities, the CRFB/1988 ensured: a) in accordance with article 158, the proceeds of the collection of the Federal Income Tax levied at source on income paid in any capacity by them, their autarchies and by the foundations they establish and maintain; b) 50% of the proceeds of the Federal Government's ITR collection, in relation to the properties located therein, the entirety of which falls within the option referred to in article 153, paragraph 4, III; c) 50% of the proceeds from the collection of the state's IPVA from motor vehicles licensed in its territories; d) 25% of the proceeds of the state's ICMS collection; and, e) 70%, in accordance with article 153, paragraph 5, II, of the revenue from the levy of the IOF on the gold operation.

In order to correct any imbalances in the collection of its entities, due to possible changes in income and revenues due to socioeconomic factors, the constituent defined the distribution of indirect revenues[7] from the Union to the States and Municipalities and from the Member States to the municipalities through participation funds. Thus, in Brazilian fiscal federalism, each entity has at its disposal its own resources from the taxes under its competence, added to the vertical transfers of resources from the largest to the smallest, in order to provide all the resources necessary to fulfill its constitutional attributions (OLIVEIRA, 2011).

II - "inter vivos" transfer, in any capacity, by onerous act, of real estate, by nature or physical accession, and of real rights over real estate, except those of guarantee, as well as assignment of rights to its acquisition; III - services of any nature, not included in article 155, II, defined in a complementary law.

[6] "(...) Participation *in the collection of a tax,* also called *direct participation in collection*, exists when it is established that part of the tax collected by a federative unit belongs to another unit. Thus, a certain unit that has the competence to institute a tax, in doing so, must allocate part of the amount collected to another unit" (CONTI, 2001. p 38).

[7] With *participation in funds* , there is the so-called *indirect participation* in the collection. This participation occurs when portions of one or more taxes are allocated to the formation of funds, and later the resources that make up the funds are distributed to the beneficiaries, according to previously defined criteria. (CONTI, 2001)

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Thus, the CRFB/1988 established indirect participation, basically in its article 159, providing for the Participation Funds of the States and the Federal District (FPE), the Participation Funds of the Municipalities (FPM) and the regional Constitutional Financing Funds (FNO, FNE and FCO).

From the intelligence of article 159[8], I of the CF/1988, it is extracted that 49% of the proceeds from the collection of income tax and IPI should be transferred to the partition funds of the States and Municipalities and to the regional development funds, as follows: a) 21.5% to the FPE; b) to the FPM a quota of 22.5% added to two more quotas of 1% each, which were added by EC55/2007 and EC84/2014, to be transferred respectively in the first ten years of December and in the first ten years of July of each year, making a total of 24.5%; and c) 3% to the Financing Funds of the North (FNO), Northeast (FNE) and Midwest (FCO) regions.

Several authors agree that the financial autonomy of subnational entities is indispensable to the existence of a Federated State, as Rocha (1997 p.185) states that the financial autonomy, arising from the direct or indirect collection, of each of the federated entities is pointed out as the cornerstone for the existence of a true federation; Pamplona (2014, p. 2) states that "in a Federal State, the financial autonomy of its members and the

[8] Article 159. The Union will deliver:
I - from the proceeds of the collection of taxes on income and proceeds of any nature and on industrialized products, 49% (forty-nine percent), as follows: a) twenty-one whole and five tenths percent to the Participation Fund of the States and the Federal District; b) twenty-two whole and five tenths percent to the Municipal Participation Fund; c) three percent, to be applied in financing programs for the productive sector of the North, Northeast and Midwest Regions, through their regional financial institutions, in accordance with the regional development plans, with half of the resources destined to the Region being guaranteed to the semi-arid region of the Northeast, in the manner established by law; d) one percent to the Municipal Participation Fund, which shall be delivered in the first ten years of December of each year; e) 1% (one percent) to the Municipal Participation Fund, which shall be delivered in the first ten years of July of each year;
II - from the proceeds of the collection of the tax on industrialized products, ten percent to the States and the Federal District, in proportion to the value of the respective exports of industrialized products.
III - from the proceeds of the collection of the contribution for intervention in the economic domain provided for in article 177, paragraph 4, twenty-nine percent (29%) to the States and the Federal District, distributed in accordance with the law, subject to the destination referred to in item II, *c*, of said paragraph.
Paragraph 1 - For the purpose of calculating the delivery to be made in accordance with the provisions of item I, the portion of the collection of income tax and proceeds of any nature belonging to the States, the Federal District and the Municipalities shall be excluded, pursuant to the provisions of arts. 157, I, and 158, I.
Paragraph 2 - No portion exceeding twenty percent of the amount referred to in item II may be allocated to any federated unit, and any surplus shall be distributed among the other participants, maintaining, in relation to them, the sharing criterion established therein.
Paragraph 3 - The States shall deliver to the respective Municipalities twenty-five percent of the resources they receive under the terms of item II, observing the criteria established in article 158, sole paragraph, I and II.
Paragraph 4 - Of the amount of resources referred to in item III that is incumbent on each State, twenty-five percent shall be allocated to its Municipalities, in accordance with the law referred to in said item.

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fiscal balance between them is fundamental to guarantee the federative pact"; Oliveira (2011, p.46) reiterates that there is a latent need to avoid the establishment of mechanisms of immunities, waivers and tax incentives that directly and primarily affect the revenues destined to the member states and municipalities of the federation; Catarino and Abraham (2018 p.189) maintain that "all federative entities are endowed with autonomy in their political-administrative organization (art. 18), manifested by the capacity for self-organization, self-government and self-administration, inserted, in the latter, the necessary financial autonomy"; Coelho (1999, p.63) concludes that, since the federation is an agreement of equality between political entities, and financial autonomy is the guarantee of the autonomy of the federated entities, any attack, even if concealed, on these guarantees, constitutes flagrant unconstitutionality.

Seeking to crystallize the financial autonomy of decentralized entities, Alves (2015) assures that the constituent by creating in article 160 of the CRFB/1988, a clause prohibiting the retention or any restriction on the delivery of revenues transferred to the States, Federal District and Municipalities, established, in fact, one of the central pillars of the Federated State, since this rule is the guarantor of the financial autonomy of subnational entities. Its objective is to ensure that the mandatory transfers through the partition funds are safe from any conditioning or political pressure on the part of the entity responsible for the transfer, thus guaranteeing the financial autonomy of these entities.

However, the same article that prohibits withholding also brings an exception to the constitutional limitations of the application of the sole paragraph of article 160 of the CRFB/1988. The attorney of the State of Rio de Janeiro, Luís Roberto Barroso (currently the Minister of the STF), pronounced, in 2009, in an opinion, the establishment that the best interpretation to be given to the provision would be for the Union to only make use of the withholding when: a) the credits are owned by it or by its autarchies, provided that they are liquid, certain and due; b) observed the principle of annuality; c) due process of law has occurred; and, d) does not compromise the fulfillment of the fundamental obligations of States.

Therefore, there is no doubt that financial autonomy is the guarantee of the political and administrative autonomy of the States, Federal District and Municipalities. In order to guarantee it, the original constituent power created the clause prohibiting the retention of mandatory sharing revenues. In view of these clarifications, we bring up the application of the clause prohibiting withholding in the judgments of Extraordinary Appeals RE

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572.762/SC and RE 705.423/SE, which are extremely important to guarantee the financial benefits of the municipalities.

OF THE EXTRAORDINARY APPEALS RE 572.762/SC AND RE 705.423/SE

RE 572.762/SC was filed by the State of Santa Catarina against a decision of the local Court of Justice that recognized the unconstitutionality of the granting of tax exemptions to private companies, through the Santa Catarina Company Development Program (PRODEC), using the mechanism of postponement of the payment of ICMS.

RE 705.423/SE, on the other hand, was filed by the Municipality of Itabi against a decision of the Federal Regional Court of the 5th Region, claiming that the Federal Government could not grant tax waiver of the amounts related to the collection of income tax and IPI in the part that would be incumbent on the Municipalities, since by doing so it would be waiving amounts that do not belong to it, pointing to RE 572.762/SC as a precedent. Having made such presentations, the analysis of the aforementioned judgments is carried out.

DESCRIPTION AND ANALYSIS OF EXTRAORDINARY APPEAL RE 572.762/SC

The event that gave rise to this RE was an ordinary action of the Municipality of Timbó filed against the State of Santa Catarina which, through the Santa Catarina Company Development Program (PRODEC), had been granting financing to companies, using, for this purpose, the mechanism of postponement of the payment of ICMS. moreover, the amount financed was part of the total state ICMS revenue and, therefore, should be part of the calculation basis of the mandatory transfer to the Municipality, which, however, had not been occurring. The Municipality pleaded for the recognition of the right to receive the transfer of the differences in the ICMS values that would be improperly appropriated by the State, defendant, since 1988.

On appeal, the local Court of Justice issued a judgment, in which it granted the appeal of the Municipality of Timbó on the grounds that the withholding of a portion of the ICMS, by the State of Santa Catarina, belonging to that decentralized entity due to the granting of tax incentives violates the Federal Constitution.

On the other hand, the dissatisfied State filed the Extraordinary Appeal No. 572.762/SC, which was judged on 06.18.2008, according to the summary below:

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SUMMARY: CONSTITUTIONAL. ICMS. DISTRIBUTION OF TAX REVENUES. PRODEC. SANTA CATARINA TAX INCENTIVE PROGRAM. RETENTION, BY THE STATE, OF PART OF THE PORTION BELONGING TO THE MUNICIPALITIES. UNCONSTITUTIONALITY. RE DENIVED. I – The portion of the state tax on transactions related to the circulation of goods and on the provision of interstate and intermunicipal transport and communication services, referred to in article 158, IV, of the Magna Carta belongs by operation of law to the Municipalities. II - The transfer of the quota constitutionally due to the Municipalities may not be subject to the condition provided for in a state-wide tax benefit program. III – Limitation that constitutes undue interference by the State in the constitutional system of tax revenue sharing. IV – Extraordinary appeal dismissed. (RE 572762, Rapporteur: Justice RICARDO LEWANDOWSKI, Full Court, judged on 06/18/2008, GENERAL REPERCUSSION - MERITS DJe-167 DIVULG 09-04-2008 PUBLIC 09-05-2008 EMENT VOL-02331-04 PP-00737)

Reporting Justice Ricardo Lewandowski delimited the question of whether it was lawful for the State to postpone the transfer of the portion of the ICMS belonging to the municipality on the pretext that the postponement occurred due to tax incentives to private individuals.

The State of Santa Catarina filed the RE based on article 102, III, a, of the CF/1988, alleging the violation of arts. 158, V and 160 of the CRFB/1988, arguing in its defense that the Santa Catarina Company Development Program - PRODEC is a mechanism for the socio-economic development of the State, which allows companies installed in Santa Catarina to benefit from one of the following forms of incentive: i) financing through an official financial institution; or ii) the postponement of the payment of ICMS.

It continues, in the case in question, that the State used the portion of the ICMS belonging to the municipalities to finance commercial and industrial enterprises. He also stated that as the moment of payment of the tax was prolonged, one could not speak of collection of the tax, much less, of the right of the Municipalities to share the revenue arising from it and the fact that the municipalities are entitled to the quota collected from said tax, did not guarantee them any portion of competence over it.

It continues, in its thesis, to state that the tax benefit granted by State Ordinary Law No. 11,345/00 [9]was only the quota of the ICMS collection of the 75% that was the responsibility of the State, stressing that there was no postponement of the payment of the tax, but only the transfer of the proceeds of the collection to the financial agents of FADESC.

[9] LAW No. 11,345, of January 17, 2000, which provides for the Santa Catarina Company Development Program - PRODEC, changes the name of the Santa Catarina Business Development Support Fund - FADESC and establishes other provisions.

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The rapporteur understood that the State's claim did not deserve to be accepted, since the CRFB of 1988 excelled in the financial autonomy of the federated entities, in such a way that it expanded their tax powers, in addition to ensuring them the transfer of resources from other entities. Stating that it is essential that the subnational entity, for the exercise of its autonomy, has at its disposal the financial resources necessary for the full exercise of its attributions.

It continues, in its vote, asserting that the political autonomy granted by the constituent to the federated entities, in order to be authentic and not just virtual, it is essential to strictly preserve their financial autonomy, not tolerating any arbitrary measure by the entities responsible for the constitutionally established transfers with regard to the distribution of tax revenues to which they are entitled.

Regarding the allegation that the tax had not been effectively collected by the State, the rapporteur refuted it by stating that the State had already collected the ICMS and withheld the municipality's portion, since in his defense in the lower court he stated that the tax incentives were granted only in the 75% belonging to the State.

On the grounds that the municipality does not have its own right to the proceeds of ICMS collection, Min. LEWANDOWSKI stated that in article 158, IV, the CRFB/1988, also establishes that collected by the State, it is de *jure part* of the Municipality's assets, and the major entity cannot dispose of it at will, under penalty of serious offense to the federative pact, which can be remedied, through the use of the *system's ultima ratio*, that is, the institute of federal intervention, provided for, for such hypotheses, in article 34, V, **b,** of the Magna Carta.

The rapporteur demonstrated that the tax under analysis is born with dual ownership, that is, one entity is responsible for the institution, collection and distribution with the other entities that are also holders of its share and reinforced this understanding based on the teaching of Harada (1999, p. 97):

> In the shared revenue tax there is necessarily more than one holder, so it is up to the entity contemplated with the tax power to refund and not pass on the portion belonging to the other political entity. **The tax is already born, by express determination of the Magno Text, with two holders with regard to the product of its collection**. **The fact that the Member State holds the tax competence in relation to the ICMS does not give it hierarchical superiority in relation to the municipality with regard to the participation of each entity in the proceeds of collection of this tax**. The Political Charter has already shared the proceeds of the collection of this tax in the proportion of 75% for the Member State, holder of the tax competence, and 25% for the Municipalities, prescribing in the sole paragraph of article 158 the criteria for crediting the installments due to the communes (...). (emphasis added).

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As demonstrated in the doctrine and established in the vote of the rapporteur, the portion of the proceeds of the municipality's collection belongs to it by right, and it is up to the entity with competence to institute the encumbrance, only to return what belongs to the smaller entities by express constitutional will. In addition to this understanding, it is worth transcribing parts of the dialogue between Justices Ricardo Lewandowski, Carlos Britto and Cezar Peluso during the plenary:

> [...] MR. RICARDO LEWANDOWSKI
> (RAPPORTEUR) - I would like to use a popular expression. What happens, in this case, it is that **the State is making courtesy with someone else's hat, in the**
> **truth.**
> No one doubts that the States may, through a complementary law, grant incentives or tax benefits – whatever they may be – as long as they are commonly agreed. **What is not allowed is that they institute benefits or grant exemptions or establish programs to help companies with the portion of the tax** – as Your Excellency very well said – **belonging to the Municipality.**
> […] JUSTICE RICARDO LEWANDOWSKI (RAPPORTEUR)
> This is the question that we have to identify in this plenary: can the State [...] make courtesy with someone else's hat?
> MR. JUSTICE CARLOS BRITTO
> Perfect. And this amount belongs so much to the municipality that the constitution even penalizes the State with federal intervention if the respective delivery to the Municipalities is no longer made. [...] **Here comes the final question, with which I close my participation: should this incentive be made with the exclusion of the twenty-five percent? That is, does the state not have the availability of the total ICMS revenue and only its seventy-five percent?**
> JUSTICE RICARDO LEWANDOWSKI (RAPPORTEUR)
> **" Of course. For me there is no doubt about that.**
> *Data venia*, **I cannot pay alms with the help of Your Excellency**.
> […] MR. MINISTER CARLOS BRITTO - In other words, the entry does not take place because the State did not allow it to happen.
> MR. MINISTER CEZAR PELUSO - No, the State changes the way it calculates what belongs to the Municipalities. It changes the calculation basis.
> MR. MINISTER CARLOS BRITTO - It is not because the State does not allow it to enter.
> MR. JUSTICE CEZAR PELUSO – [...] **although this has an important fiscal purpose. But this must be done on the basis of the seventy-five percent that belong to the State. That is, the value of the transfers cannot be deducted from the amount on which the portion belonging to the Municipalities is calculated.**
> MR. MINISTER CARLOS BRITTO - This is the first time that we are deciding in this sense.
> MR. RICARDO LEWANDOWSKI
> (RAPPORTEUR) - Undoubtedly, it is a general repercussion, that is why it came to the Plenary". (RE 572762, Rapporteur: Justice RICARDO LEWANDOWSKI, Full Court, judged on 06/18/2008, GENERAL REPERCUSSION - MERITS DJe-167 DIVULG 09-04-2008 PUBLIC 09-05-2008 EMENT VOL-02331-04 PP-00737). (Emphasis added).

From the above dialogue it is possible to extract a consensus signed by the Ministers that the State of Santa Catarina cannot grant tax benefits and incentives with the

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twenty-five percent of the ICMS that belongs to the Municipalities, even if under the pretext of using the Municipality's quota for a regional development program.

In this same direction, it is essential to highlight parts of the vote, clarifying with regard to the financial autonomy and the municipality's own right in the share of constitutionally shared taxes, by Justice Celso de Melo, quoted below:

> [...] **because there is no doubt about the fact that the portion (25%) concerning the ICMS, referred to in article 158, item IV, of the Federal Constitution, belongs, by full right, to the municipalities.**
> **This means that this portion of revenue, which belongs by operation of law to the Municipalities, must be credited to them without any other restriction than those alluded to in the constitutional text itself.**
> This share, even if collected by the Member State, in the exercise of its tax jurisdiction, composes, by express constitutional destination, the assets of the Municipalities, **which have the subjective public right to demand, even legally, the share that is theirs in the collection of ICMS**, observing only the criteria established in article 158, sole paragraph, items I and II, of the Federal Constitution.
> In a word, **the portions of the tax revenue in question cannot be reduced by the Member States (which have the right to dispose of them), and it is not up to them to manipulate the transfer of such portions due to the municipalities (FC, art. 158, IV), even if on the (clearly unconstitutional) pretext that, as a result of a state development program (PRODEC), taxpayer companies have been granted, as a form of tax benefit, the postponement of the payment of the ICMS itself.**
> It is worth remembering, at this point, that **the Federal Supreme Court**, already under the previous constitutional regime, **decided**, albeit from different perspectives, **that the portion of tax revenue (federal or state), constitutionally due to the Municipalities, belongs to them, in their own right,** rejected, for this very reason, as unconstitutional, any reduction, suppression or exclusion of amounts pertinent to the taxes submitted, by the constitution itself, to the system of sharing.
> I understand, Mr. President, that the postulation made by the Member State (the State of Santa Catarina, in this case), if accepted, would imply a serious transgression of the federative principle, as the eminent rapporteur pointed out in his vote
> [...]In this regard, Mr. President, the precedents that this Supreme Court has established in the matter under examination (RTJ 82/200 – RTJ 83/619 – RTJ 85/712 – RTJ 86/722 – RTJ 89/233 – RTJ 516/223, e.g.) are diverse, and have even summarized the jurisprudence around the issue pertaining to the distribution of tax revenues to municipalities (precedent 578).
> [...] the Federal Supreme Court recognized that the undue withholding, by the Member State, in any capacity, of the portion that constitutionally should be transferred by it to the Municipality establishes, in favor of the latter, when compelled to go to court to claim the missing quota, the right to receive the portion due, monetarily updated and plus default interest (RTJ 90/731)
> **It seems relevant to me to observe that the controversy under examination must consider the principle of municipal autonomy, which represents, in the context of our political-legal organization, one of the cornerstones on which the institutional edifice of the Brazilian federation is structured.**
> [...]**I conclude my vote by recognizing that the constitutional distribution of tax revenues qualifies as a necessary and essential instrument for the preservation of the integrity of the municipality's autonomy, understood in its dimension and financial projection.** (RE 572762, Rapporteur: Justice RICARDO LEWANDOWSKI, Full Court, judged on 06/18/2008, GENERAL REPERCUSSION -

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MERITS DJe-167 DIVULG 04-09-2008 PUBLIC 05-09-2008 EMENT VOL-02331-04 PP-00737). element.

What can be extracted from the vote of Justice Celso de Melo is that the municipalities have a subjective right to a share of the mandatory sharing taxes that must be transferred, without any arbitrary restriction, by the entity responsible for the transfer, being subject only to those constitutionally established in article 160 of the CRFB/1988, under penalty of serious violation of the financial autonomy of the municipalities, which in our constitutional system is the cornerstone of the institutional edifice of the Brazilian federation.

In his vote, Justice Menezes Direito stated that if the State's allegation, in relation to the Municipality only having the right to the proceeds of the collection, were accepted, it would be absurd, as it would be authorizing the State to establish the percentage that it would pass on to the Municipalities. Thus violating the Constitution.

Justice Cármen Lúcia followed the vote of the rapporteur and added that the composition of the Brazilian federation is precisely with the guarantee of the financial autonomy of the Municipalities and that if this autonomy is not met, it will be a breach of a constitutional principle.

Justice Carlos Brito, in turn, stated that there is no way for subnational entities to maintain their political-administrative autonomy without the guarantee of financial autonomy, as this is the support of the former. It goes on to state that the Constitution in its Article 158, IV provides that "they belong to the Municipalities", no matter how much the State creates, imposes, inspects and collects the ICMS, a portion of the recitals belongs to the Municipalities, by express constitutional order.

In turn, Justice Gilmar Mendes, president of the STF, adhered to the rapporteur's vote, recognizing that although it is a technical matter of revenue sharing, it is emphatic with regard to municipal autonomy, more precisely the financial autonomy that is conceived by a complex redistribution of participation constitutionally established.

In short, in this RE the justices unanimously recognized that the state of Santa Catarina is not prohibited from granting tax incentives and exemptions, as long as it does so in the 75% of the part of the ICMS that belongs to it, safeguarding the entirety of the 25% portion belonging to the communes in its own right. The transfer of the quota constitutionally due to them cannot be subject to the condition provided for in a statewide tax benefit program, under penalty of flagrant unconstitutionality.

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Still in this vein, we will analyze Extraordinary Appeal No. 705.423/SE, which was issued by the Federal Supreme Court itself, whose analysis falls on the constitutionality of the tax exemptions granted by the Union in shared revenue taxes, which is extremely important in the discussion of the financial autonomy of the Municipalities as a guarantee of the federative pact itself.

3.2 DESCRIPTION AND ANALYSIS OF EXTRAORDINARY APPEAL 705.423/SE

RE 705.423/SE, which is an important judgment in terms of the financial autonomy of the municipalities, was filed by the Municipality of Itabi-Sergipe against the Federal Government, based on item "a" of article 102 of the CRFB/1988, alleging that the provisions of article 159, item I, paragraphs "b" and "d", of the CRFB/1988 were violated by the judgment of the Federal Regional Court of the 5th Region, stating that the Federal Government could not grant tax waiver of the amounts related to the collection of IR and IPI in the part that would be the responsibility of the Municipalities, since by doing so it would be waiving amounts that do not belong to it.

He asserted the existence of a divergence between the judgment under appeal and the Extraordinary Appeal RE 572.762, written by Justice Ricardo Lewandowski, which, in his understanding, established the granting of benefits, incentives and tax exemptions to be granted only to the portions that would fall to the States and the Federal Union, and the preservation of the portions of the amount collected that constitutionally belong to the municipalities.

He also added that the Federal Constitution does not allude to any deduction to be made for the composition of the FPM and that, with the purpose of the political autonomy granted by the constituent to the federated entities to be real, effective, and not just virtual, it strictly preserves its financial autonomy, not allowing, with regard to the distribution of tax revenues, any arbitrary conditioning of the entities responsible for the transfers to which they are *entitled*. Finally, it alleges that the Union would be using the resources that constitutionally belong to the Municipalities, already quite reduced, to grant tax favors to certain companies.

As it is a very extensive decision, for didactic purposes, the main points of the judgment are described, but without losing sight of the main arguments that led the Ministers of the STF to this judgment, which was judged on 11.26.2016, as follows:

> EXTRAORDINARY APPEAL. GENERAL REPERCUSSION. CONSTITUTIONAL, TAX AND FINANCIAL. FISCAL FEDERALISM. MUNICIPALITIES PARTICIPATION FUND – FPM. INTERGOVERNMENTAL TRANSFERS. DISTRIBUTION OF TAX

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> REVENUES. COMPETENCE BY SOURCE OR PRODUCT. TAX JURISDICTION. FINANCIAL AUTONOMY. PROCEEDS FROM THE COLLECTION. CALCULATION. DEDUCTION OR EXCLUSION OF TAX WAIVERS, INCENTIVES AND EXEMPTIONS. INCOME TAX - IR. TAX ON INDUSTRIALIZED PRODUCTS – IPI. ARTICLE 150, I, OF THE CONSTITUTION OF THE REPUBLIC. 1. The financial autonomy of the Municipalities does not derive from the financial autonomy of the Municipalities a subjective right of a constitutional nature with the ability to invalidate the free exercise of the Union's tax competence, including in relation to tax incentives and waivers, provided that the constitutional, legislative and jurisprudential control parameters related to the exemption are observed. 2. The expression "proceeds of collection" provided for in article 158, I, of the Constitution of the Republic, does not allow for constitutional interpretation in order to include in the calculation basis of the FPM the tax benefits and incentives duly realized by the Federal Government in relation to federal taxes, in light of the technical concept of collection and the stages of public revenue. 3. The demand differs from Topic 42 of the general repercussion system, whose paradigm appeal is RE-RG 572.762, written by Justice Ricardo Lewandowski, Full Court, judged on 06.18.2008, DJe 09.05.2008. This is because in the previous judgment it focused on the compulsory or voluntary nature of intergovernmental transfers, while the core of the debate on this topic lies in the differentiation between direct and indirect participation in the tax collection of the Fiscal State by a federative entity. Previous. Doctrine. 4. Establishment of a legal thesis to Topic 653 of the general repercussion system: "It is constitutional for the Federal Government to regularly grant tax incentives, benefits and exemptions related to Income Tax and Tax on Industrialized Products in relation to the Municipal Participation Fund and respective quotas due to the Municipalities." 5. Extraordinary appeal dismissed. (RE 705423, Rapporteur: Justice EDSON FACHIN, Full Court, judged on 11/23/2016, ELECTRONIC PROCESS GENERAL REPERCUSSION - MERITS DJe-020 DIVULG 02-02-2018 PUBLIC 05-02-2018)

The present RE of the rapporteurship of Min. Edson Fachin delimited the controversy in knowing whether it is constitutional to reduce the proceeds of the collection that backs the FPM and respective quotas due to the Municipalities, due to the regular granting of incentives, benefits and tax exemptions related to Income Taxes and Taxes on Industrialized Products by the Union and what the expression "product of the collection" means.

The rapporteur goes on to refute the allegation of the Municipality of Itabí that the judgment of the local Court diverged from the decision rendered by the STF in Topic 42 of the general repercussion system, in RE 572.762, on the grounds that the controversies were very different in their underlying factual and normative contexts. In RE 572.762, the STF established an understanding that the transfer of tax revenues of mandatory sharing transferred, through the participation fund, cannot be subject to the techniques and conditions provided for in the state tax benefit program, focusing on the compulsory or voluntary nature of the transfers of revenues from the proceeds of ICMS collection, different, therefore, from the center of the debate on topic 653 of the general repercussion

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system that consists of the differentiation between direct and indirect participation in the tax collection of the Fiscal State by a federative entity.

The difference proposed by Min. Edson Fachin agrees with several judgments handed down by the Presidency of the Federal Supreme Court, according to which the specificities of the precedent formed in RE 572.762 do not allow its application to general cases of granting tax benefits and exemptions, as is the case:

> STA 685, written by Minister-President Ayres Britto, DJe 03.08.2012; STA-MC 681, reported by Minister-President Joaquim Barbosa, DJe 05.12.2012; STA 350, with the rapporteurship of Minister-President Gilmar Mendes, DJe 09.11.2009; and STA 823, with the rapporteurship of Minister-President Ricardo Lewandowski, DJe 23.02.2016.STA 685.

With regard to the Municipalities in the Brazilian fiscal federalism, the rapporteur, based the 1988 Constitution on its articles 1, 18 and 34, erected the Municipality as a state entity endowed with autonomy, as an integral part of the federal State. In view of this new position, the Municipalities had a significant growth in their available revenues, which went from only 6.4% of the national available revenue in 1960 to 19.3% in 2014.

It goes on to state that, despite having advanced in the decentralization of revenues, the Constitution of the Republic of 1988 also presented a relevant change in the procedure for the creation of municipal entities, which went from the criterion of minimum economic and population viability to those established by the state legislature, provided that prior consultations with the population were respected, thus resulting in a growth in the number of units of approximately forty percent in two decades, which went from 3,974 municipalities installed in 1980 to 5,561 in 2000.

The following are excerpts from the rapporteur's vote that are essential to the understanding of the aforementioned decision:

> In this sense, it remains to be inquired into the legal meaning that the exemption from payment of income tax and IPI made by the Federal Government acquires in the federative context of the National Tax System, especially with regard to the indirect participation of municipal entities in the proceeds of the collection of these taxes, through the FPM.
> Therefore, **I am convinced that the financial autonomy of the Municipalities does not derive from the financial autonomy of the Municipalities a subjective right of a constitutional nature with the ability to invalidate the exercise of the Union's tax competence, including in relation to tax incentives and waivers, provided that the constitutional, legislative and jurisprudential control parameters related to the exemption are observed.**
> It can be seen, by the way, that **the distribution of current tax revenues in the** National Tax System **combines two types** of financing by local governments: **one by the criterion of the source** (collection of taxes under its own competence) and **the other by** the product, which translates into participation in the tax cake under

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> the competence of the central government. **In this second hypothesis, there is no right to a share of a maximum potential collection that would include tax incentives and waivers, under penalty of subversion of the decision of the Constituent Power at a constitutional moment with regard to the model of fiscal federalism.** [...] Thus, in my view, the current constitutional normativity does not allow a conclusion different from the one mentioned above, so that it remains to apply it to the litigation in concrete, especially to **interpret the expression "proceeds of collection", used by arts. 157, 158 and 159 of the Constitutional Text to indicate the amount to be shared by the larger entities to the smaller ones.** [...] Considering the provisions of article 150, paragraph 6, of the Constitution of the Republic, which subjects to the specific law the granting of "*any subsidy or exemption, reduction of the calculation basis, granting of presumed credit, amnesty or remission, related to taxes, fees or contributions*", in turn regulated in article 14 of LC 101/2000 (Fiscal Responsibility Law), The tax exemption regularly granted makes it impossible to forecast public revenue. Therefore, it is inappropriate to interpret the expression "proceeds of collection" in such a way that these tax waivers are not deducted. [...] However, in my view, **accepting the appellant's claim would mean invalidating the model of distribution of tax revenues elected in the constitution. At present, this solution is in the mold of the current constitutional directives.** (RE 705423, Rapporteur: Justice EDSON FACHIN, Full Court, judged on 11/23/2016, ELECTRONIC PROCESS GENERAL REPERCUSSION - MERITS DJe-020 DIVULG 02-02-2018 PUBLIC 05-02-2018).

From the above, it is extracted that there is nothing to speak of the Municipality's own right arising from its financial autonomy of a constitutional nature with the power to annul the competence of the Union to grant incentives and tax waivers, and must observe only the criteria related to constitutional, legislative and jurisprudential control linked to the exemption. Thus, as it is indirect revenue, the municipality does not have the right to what was not collected, but only to the "proceeds of collection" excluded from it, the amounts of tax incentives and waivers, regularly granted by the Union in IPI and IR. He concluded his vote by stating that accepting the municipal claim would mean annulling the revenue sharing model constitutionally established by the constituent power.

Justice Luís Roberto Barroso followed the vote of the rapporteur, but with a question regarding the competence of the Union in Brazilian fiscal federalism, as excerpted below:

> [...] I think that, **from a constitutional point of view, the vote of Justice Luiz Edson Fachin makes the correct interpretation that, in the absence of collection, that is, the tax, both the Income Tax and the IPI are unequivocally the competence of the Union.** The possibility of granting exemptions from this tax, by law, in the case of Income Tax, and, in the case of IPI, even without law, and increasing or reducing the rate is also provided for in the Constitution. Therefore, **the competence is of the Union to collect them, the competence is of the Union to grant exemptions**, **the Municipalities and the States, in the Participation Fund, are only entitled to a percentage of what has actually been collected.** Therefore, **if there was no collection, I think that logically there is no right to participation**. So, even when this policy of exemptions may eventually seem unfair, I **think that there is no acquired right of the Municipalities in this line**. [...] In addition, the Union would not only not receive the taxpayer's tax, but would have to pass on what it did not receive. This argument also impressed me. (RE 705423, Rapporteur: Justice EDSON FACHIN, Full Court, judged on

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11/23/2016, ELECTRONIC PROCESS GENERAL REPERCUSSION - MERITS DJe-020 DIVULG 02-02-2018 PUBLIC 02-05-2018).

In this fragment, Justice Barroso understood that the Constitution provides for the possibility of the Union granting exemptions, increasing, reducing, the IPI and IR rate, to States and Municipalities as a Participation Fund only has the right to receive the share of what was effectively collected, establishing that the municipalities do not have an acquired right in these revenues, Because it would be controversial to say the least the fact that the Federal Government, in addition to not receiving from the taxpayer, has to pass on what it did not receive.

Justice Teori Zawascki, in turn, pointed out that the allegation that the granting of tax incentives would substantially reduce the collection of decentralized entities is very simplistic, since this may seem true in the short term, however, in the medium and long term, tax exemptions can promote economic development and consequently increase tax revenues of States and Municipalities. He also stated that the IPI is an eminently extrafiscal burden and that if it removes the power of the Union to increase and reduce its rates to certain sectors or specific situations, on the basis of a reduction in the FPM, it would be removing from the IPI its constitutional nature of extra-taxation.

Justice Luiz Fux granted the municipality's appeal, based on his vote that the CRFB/1988, by providing for the distribution of mandatory tax revenues to subnational entities, actually sought to guarantee the constitutional project of decentralization of power, protecting the financial autonomy of these units from any arbitrary conditioning of the entities responsible for the transfers.

However, since the 1990s, the federal government has been implementing a policy of centralization of revenues through the creation and increase of the rate of non-shared taxes and granting incentives and tax exemptions in the encumbrances of shared revenues, thus distorting the model of cooperative fiscal federalism conceived by the constituent, directly reducing the revenues of subnational entities through the underpayment of the Participation Funds of the States and Municipalities. It also demonstrated, based on data provided by the TCU between the years 2008 and 2013, that for every R$ 1.00 (one real) waiver of IPI and IR granted by the Union, it was estimated that R$ 0.58 (fifty-eight cents of real) belonged to the States and Municipalities, due to the revenues collected from these taxes being shared with subnational entities.

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It goes on to state that the controversy of this RE is different from that faced in RE No. 572,762/SC, since in the former the hypothesis was not of exemption, but of deferral of the transfer of the ICMS portion to the communes. However, the grounds of the decision could be perfectly applied to the case under analysis, especially what refers to the recognition that the revenues constitute the right of the Municipalities and are not conditioned to the effective entry of the tax into the state treasury.

He concluded, demonstrating that, in the RE of Santa Catarina, the State was not denied competence to establish tax exemptions related to its own taxes, however, on the other hand, it was recognized by express constitutional commandment that such benefits could not impact the amount transferred to municipal entities.

It alleged that there are several precedents in the STF in which the grounds of RE No. 572,762/SC were applied to refute the States' thesis of inapplicability of said RE to cases of the same kind, among them:

> a) RE 726.333 AgR (Second Panel, Rel. Min. Cármen Lúcia, judged on 12/10/13, DJ of 02/03/14), which confirmed the monocratic decision in which the 'irrelevance of the absence of effective entry into the state treasury of the tax' was expressly established, for the purpose of refuting the State's thesis of inapplicability of the *leading case* to the species; b) The same occurred in STA 451 AgR (Plenary, Rel. Min. Cezar Peluso, judged on 05/18/11, DJ of 06/02/11); c) In the same sense, RE 695.421 AgR, Second Panel, Rel. Min. Cármen Lúcia, judged on 04/24/13, DJ of 05/15/13.

Justice Luiz Fux, continues in his vote stating that the Constitution, by using the words **belong** to article 157 and **will deliver** in article 159, both of the CRFB/1988, was denoting the will of the constituent to confer on the proceeds of the collection shared among the entities of the federation a double title, in which part belongs to the entity competent to institute the encumbrance and the other belongs to the entity with the right to participate.

In this sense, it lists that the share of IPI and IR destined to the FPM is a fundamental right of the Municipalities and that the exemptions must be borne by those who exempt them. It also stated that:

> "[...] the only exception to the obligation to transfer is the sole paragraph of article 160 of the Constitution, which allows the Union to condition the delivery of the resources to be transferred to the payment of its credits and those of its autarchies, a hypothesis that does not correspond to the present case".

In turn, Justice Ricardo Lewandowski assured that the CRFB/1988 itself has already established the limits in article 159, when it crystallized that the distribution of revenues

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arising from IPI and IR are given by the result of what was effectively collected, and this constitutional limitation is insurmountable.

Justice Marco Aurélio stated in his vote that it was necessary to review the decision rendered in RE 52.762, since it is not up to the STF to rewrite the Federal Constitution, due to the deficiencies of the tax system regarding the competences of its entities and concluded that there is no way to give any other interpretation than that established under the terms of articles 157, 158 and 159 of the CRFB/1988, that the Municipalities only have the right, with regard to the FPM, of what was effectively collected from the IPI and IR.

Finally, the president of the STF, Minister Cármen Lucia, followed the vote of the rapporteur and added that the limit of the judgment is the Constitution, so outside of it there is no solution.

In view of the analyses of RE 562.762/SC and RE 705.423/SE, it is appropriate to ask: how did cases with similar causes of action, based on the constitutional premise of the financial autonomy of the Municipalities, have completely opposite decisions? Based on this question, I had to clarify it in the following topic, from the point of view of the nature of the tax revenues under discussion in each case.

THE DIFFERENCES BETWEEN THE DECISIONS OF RE 562.726/SC AND RE 705.423/SE

Apparently, at first glance, the equivocal conclusion can be reached that RE No. 562,726/SC and No. 705,423/SE deal with the same constitutional controversy. However, they are disparate, as they claim revenues of different natures, namely, in the first the discussion revolves around direct revenues belonging to the municipalities, while in the second indirect revenues are limited. For better clarification and fixation of this difference, it is imperative to explore an interesting judgment handed down by the Federal Supreme Court in RE 991329 AgR, of Rapporteurship of Justice MARCO AURÉLIO, judged on 08/14/2018, by the First Panel.

In the case under review, the municipality of Amarinópolis filed a request for reconsideration. Alleging lack of similarity between RE No. 705,423/SE and the reasons object of RE 991329 AgR. It defended the adequacy of what was decided by the Court in the judgment of extraordinary No. 572,762/SC. He argued that there was no hypothesis of exemption in the specific case, but a simple deferral instituted by the State of Goiás as a

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form of economic incentive, stating that RE 705.423/SE deals with a tax different from the one discussed in this case.

The reporting Justice Marco Aurélio, dismissed the case and ordered the referral to the Court of Justice of Goiás, alleging that the understanding adopted differs from that established by the Supreme Court in the judgment of the extraordinary judgment of No. 705,423/SE, for compliance with the system of general repercussion.

However, Justice Marco Aurélio had his thesis rejected by the other Justices of the First Panel on the grounds that the case law of the STF is firm in the sense that the transfer of ICMS installments due to the Municipalities cannot be subject to the State's tax incentive plans, under penalty of violating the constitutional system of revenue sharing.

Justice Alexandre de Morais, president of the First Panel, stated in his vote that it is:

> It is imperative to emphasize the inadequacy of Topic 653 to the specific case. In this precedent paradigm, the COURT turned its attention to the "**differentiation between direct and indirect participation in the tax collection of the Fiscal State by a federative entity**", **taking into account that "the specificities of the precedent formed in RE-RG 572.762 do not allow its application to general cases of granting tax benefits and exemptions"**, observed the Noble Rapporteur, Justice EDSON FACHIN. Furthermore, the Reporting Justice stressed that the central point of that controversy was the exemption from payment of Income Tax (IR) and Tax on Industrialized Products (IPI), carried out by the Federal Government and its indirect impact on the Municipal Participation Fund (FPM), which was considered constitutional in the light of article 159 of the MAGNA CARTA and article 34 of the Transitional Constitutional Provisions Act, **weighing, on the one hand, the financial autonomy of the municipalities, and, on the other, the tax competence of the Union**. This issue is different, therefore, from the matter dealt with in RE 572.762, which is expressly included in the vote of the Honorable Justice EDSON FACHIN. [...] **Therefore, considering the specific situation of these proceedings, which are similar to the peculiarities of the pilot case contained in Topic 42, and in view of the generic guidelines established in RE 705.423 (Topic 653), regarding the granting of tax benefits and exemptions, the incidence of the latter topic must be ruled out in the present case.** (RE 991329 AgR, Rapporteur: Justice MARCO AURÉLIO, Rapporteur for Judgment: Justice ROBERTO BARROSO, First Panel, judged on 08/14/2018, ELECTRONIC PROCESS DJe-197 DIVULG 09-18-2018 PUBLIC 09-19-2018). (grivo nosso)

From the fragment above, the precise difference between the cases judged in RE 572.762/SC and RE 705.423/SE is extracted, since the first deals with direct transfers that constitute the municipality's own right, which according to Ribeiro (2016, p.53) are "a transfer of a predominantly devolutive nature from state governments to local governments", that is, the Municipalities have a portion of the contribution to tax collection. The second judgment, on the other hand, falls on indirect revenues, which in the words of Conti (2001, p. 70) is "the indirect participation constitutionally provided for comes [...] outlined in article 159, which provides for the two main funds: The Participation Fund of the

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States and the Federal District and the Participation Fund of the Municipalities". As noted, in RE 705.423/SE, the Municipality only receives what was collected by the Union without any participation in the collection.

Thus, it is clear why, apparently similar situations, had such different results with regard to the ownership of revenues and the constitutionality of tax incentives and exemptions practiced by entities with competence over the institution, collection and eventual exemption of IR, IPI and ICMS, as well as their impact on the revenue of decentralized entities.

FINAL CONSIDERATIONS

This article was based on the analysis of the central pillar of the building of the Brazilian Federation inaugurated by the CRFB/1988, fiscal federalism. Since, there is no way to exercise political-administrative autonomy without the guarantee of the financial autonomy of subnational entities, the latter being the pledge of the others.

However, it was noted that our fiscal federalism is very far from that desired in the CRFB/1988, in which there would be a considerable decentralization of tax revenues in favor of the States, Federal District and Municipalities. However, the picture we have today is very different, where there is a strong process of recentralization of revenues in the hands of the Union, through the increase in the collection of non-shared taxes and a decrease in the collection of those of mandatory sharing, thus minimizing the long-awaited autonomy of decentralized entities.

Thus, it is pointed out that the Federal Supreme Court produced a considerable advance, in the judgment of RE 572.762/SC, by ensuring that direct tax revenues destined to the Municipalities are not reduced due to the tax exemption policies practiced by the States and that these can be granted, as long as they do not imply a reduction in the revenues of the municipalities. However, it missed the opportunity to ensure the effectiveness of cooperative federalism in the judgment of RE 705.423/SE, which, through a long hermeneutic exercise, materialized the perverse policy of tax exemption practiced by the Federal Government, by deciding that, as it is indirect revenue, the calculation of the value of the FPM must be made on the proceeds of the collection. Therefore, it is chlorine that the "courtesy with the hat of others" can be done, depending on who grants it.

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ISSN: 2358-2472

REFERENCES

1. Afonso, J. R. R., & Junqueira, G. G. (s.d.). O federalismo fiscal na organização do Estado brasileiro pela Constituição de 1988. Recuperado em 2 de outubro de 2018, de https://www12.senado.leg.br/publicacoes/estudos-legislativos/tipos-de-estudos/outras-publicacoes/volume-iv-constituicao-de-1988-o-brasil-20-anos-depois.-estado-e-economia-em-vinte-anos-de-mudancas/do-sistema-tributario-nacional-o-federalismo-fiscal-na-organizacao-do-estado-brasileiro-pela-constituicao-de-1988

2. Alves, R. de A. V. (2015). A interpretação do art. 160 da Constituição à luz do novo contexto federativo. Revista de Finanças Públicas, Tributação e Desenvolvimento, 3(3), 1–[página final, se disponível].

3. Barroso, L. R. (2009). Sentido e alcance do parágrafo único do art. 160 da Constituição: Parâmetros para a retenção de receitas estaduais pela União Federal. Revista de Direito da Procuradoria Geral do Estado do Rio de Janeiro, (64), 295–321.

4. Brasil. (1988). Constituição da República Federativa do Brasil de 1988. Recuperado em 8 de outubro de 2018, de http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm

5. Brasil, Supremo Tribunal Federal. (2008). Recurso Extraordinário nº 572762. Relator: Min. Ricardo Lewandowski. Recuperado de [inserir URL, se disponível].

6. Brasil, Supremo Tribunal Federal. (2016). Recurso Extraordinário nº 705423. Relator: Min. Edson Fachin. Recuperado de [inserir URL, se disponível].

7. Brasil, Supremo Tribunal Federal. (2018). Recurso Extraordinário nº 991329 AgR. Relator: Min. Marco Aurélio. Recuperado de [inserir URL, se disponível].

8. Cantizano, D. L. (1969). O novo sistema tributário brasileiro. Rio de Janeiro, RJ: Forense.

9. Catarino, J. R., & Abraham, M. (2018). O federalismo fiscal no Brasil e na União Europeia. Revista Estudos Institucionais, 4(1), 186–210. https://doi.org/[inserir DOI, se disponível]

10. Coelho, S. C. N. (1999). Curso de direito tributário brasileiro (2ª ed.). Rio de Janeiro, RJ: Forense.

11. Conti, J. M. (2001). Federalismo fiscal e fundos de participação. São Paulo, SP: Juarez de Oliveira.

12. Harada, K. (1999). Vinculação, pelo município, das cotas do ICMS para garantia de operações de crédito: Efeitos. Repertório IOB Jurisprudência, (3), [inserir páginas, se disponível].

Revista ARACÊ
ISSN: 2358-2472

13. Oliveira, O. R. de. (2011). Curso de direito financeiro (4ª ed.). São Paulo, SP: Revista dos Tribunais.

14. Pamplona, K. M. (2014). Estado federativo fiscal e o comportamento do sistema de transferências intergovernamentais no Brasil e na receita municipal por mesorregiões do Pará: Uma análise sob as perspectivas da equalização fiscal e do desenvolvimento (Tese de doutorado). Universidade Federal do Pará, Belém, PA.

15. Ribeiro, M. B. (2016). Uma resenha sobre as avaliações mais recentes dos efeitos locais das transferências do Fundo de Participação dos Municípios (FPM). Boletim Regional, Urbano e Ambiental, (15), [inserir páginas, se disponível]. Recuperado em 25 de outubro de 2018, de http://repositorio.ipea.gov.br/bitstream/11058/7109/1/BRU_n15_Resenha.pdf

16. Rocha, C. L. A. (1997). República e federação no Brasil: Traços constitucionais da organização política brasileira. Belo Horizonte, MG: Del Rey.

17. Santa Catarina. (2000). Lei nº 11.345, de 17 de janeiro de 2000. Recuperado em 20 de outubro de 2018, de http://legislacao.sef.sc.gov.br/html/leis/2000/lei_00_11345.htm

18. Santos, A. P. (2011). Autonomia municipal no contexto federativo brasileiro. Revista Paranaense de Desenvolvimento, (120), 209–230.

19. Sarlete, I. W., Marinoni, L. G., & Mitidiero, D. (2013). Curso de direito constitucional (2ª ed.). São Paulo, SP: Revista dos Tribunais

20. Pamplona, K. M. (2014). Fiscal federative state and the behavior of the intergovernmental transfer system in Brazil and municipal revenue by mesoregions of Pará: An analysis from the perspectives of fiscal equalization and development (Doctoral dissertation). Federal University of Pará, Belém, PA.

21. Ribeiro, M. B. (2016). A review of the most recent evaluations of the local effects of transfers from the Municipal Participation Fund (FPM). Boletim Regional, Urbano e Ambiental, (15), [inserir páginas, se disponível]. Recuperado em 25 de outubro de 2018, de http://repositorio.ipea.gov.br/bitstream/11058/7109/1/BRU_n15_Resenha.pdf

22. Rocha, C. L. A. (1997). Republic and federation in Brazil: Constitutional traits of the Brazilian political organization. Belo Horizonte, MG: Del Rey.

23. Santa Catarina. (2000). Lei nº 11.345, de 17 de janeiro de 2000. Recuperado em 20 de outubro de 2018, de http://legislacao.sef.sc.gov.br/html/leis/2000/lei_00_11345.htm

24. Santos, A. P. (2011). Municipal autonomy in the Brazilian federative context. Revista Paranaense de Desenvolvimento, (120), 209–230.

Revista ARACÊ
ISSN: 2358-2472

25. Sarlete, I. W., Marinoni, L. G., & Mitidiero, D. (2013). Curso de direito constitucional (2ª ed.). São Paulo, SP: Revista dos Tribunais.