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The Feasibility of Tax Arbitration In The Brazilian Legal System

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Abstract *— The ineffectiveness and slowness of national tax litigation, whether in the judicial or administrative field, is an irrefutable reality. There are several causes of this reality and it is natural that the scant presence of alternative methods of conflict resolution contributes to the perpetuation of this scenario. In this context, the theme under study is tax arbitration in Brazil, with a main cut in the feasibility of the use of arbitration in the resolution of tax disputes. The problem of research is the effective use of arbitration in tax pending. The problem of research is the effective use of arbitration in tax pending. For the development of this work, the deductive method will be used, starting, as can be seen, from the general analysis of arbitration to the specific points that outline the theme. Thus, the study was split into five topics: the status of the taxpayer; Bill No. 4,257/2019; Bill No. 4,468/2020; tax arbitration in Portugal, and finally the feasibility of tax arbitration by the National Tax Code (CTN) and criticism and praise on the part of the doctrine. Thus, the issue of arbitration will be better understood, especially by relating it to the branch of Tax Law, so that the practical implementation of this mechanism can be assessed.*

I. INTRODUCTION

Evidently, a tax reform that seeks to modify the bases of consumption taxation, as is currently being debated, is not enough. It is not enough (and this is not even the agenda) a reform that aims to change the levels of income taxation. It is necessary to reassess the structure of collection and collection of taxes in the Brazilian territory.

Public Administration should be guided by the idea of implementing a tax collection model that consists of imposing the lowest possible cost on the state entity to collect the highest possible amount, within the legal framework (OLIVEIRA, 2015).

The reality is that, until the recent implementation of the tax transaction, there has been little progress in tax litigation other than the introduction of political sanctions, restricting the regular exercise of taxpayer activities. It is observed that tax litigation has been suffering from the idea anchored in issues such as isonomy, illegality, unavailability of tax credit, as if this made it impossible to use alternative methods that would improve the resolution of tax conflicts.

Certainly, the unavailability of the public interest does not impose the immobilization of the state machine. The starting point must be the thought that collective interests must prevail over the interests of the Public Administration. And the collective interest in the application of alternative methods can be easily ascertained, either from the increase in revenue, or from the promotion of business maintenance.

In this perspective, the focus should be on the public interest involved, which, in the opinion of Celso Antônio Bandeira de Mello, would be the desires arising from the set of interests that the subjects personally hold when considered in their quality as members of society and by the simple fact that they are (BANDEIRA DE MELLO, 2005).

It should be noted that, supporting the reception of alternative measures, the Organization for Economic Cooperation and Development-OECD argues that the current financial crisis must be eradicated by the tax authorities, taking into account the possibility of providing swift legal certainty to taxpayers, with regard to their tax liabilities, in cases where this can free up resources or unlock cash flow (CIAT /IOTA/OECD, 2020).

Fortunately, it is possible to observe, in Brazilian territory, an evolution of the discussion about the adoption of alternative methods of resolving tax disputes. In this wake, the tax transaction institute has been gaining more and more strength. The same is true of tax arbitration. Until recently, the doctrine was still focused on the discussion about the possibility of the tax credit being the subject of arbitration , based on the debate about the availability of the tax credit, as well as whether the arbitration award could be recognized as one of the reasons for extinction of the tax credit, or even what the enforceability of the credit would look like in the course of the arbitration procedure (ESCOBAR, 2017).

The national scenario is not far from that identified in other nations and, notably, this debate needs to exist so that the population is comfortable with having part of the demands that deal with Tax Law resolved outside the jurisdictional path or administrative bodies subordinated to the Executive Power.

In this context, the present work will address several issues concerning arbitration, giving a special bias to arbitration in the sphere of Tax Law, thus, identifying the strategies present in this area, through an approach based on good practices and indicators of quality is relevant.

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II. METHODOLOGY

The method used in the present research is the deductive one, starting from the analysis of the Taxpayer Statute, of several doctrinal positions and of legal dispositions to infer a plausible conclusion. Regarding the means, the research is bibliographical and is developed through consultation of doctrine and legislation at the national and international level, especially tax arbitration in Portugal, in order to bring a greater understanding of the phenomenon under study.

2.1. SUSTAINABLE DEVELOPMENT OF AGRIBUSINESS

The search for sustainable development is growing more and more in Brazil, and practices are being adopted that aim at environmental preservation allied to agribusiness. The use of land without sustainable practices can generate irreparable damage to the environment, and economic losses within the activity.

Sustainability consists of the existing natural resources, while without it, far beyond society, biodiversity would also be vulnerable, resulting in serious risks to the global ecosystem (MILARÉ, 2018).

As for natural resources, their definition is very broad, since it covers land, soil and its topography, water, climate, ore, as well as the possibility of fishing, integrating the location and geographical extension of these resources (BURANELLO, 2018). For this reason, the awareness of agricultural entrepreneurs about the protection of the Conservation Units is of extreme importance so that entrepreneurial actions are carried out with special attention to sustainable development.

Antunes (2019) defines Conservation Units as "[...] territorial spaces which, by virtue of an act of public authority, are destined for the study and preservation of specimens of flora and fauna [...]".

According to article 2, item XI, of Law 9.985/2000, sustainable use is about exploring the environment in a way that guarantees the continuity of renewable resources and ecological processes, so that biodiversity is maintained in a fair and economically viable way.

Although the environment presents an abundant ecosystem, sustainability is still difficult to achieve, since the great majority of the population does not recognize the importance of natural resources for agribusiness.

With the transformations that the environment undergoes as a result of exploitation, specifically for agricultural expansion, native flora and fauna are harmed, since burning and deforestation occur, in addition to the high rate of water use and land use in an immoderate

manner. The indiscriminate use of natural resources can cause irreversible damage, involving current and future generations.

"Thus, environmental management in agribusiness must be based on an ecological approach, whose focus implies the integral treatment, before, during and after production, of all relevant environmental issues [...]" (BURANELLO, 2018).

The relevance of the studies and the achievements in favor of the protection of the natural environment of the group of scientists protecting nature, from the 19th century on, under the aspect of valuation and care of forests, fauna and flora, deserves to be reassessed in the light of current legislation. This new evaluation of the natural environment in the XIX century will provide reflections and practices for the maintenance of the vegetation still existing in Brazil, as well as, the regularization (spontaneous or coercive) of rural areas, public and private, that had irregular suppression of vegetation by anthropic actions (CÉSARO; FERREIRA, 2018).

"Sustainability is associated with economic and material development without harming the environment, using natural resources wisely so that they can be conserved in the future, i.e., they aim at the very survival of the planet [...]" (MOREIRA, 2018).

In fact, especially in the Cerrado biome, sustainability becomes a challenge, since society does not understand that fauna and flora, while a diverse set of native vegetation and animals, carry a commercial potential of great value (MOREIRA, 2018).

Thus, it can be observed that from the 19th century on, through research by scientists and scholars who were concerned with nature, the protection of the fauna and flora in Brazil began to be valued, so that the practices of maintenance and conservation of vegetation in rural and urban areas have been gaining focus in the current forest legislation.

2.2. DRAFT LAW 4.257/2019

On August 6, 2019, Bill 4,257 was presented, proposing the modification of the Tax Enforcement Law, to, among other measures, enable the institution of arbitration proceedings in the field of defense of tax enforcement proceedings .

In general terms, the aforementioned Project aims to admit that the defendants, by offering a deposit, surety bond or surety, may opt for the Arbitration Convention for judgment of the motion to be embargoed.

The data mentioned in the project's justification and, several times, published by official bodies, show that tax executions account for a large portion of the stock of tax cases awaiting resolution. In addition, it is known that this high volume of executions, dealing with the most varied topics, in many cases, prevents magistrates from responding to the parties quickly and effectively.

Therefore, without a shadow of a doubt, the Project clearly presents a great importance in the attempt to solve this issue. However, it is necessary to consider that the arbitration procedure, a *priori* , is intended to deal with the most complex cases, offering the litigants the best possible decision, in view of the specialized knowledge of the arbitrators, with regard to the procedure and substantive law. .

Thus, due to the very nature of the arbitration procedure, it does not seem to us that the promotion of arbitration in the proposed manner is an effective measure to promote a significant reduction in tax foreclosures sent to the Judiciary, but it will certainly represent a relevant mechanism for faster resolution of disputes. more complex tax disputes, ensuring a more efficient and specialized analysis of documents, facts and legal issues involved, generating better collection efficiency.

It is important to emphasize that the Economic Affairs Committee issued an opinion on Bill 4,257/2019, with the rapporteurship of Senator Otto Alencar proposing some amendments to the Bill, among them the following:

> Art. 41-T. The debtor may opt for the arbitration procedure provided for in arts. 16-A to 16-F case, when filing the action provided for in art. 164 of Law 5,172, of October 25, 1966 , or the action for annulment of the debt declaratory act, provided for in art. 38 of this law, guarantee the judgment by cash deposit, bank guarantee or guarantee insurance (SENADO FEDERAL, 2019, p.8).

According to the aforementioned proposal, the tax arbitration procedure in question would also be capable of reaching consignatory and annulment actions, thus, going beyond the debates held in the field of tax foreclosures. The proposal is bold, but very salutary. It is normal that taxpayers, defeated in the administrative sphere or even aware of the impossibility or the tiny chances of success, especially in view of the type of matter, choose not to wait

to receive an executive charge, but rather to file an ordinary action aiming at the annulment of the tax credit.

Discussions in this type of judicial process usually drag on for several years, as they involve highly complex issues that require the participation of experts, especially accounting experts. Thus, it seems to us that arbitration would appear here as an alternative method of considerable value.

2.3. DRAFT LAW 4.468/2020

In the context of the encouraging and evolving arrangement of the State to make use of consensual dispute resolution methods, it is extremely important to point out some considerations about PL n. 4,468/2020, since it was recently filed, on September 3, 2020, at the Federal Senate, and which, despite not dealing with tax transactions, provides for the establishment of a special tax arbitration regime for the resolution of disputes **.**

As is well known, arbitration reveals itself as an alternative means of conflict resolution, in which a third party is elected to carry out this resolution. However, in this PL, the arbitrator will have his/her performance restricted to factual matters, being prohibited to use this mechanism in situations of tax credits already constituted, debates about the constitutionality of laws and legal norms, or decision contrary to the understanding sedimented by the Judiciary (TOLEDO, 2020).

Arbitration as an alternative mechanism to the judicial route in the resolution of disputes is not new, both nationally and internationally, having been present since the Roman period. In Brazil, the contemporary time frame was the entry into force of Law nº 9.307/1996 (Arbitration Law), which "adopted the *monist system* of arbitration, providing for a single standard of rules for arbitration, whether for those considered to be international arbitrations, or for those considered domestic arbitrations" (FICHTNER, MANNHEIMER, MONTEIRO, 2019. P. 96).

Taking into account the current moment in the country, which is marked by the high incidence of lawsuits that overload the Judiciary, and in view of the debate about the need for a tax reform to simplify the collection of taxes, which the Bill n. . 4,468/2020 was presented under the argument of being able to provide greater speed and efficiency in the recovery of values in the resolution of impasses (SENADO FEDERAL, 2020).

One of the novelties that most attract attention, with regard to this special tax arbitration, refers to the mandatory constitution of an arbitration triad to mediate the conflict. According to the Bill above, one arbitrator must be appointed by the taxpayer, another by the administrative authority, and the third arbitrator must be elected, by mutual agreement, by both opponents (SENADO FEDERAL, 2020).

As you can have an idea, this third party will have a "tie-breaker" role, which will be in charge of evaluating the documentation of the process and rendering a decision, when there is no unanimity in the arbitration award. Thus, the scope of seeking a more agile solution in disputes will be compromised, as it can make the solution more time-consuming, including generating costs, hitherto non-existent, between the Public Administration and the taxpayer (TOLEDO, 2020).

The explanatory memorandum also highlights its impact on the quantification of credit recognized in court, or on its application in tax consultations. In this wake, the criticism rests on the consultation institute, since it does not have the scope to resolve any impasse, but only to clarify to the taxpayer about the interpretation that the Public Power has about the application of a certain normative provision (TOLEDO, 2020).

In view of the aforementioned considerations, special arbitration, under the terms proposed in PL No. 4,468/2020, seems to be relevant. However, it will still require further evaluation, with the aim of helping to resolve the enormous tax dispute.

2.4. TAX ARBITRATION IN PORTUGAL

Arbitration for the resolution of tax disputes has gained increasing visibility in international law, becoming common practice in the USA, Germany, the Netherlands, Australia, Japan, Canada, France, the United Kingdom, Mexico and, above all, , in Portugal, taking into account that the numbers of lawsuits pending before the receipt of the institute under discussion were also exorbitant (PASINATTO; VALLE, 2017).

The insertion of tax arbitration in the Portuguese regulatory framework represented an innovative mechanism, because Portugal assumed a pioneering role, being one of the first nations to welcome tax arbitration in its domestic legislation (FERNANDES, 2019). Thus, there was some fear regarding its institution, since there was no comparative law at the time for Portugal to be able to evaluate the experiences and analyze the pros and cons, to decide whether or not to implement the mechanism.

It is well known that tax arbitration in Portugal had its spark in 2004, through the reform of administrative litigation, which opened up possibilities for debates in the administrative field, and enabled the establishment of arbitration centers, until then restricted to administrative contracts (FERNANDES, 2019). In this sense, through Law 13/2002, the Statute of Administrative and Tax

Courts (ETAF) was approved, by which, in its articles 12 and 26, b, it recognized that only matters of law would be dealt with (PORTUGAL, 2002).

In addition, Law 15/2002 brought the Code of Procedure in the Administrative Courts-CPTA. With the advent of the CPTA, permission to establish permanent arbitration centers was verified, whose focus would be to allow the evaluation of issues related to contracts, legal relations of public employment, civil liability of the Administration, public systems of social protection and urbanism (PORTUGAL, 2002).

In this context, the legislator had two alternatives: to use the existing Voluntary Arbitration Law (LAV) as a basis and make the necessary adaptations, or to develop a more pragmatic regime, and the latter option was accepted. Thus, an alternative dispute resolution means was created, applying not equity, but the law.

In 2009, the Administrative Arbitration Center (CAAD) was created in Lisbon, used to resolve conflicts between the state entity and the civil servants, and in 2011, through Law 10/2011, Tax Arbitration became effectively implemented, aiming to strengthen the effective protection of the rights and interests of the taxable person, to provide agility in the resolution of disputes and to work on minimizing procedural pending issues, in the tax and administrative courts, leaving a clear need to raise funds.

It should be noted that the use of arbitration was gradual, according to the president of CAAD, Nuno Villa-Lobos, who stated that tax arbitration surpassed even the most positive expectations. Emphasizing the high level of quality of the decisions and the response time linked to the present deontological credibility. In the meantime, it took a while for trust to remain solidified, and the first decisions had to be made so that, gradually, the use of tax arbitration increased (PASINATTO; VALLE, 2017).

In Portugal, Arbitration has the function of resolving conflicts with the same value attributed to the Judiciary, and the purpose is to reduce pending issues, bring revenue to the public coffers and relieve the courts. However, such a reduction has not yet been possible, despite being a trend, taking into account the increasingly expressive increase in the number of cases that the Administrative Arbitration Center judged (CAAD, nd). As pointed out, it all started with a high economic crisis and a high number of active debt inscriptions, requiring that adequate decisions be taken so that the credits were quickly collected.

With regard to the economic crisis, there was an intervention by the Troika, which sought financial support and halted the recession, with the signing of a memorandum of understanding between the Portuguese government, the European Commission (EC), the International Monetary Fund (IMF) and the Central Bank. European (ECB). In this wake, the Organization for Economic Co-operation and Development (OECD) expressed itself about the exit from the recession: Portugal is emerging from a deep and long recession, which has resulted in a high unemployment rate (about 15% in March of the year 2014), and a reduction in the income of family entities. Recent economic indicators have pointed to certain positive trends, including the reduction of unemployment and growth in exports (OECD, 2018).

The reform efforts carried out by the competent authorities have paid off ahead of schedule at the start of the joint program of the European Union (EU), the IMF and the ECB. As global conditions improve, the economy should gradually gain strength (OECD, 2018).

The aforementioned president of CAAD, Nuno Villa Lobos, one of the most responsible for the battle for the implementation of Arbitration, pointed out advantages for the institute to be used and pointed out that: there would be a reduction in the costs that the state entity has exhaustively with the judicial demands; dispute resolution would take place more quickly, underlining that taxpayers would save money when discussing their rights; in addition to the entry of revenue (PASINATTO, VALLE, 2017).

Another interesting issue that attracted the attention of taxpayers is that, in the CAAD, in the event that the claim is proven, the amount spent with the arbitration fee would be returned in full. Greater trust was observed in arbitrators, taking into account their technical specialties, and there was a reduction in litigation in the courts, with tax collection occurring more quickly (PASINATTO, VALLE, 2017).

In 2014, the OECD pointed out suggestions for improvements for Portugal, and mentioned improvements in the tax field, with regard to improved litigation and collection; highlighted that the improvements were identified as of 2011 and the aforementioned improvements took place during the arbitration period.

Raising tax revenues, through greater compliance by taxpayers, and reducing tax administration expenditures thanks to improved operational effectiveness are also part of the State's budget consolidation plan. Positive progress was made between 2011 and 2013, including the creation of a new integrated authority for customs and taxes - Autoridade Tributária e Aduaneira (AT) -, however, essential reforms that will have to be evaluated in close by AT servers (OECD, 2018).

Despite the aforementioned suggestion being relevant, it is important to point out that the Tax Arbitration

mechanism was not introduced in Portugal in an isolated way, integrating various measures indispensable to the promotion of the country, and to the exit from the crisis.

A survey carried out by the CAAD, in 2017, indicates that 60% of the cases submitted to the arbitration court had the taxpayers as winners, however, it is curious to note that data listed by the OECD also state that these same 60% are won in the courts, that is, the taxpayers are successful both when they are before arbitrators and judges. In this light, what can be seen as advantageous is the quicker response in the Arbitration Convention.

As already pointed out, the purposes of the Arbitration institution were to reduce pending in the courts and to speed up the demands, reinforcing the protection of the interests of the parties. In this context, it is noted that speed was achieved, the demands obtained arbitration awards, in a short period of time (in approximately four months), and, if the purpose was to guarantee revenue quickly, Arbitration played a crucial role, given that , in the words of the president of the CAAD: a lengthy court decision delays the effective collection of tax revenue by the Public Power or, in case the taxpayer wins the case, may cause the amount of compensation to be paid by the Public Administration to 'shoot up' only in due to interest, plus sponsorship and guarantee charges (PASINATTO, VALLE, 2017).

CAAD data exposed in the work whose coordinators Nuno Barroso and Pedro Marinho Falcão (2015) outlined the socioeconomic profile of the contributors and identified that approximately 75% of the requests for submission to Arbitration were distributed by collective contributors, that is, they are at the center of the Arbitrage the mass issues.

It is noted that there was a reduction in litigation expenses; attraction of the taxpayer by the fact that, in the event of being victorious, he will be entitled to a refund of the fee paid; faster revenue collection; prediction of the arbitration decision time, that is, it helps entrepreneurs to work their provisions, which also attracts more investors; and more quality in the decisions taken – positive aspects.

In general, arbitration is seen in a positive way in the Portuguese scenario, however, the challenges are latent, since the sought success has not yet been reached, that is, it is too early to be sure about a possible success, because, as everything is still relatively recent, there is a lack of quantitative and qualitative data for conclusion purposes.

2.5. FEASIBILITY OF TAX ARBITRATION BY THE CTN AND CRITICISM AND COMPLIMENTS FROM THE DOCTRINE

With regard to the provision for the use of tax arbitration in national legislation, it is important to mention that the effects of the arbitration decision are already duly outlined in the National Tax Code (CTN) as circumstances of extinction and suspension of the tax credit. The simplicity of the argument is also based on its justifications, reiterating the need to distance itself from the systemic reading of the regulations on the matter.

With regard to the provision for the extinction of the credit by the arbitration award, it is imperative to draw attention to the fact that articles 141 and 156, X, of the CTN, provide for the extinction of the tax credit by the " decision passed in res judicata ". Notably, there is the unmistakable equivalence of the arbitration award to the hypothesis established in art. 156, X of the CTN, since both article 31 of the Brazilian Arbitration Law (LBA) and item VII, art. 515, of the Civil Procedure Code (CPC) equates the arbitration award to the judicial enforcement title, that is, to the final and unappealable judicial decision.

Assuming that the expression “ transit in res judicata ” is a consequence of the legitimacy of the judicial decisions (SOARES, 2010) , in the case that the arbitral award is legitimate, it constitutes a judicial enforceable title, or, in the terms of the art. 156, Inc. X of the CTN, that is, it configures a hypothesis of extinction of the tax credit already inserted in complementary legislation, pursuant to art.146, inc. II, of the constitutional text.

The same logic applies to the provision of suspension of the tax credit by arbitration, pursuant to art. 151, Inc. V, of the CTN, since it adopted the expression: “the granting of an injunction or of injunctive relief, in other types of legal action” (BRASIL, 1966), however, it being certain that, in addition to the application of the same logic already used to the extinction of the tax credit, it should be noted that art. 31 of the LBA determines that “the arbitration award produces, between the parties and their successors, the same effects as the sentence handed down by the Judiciary bodies” (BRASIL, 1996), that is, by affirming the hypothesis of suspension of the tax credit in other modalities of legal action, the CTN considered the arbitration award among the suspension hypotheses, given the provision in ordinary law - CPC and LBA - stating that the arbitration award produces the same effects as the sentence issued by the bodies of the Judiciary (BRASIL, 1966 ; BRAZIL 1996).

Still with regard to the provision in a complementary law of the effects of the arbitration award in tax matters, it is important to emphasize that inc. V of art. 151 of the CTN was added upon the enactment of LC 104/01, necessarily due to the need to extend the interpretation of the provision established in inc. IV of the

same legal provision that restricted the suspension only when an " injunction in a writ of mandamus " was granted.

In the same way, when extending the hypotheses of suspension of the enforceability of the tax credit, the legislator chose to insert a broad provision, admitting the suspension both in the granting of injunctive relief and preliminary injunctions in " other types of legal action ", being wrong to discuss the regarding the practical reiteration of the granting of precautionary or urgent measures in arbitration proceedings, in view of the provision of the sole paragraph of art. 22-B of the LBA, which allows arbitrators even to maintain, amend or revoke the precautionary or urgent measure granted by the Jurisdictional Power.

Although the effects of the arbitration award are already duly outlined in the CTN with clear hypotheses of extinction and suspension of the tax credit , it is natural that tax experts instinctively react by seeking the express insertion of a provision for tax arbitration, in the text of the CTN, and not only in its reflexes.

However, this initial desire is also not supported, by paths already trodden by previous discussions, since arbitration is a matter related to Civil Law and Civil Procedure (ESCOBAR, 2017) and having been fully conveyed by ordinary legislation - LBA - has fulfilled its normative role in a harmonious way, relegating to the CTN only predicting the effects of arbitral awards, without such a conclusion imposing any sort of affront to the provision in inc. II of art. 146 of the Magna Carta.

This conclusion follows from the provision listed in art. 22, Inc. I of the constitutional text, which restricts the Union to privately legislate on the process. Once again, the matter does not present anything new, since it has already been discussed in the doctrinal field, and, in the opinion of Carlos Alberto Carmona (2009), it might be plausible that - similarly to France and Italy - the discipline of arbitration was inserted within the CPC , however, further ponders that, taking into account the specificity of the institute and the fact that the law contains rules that cannot be considered only procedural, the legislator chose to outline the rules in a separate diploma (CARMONA, 2009).).

In turn, Cândido Rangel Dinamarco (2013) is more incisive in defending that arbitration would constitute a specialized expression of a more extensive science, that is, the general theory of the process .

The position of the doctrine reflects an old judgment of the Supreme Court of November 14, 1973 in the emblematic Lage Case - AI 52.181/Guanabara - which crystallized the understanding that arbitration is not a matter of Administrative Law, but of the Civil and Law field. Civil Procedure (STF, 1973).

In other words, as arbitration is also a matter of Civil Procedural Law, it is up to the Union to legislate privately, as it did, to institute arbitration through the LBA, as well as to provide for the rules of the current civil procedural law, being in both situations , edited through ordinary legislation.

Considering the reason why the LBA should, as it was edited by ordinary legislation, there is no need to talk about the institution of authorization, through an express provision of arbitration in the middle of the CTN, for the simple fact that the aforementioned Codex also does not admit in its articles the use of the civil procedure, but it deals only with the effects of the decisions rendered in the civil procedure, as suspension and extinction of the tax credit.

As in the example of the lack of provision allowing the use of the civil procedure in the CTN, the mere argument of the indispensability of a complementary law to provide for arbitration in tax matters is also not plausible, since the LBA, as ordinary legislation, fulfills its function normative to submit all administered and federated entities to the same content agenda, and the Supreme Court has also discussed the issue a lot, pointing out that "general rules" do not mean "generic rules, since the term "general" refers to the normative predisposition to submit all administered and federated entities to the same conduct agenda, as a mechanism for stabilizing and harmonizing expectations of the legal certainty pact (STF, 2010) .

Thus, the CTN still prohibits, in its art. 110, that the law modifies "the definition, content and scope of institutes, concepts and forms of private law", thus being prohibited to the tax law any attempt that aims to bring new concepts or redefine arbitration (BRASIL, 1966) .

According to Ribeiro e Castro (nd), within the scope of the private sector, it appears that the arbitration institute is totally valid, given that the composition of conflicts can be much more advantageous than having to resort to the judicial process to this end, since the Judiciary still imposes a series of formalities that, many times, intimidate the litigants. On the other hand, with regard to tax arbitration, these scholars state that there are still doubts as to whether this represents a legitimate way to resolve impasses, since there is already a prevailing party in the relationship over the other, that is, the entity state-owned. Thus, there could be intimidation of opponents of the State, as it is considered sovereign and supreme.

With regard to external tax arbitration, it was found that it is already present in some nations, and, in the

case of Europe, the European Constitution brings this possibility, including the establishment of arbitration tax courts, which operate under the prism of the Administrative Arbitration Center (RIBEIRO; CASTRO, nd).

In the opinion of Escobar (2018), the alleged technical infeasibility of submitting tax matters to arbitration leads us to the hasty and erroneous understanding that it would be a strictly academic discussion, without major impacts on the factual sphere, as it depends, in theory, on the specific law edition. The imprecision of this limiting view stems from the fact that the overwhelming majority of tax experts do not actually act in arbitrations , in the same way that a tiny portion of arbitrators are specialists in tax matters. Under the empirical prism of both segments - taxation and arbitration -, added to a systematic interpretation, through a holistic panorama of the national system, however, a new perspective arises, free from barriers and prejudices, in theory, insurmountable.

With regard to the application of arbitration in the tax field, the importation of ideas from the Portuguese experience must be preceded by a necessary adaptation and by an intense debate. The national reality with all its social, economic and political nuances requires quick solutions that need to be followed by a new model of tax process.

The differences between the Brazilian and Portuguese tax administrative processes would not be able to prevent the creation of an arbitration court in the CAAD standard in Brazil. The national tax administration does not express any practical interest in adopting the tax arbitration institute, despite the fact that the Ministry of Finance encourages alternative methods of conflict resolution.

In the country, a CAAD could also be created, which would function as a Public-Private Partnership (PPP), with intense supervision by the Public Power, to ensure the smoothness of the procedure, as seen in Portugal. Furthermore, the cases of tax arbitration must be attentive to the specificities that justify it and that consider the peculiarities of the tax credit as an arbitration object. Certainly such a mechanism does not have the power to work as a magic formula in this field, however, if adopted by the Public Power, it could contribute positively to the stir that arose during the course of this study.

Concluding the issue of not including the provision of tax arbitration in the CTN, it is important to remember that authorization for its use, including by the Public Power, is properly affirmed in art. 1st of the LBA. In this wake, it is imperative to certify the availability of the tax credit, a condition also established in art. 1st of the LBA.

2.6. (IN) AVAILABILITY OF TAX CREDIT

With regard to the availability of the tax credit, an essential presupposition for its arbitration, pursuant to art. 1 of the LBA, we also did not observe major obstacles to overcome this barrier (BRASIL, 1996). From the CTN, it appears that the tax credit is formed by the administrative procedure tending to verify the generating event constituting the tax credit, called release, and that can be changed, including the effects and extent (BRASIL, 1966).

Especially with regard to the hypothesis of altering the assessment, the CTN is also clear in providing that it can be modified by the taxpayer's resistance exercised through the tax administrative procedure (BRASIL, 1966). Thus, in practice, what happens is the improvement of the entry, through the tax administrative procedure, until, through it, it is perfected and the tax credit is constituted. Improvement is the act that begins with the inspection, results in an eventual tax assessment, and may be object of challenge and target of appeal by taxpayers; These resistances will be assessed in the first and second administrative instances, which may maintain the infraction notice, reduce it or even proceed with its cancellation (BRASIL, 1966).

Now, if in the process of improving the assessment there is no need to talk about a tax credit actually constituted, but simply in expectation on the part of the Public Power embodied in a tax work that will be subject to review by the competent administrative authorities, one cannot speak of unavailability , since it is not even before something that has already been implemented, but in the process of calculation, evolution, improvement.

The tax assessment notice, which only reflects the beginning of the assessment process, which is perfected during the tax administrative procedure, only reflects an expectation on the part of the Public Power, since the tax work is subject to failures, imperfections or excesses.

Once the availability of the “tax credit” has been appreciated until the conclusion of its release, the next question would be whether this availability would also be present after the registration of the credit in active debt (arts. 201 to 204 of the CTN) (BRASIL, 1966) . Without long delay, as they are unnecessary, the question referred to in the figure of the so-called special installments, such as the Tax Recovery Program (REFIS), implemented by Law 9,964/2000 (BRASIL, 2000) is returned; the Special Installment Payment (PAES), established by Law 10,684/2003 (BRASIL, 2003); the Tax Regularization Program (PERT or Novo REFIS) - established in Law

13,496/2017 (BRASIL, 2017), among others, including at municipal and state levels, that is, even after the effective constitution of the tax credit, the Power itself The Public has the credit, in the examples of the installments mentioned above, whenever it issues a specific legal diploma, since, before its constitution, there is also a clear example of the disposition of a substantial portion of the taxes by the Public Power, when implementing SIMPLES, which considerably reduces the tax burden, encompassing several taxes with substantial reduction in rates.

A new element was recently inserted in this debate, when Law 13.988/20 was published, which, by providing for the transaction of tax disputes, removed any debate about the availability of tax credit, since, if subject to transaction, it may also be subject to of arbitration, the tax transaction being a gateway to tax arbitration, since it becomes indisputable that, when transacting any tax, the state entity will have a portion of it (BRASIL, 2020).

Even so that the lack of indication of the competent authority is not considered, it is important to remember that the sole paragraph of art. 171 of the CTN already established, when it was enacted, that the legal system would indicate the competent authority to approve the transaction, given that this gap has been remedied, since 2015, by the inclusion of § 2 of art. 1 of the LBA, stating that "the authority or competent body of the direct public administration for the execution of an arbitration agreement is the same for the execution of agreements or transactions" (BRASIL, 2015). In the meantime, law 13.988/20 (tax transaction law), five years after the amendment of the LBA indicated herein, addressed the alleged gap of the competent authority in its art. 13 (BRAZIL, 2020).

III. CONCLUSION

Undoubtedly, the Brazilian tax system is extremely complex, in addition to the high tax burden that falls on taxpayers, especially legal entities, representing causes of stimulus to litigation. This context, in parallel with the continental dimension of the national territory, generates a worrying level of ineffectiveness in conflict resolution, both in the judicial and administrative spheres. Despite this, the discussion on alternative dispute resolution methods in the tax field, which would have the bias of improving this reality, is still incipient.

It should be noted that the approval of these bills will not represent the biggest obstacle to the establishment of arbitration in the tax area, the biggest challenge will be to change the culture rooted in the Public Tax Administration of judicializing all tax debt collections. An example of this is that, in 2015, federal law authorized arbitration within the scope of the Public Power and to date the vast majority of state entities do not adopt this alternative dispute resolution mechanism.

The differences between the Brazilian and Portuguese tax administrative processes would not be able to prevent the creation of an arbitration court in the pattern of the Administrative Arbitration Center (CAAD) in Brazil, which would function as a Public Private Partnership (PPP), with intense supervision by the Federal Government. Public, to ensure the smoothness of the procedure, as seen in Portugal. The national tax administration does not express any practical interest in adopting the tax arbitration institute, despite the fact that the Ministry of Finance encourages alternative methods of conflict resolution. In other words, the main change must occur in the cultural field.

Furthermore, the cases of tax arbitration must be attentive to the specificities that justify it and that consider the peculiarities of the tax credit as an arbitration object. Certainly, such a mechanism does not have the power to work as a magic formula in this field, however, if adopted by the Public Power, it could contribute positively to the stir that arose in the present study.

For all the above, it appears that Brazil is still far from being able to use tax arbitration, such as the Lusitanian experience, and it is important to note that not even in this nation is the adoption of arbitration for the resolution of conflicts of order unanimous. tributaries.

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