



REVISTA AMBIENTE CONTÁBIL
Universidade Federal do Rio Grande do Norte
ISSN 2176-9036

Vol. 14, No. 1, Jan./Jun., 2022

Sítios: <http://www.periodicos.ufrn.br/ambiente>

<http://www.atena.org.br/revista/ojs-2.2.3-06/index.php/Ambiente>

Article received: 15 February 2021. Peer reviewed: 10 March 2021. Reformulated: 02 April 2021. Evaluated by using the double-blind review system.

DOI: 10.21680/2176-9036.2022v14n1ID27704

Impact of the exclusion of ICMS from PIS and COFINS calculation base: study on the STF decision and its effects on a food company

El impacto de la exclusión del ICMS de la base del cálculo del PIS y del COFINS: estudio sobre la decisión del STF y sus efectos en una empresa del segmento alimenticio

Impacto da exclusão do ICMS da base de cálculo do PIS e da COFINS: estudo sobre a decisão do STF e seus efeitos em uma empresa do segmento alimentício

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Abstract

Objective: This study aims to present the impact of the decision issued by the Supreme Federal Court that excludes ICMS from PIS and COFINS calculation basis and to present the amount

of these contributions to be refunded by a company in the food sector, within the framework of the actual profit method.

Methodology: A descriptive research was used, applied to a case study with quantitative data approach. The composition of the values and identification of the undue amount was made from the thorough analysis of the company's tax and accounting documents, from 2012 to 2017.

Results: It was found that the STF decision allows different interpretations regarding the calculation system for reimbursement of eventual values, therefore, as there is still no legal certainty regarding the criterion to be used, it was decided to show the values by both methods, that is, excluding the posted ICMS and the collected ICMS. The research result showed that both forms of calculation proved to be beneficial for the company, even with the huge discrepancy identified when confronting the undue amounts found in each calculation criterion.

Study Contributions: The study makes a significant contribution because it is the decision made by the STF that excludes ICMS from the PIS and COFINS calculation base, a matter that has been dragging on by the STF for many years, and which is still confused and allows different interpretations as to the method of calculating the amount due. Disharmonized and unsafe decisions, the great amounts that the government needs to return to companies and the breadth that decision has taken at the national level make the matter relevant because as shown in the present study, despite the discrepant results between the ways of calculating the amount to be refunded / compensated, the company obtains a significant financial advantage.

Keywords: ICMS. PIS. COFINS. Undue.

Resumen

Objetivo: El objetivo del estudio fue presentar el impacto de la decisión proferida por el Supremo Tribunal Federal en que excluye el ICMS de la base del cálculo del PIS y del COFINS y presenta el montante de las contribuciones que serán restituidas por una empresa del sector alimenticio, que se encuadra en el régimen del Lucro Real.

Metodología: Se utilizó una pesquisa descriptiva, aplicada a un estudio de caso con el abordaje cuantitativo de los datos. La composición de los valores e identificación del indebido fue hecho a partir del análisis minuciosas de los documentos fiscales y contables de la empresa, de los años de 2012 hasta 2017.

Resultados: Se verificó que la decisión del STF permite la interpretación distinta cuanto a la sistemática del cálculo para el resarcimiento de eventuales valores, por lo tanto como no hay seguridad jurídica cuanto al criterio a ser utilizado, se optó por demostrar valores por los dos métodos, o sea, excluyendo el ICMS destacado y el ICMS recogido. El resultado de la pesquisa evidenció que ambas las formas del cálculo se mostraron benéficas a la empresa, con la enorme discrepancia identificada se confrontaron los valores indebidos encontrados en cada criterio del cálculo.

Contribuciones del Estudio: El estudio trae una contribución significativa pues se trata de la decisión proferida por el STF en que excluye el ICMS de la base de cálculos del PIS y del COFINS, asunto ese que se arrastraba por el STF a muchos años, y que aún, se muestra confuso y permite interpretaciones distintas cuanto al método del cálculo indebido. Las decisiones

desarmonizadas y inseguras, los grandes valores en que el gobierno necesita restituir a las empresas y la amplitud que esa decisión tomó en ámbito nacional, tornaron el asunto relevante, pues como mostrado en el presente estudio, aunque los resultados discrepantes entre las formas de apuración del valor a restituir/ compensar, la empresa obtiene expresiva ventaja financiera.

Palabras claves: ICMS. PIS. COFINS. Indebido.

Resumo

Objetivo: O objetivo do estudo foi apresentar o impacto da decisão proferida pelo Supremo Tribunal Federal que exclui o ICMS da base de cálculo do PIS e da COFINS e demonstrar o montante dessas contribuições a serem restituídas por uma empresa do setor alimentício, enquadrada no regime do Lucro Real.

Metodologia: Utilizou-se uma pesquisa descritiva, aplicada a um estudo de caso com abordagem quantitativa dos dados. A composição dos valores e identificação do indébito foram feitos a partir da análise minuciosa dos documentos fiscais e contábeis da empresa, dos anos de 2012 até 2017.

Resultados: Verificou-se que a decisão do STF permite interpretações distintas quanto a sistemática de cálculo para ressarcimento de eventuais valores, portanto como ainda não há segurança jurídica quanto ao critério a ser utilizado, optou-se por demonstrar os valores pelos dois métodos, ou seja, excluindo o ICMS destacado e o ICMS recolhido. O resultado da pesquisa evidenciou que ambas as formas de cálculo se mostraram benéficas para a empresa, mesmo com a enorme discrepância identificada se confrontados os valores de indébito encontrados em cada critério de cálculo.

Contribuições do Estudo: O estudo traz uma contribuição significativa pois trata-se da decisão proferida pelo STF que exclui o ICMS da base de cálculo do PIS e COFINS, assunto esse que arrastava-se pelo STF há muitos anos, e que ainda se mostra confusa e permite interpretações distintas quanto ao método de cálculo do indébito. As decisões desarmonizadas e inseguras, os grandes valores que o governo necessita restituir às empresas e a amplitude que essa decisão tomou em âmbito nacional tornam o assunto relevante pois como mostrado no presente estudo, apesar dos resultados discrepantes entre as formas de apuração do valor a restituir/compensar, a empresa obtém expressiva vantagem tributária.

Palavras-chave: ICMS. PIS. COFINS. Indébito.

1 Introduction

The complex Brazilian taxing system elevates the litigation level, resulting in overwhelming judicialization of taxing matters, and this occurs due to, according to decree by the Brazilian Institute of Tributary Planning, Brazil having one of the highest tax burdens in the world, together with Denmark, Finland, Belgium, France and Italy.

The high complexity in taxing factors and the problems that companies suffer from daily in adapting to prevailing laws and norms for each industry, sold products and/or service offers, all of it amounts so that Brazil gets highlighted negatively in this scenario, as one of the world champions in taxpaying, fees and contributions (Broetto, Silva & Gugel, 2017). According to a ranking by OECD (Organization for Economic Co-operation and Development),

Brazil has the second largest tax burden in Latin America, second only to Cuba (Época Negócios, 2019).

Consequently, countless conflicts emerged, and debates between Fisco and contributors over tributes to be collected. (Souza, Vargas, & Batista, 2019). These debates produce millions of court actions that are brought to the Brazilian Supreme Court. However, due to the elevated store of processes awaiting judgement, the STF takes many years to solve tributary litigations, and this low performance effects the inefficiency of the system, resulting in a juridical insecurity from contributors. Moreover, in accordance with the report from Campos (2019), situations have already occurred in which when judging a case, the STF assembled new disputes due to the fragmented argumentative line itself, the case of the exclusion of ICMS from the calculation basis of PIS and COFINS is an example.

This theme had been dragged for decades in the plenary, until in 2017 the court ruling of the extraordinary appeal No. 574.706, put through the following thesis: “The ICMS doesn’t compose the calculation basis for the occurrence from PIS and COFINS”, since, from STF’ perspective, ICMS doesn’t categorize revenue, once the highlighted values must be given to Estate Fisco (Almeida, 2019).

Nonetheless, STF’s decision has shown itself confused, for it doesn’t clarify what is the value of ICMS that has to be deleted from the calculation basis from referred contributions. If on the one hand, the major understanding of contributors and taxpayers is that all of the value of ICMS incident in the sale transaction should be excluded from the calculation basis from PIS and COFINS, on the other hand, the Brazilian Internal Revenue Service positioned itself for the exclusion of the amount ICMS collected (Baeta, 2018).

The financial impact that this decision brought is expensive because, beyond future economy, taxpayers who have filed a lawsuit and whose decision was favorable, may reimburse and/or compensate the amounts overpaid with possible tax debts. It is this financial impact caused to the Union that motivated the Brazilian Internal Revenue Service to publish the Internal Consultation Solution No.13 (Cosit 13/2018) that, according to ascription by Amaral et al. (2019), sought “to give a new interpretation to STF’s decision and, with that, restrain contributors’ rights”.

To scale the approach on the theme, it is possible to cite some studies like Santos and Moraes (2018), Silva et al. (2019) and Souza, Vargas and Batista (2019) that have shown important results relating to the object listed in this research, with regard to the economic benefit that taxpayers will have when excluding ICMS from the PIS and COFINS calculation base. Faria and Santos (2019), Klein and Plastina (2018) and Silva (2018) enforce that in their studies the theme in regards to the value of ICMS to be excluded from the calculation base must be posted in the invoice.

Considering the above, and the relevance of the study, the following issue was brought: What is the undue value of PIS and COFINS to be recovered, consequent of STF’s decision (Extraordinary Resource No.574.706) that excluded ICMS from the calculation base of the respective contributions, by a company in the food industry from 01/2012 to 03/2017 under the calculation criteria of the posted ICMS and the collected ICMS?

The main objective of the study was to present the impact of the decision made by the Federal Supreme Court that excluded ICMS from the calculation bases of PIS and COFINS and to exhibit the sum of these contributions to be reinstated by a company in the food industry, under the regiment of the true profit.

An important explanation of the theme displayed is the central relevance that the tributes have in accounting routine. The influence from accounting professionals in

ascertainment and control of the tributes in Brazil is undeniable, even with, being knowingly assisted by other professionals

Upon observing bibliometric studies on tributes and accounting, one notices the existence of a space to be occupied. The findings of Tavares, Machado and Machado (2014) aim to promote this debate when exposing the scarcity of research of tributary accounting nature. This paper aims to, within limitations, contribute to the debate over the theme.

In the following sections, to answer the issue posed, the following specific objectives are developed: i) legal basis for PIS and COFINS; ii) understanding the extent of STF's decision, regarding the Extraordinary Resource No. 574.706; iii) comparing the taxpayers' and the Brazilian Internal Revenue Service's interpretation of the calculation criteria to be utilized; iv) analysis of the demonstrations on the calculations utilizing both criteria, that is, by highlighted ICMS exclusion and collected ICMS exclusion; And, v) acknowledgement of the effective value of PIS' and COFINS' reinstatement to what the company has a right to.

2 Reading Review

In the present section, the main approach is theoretical and conceptual in relation to the legal basis of PIS and COFINS. Next, the discussion of ICMS' exclusion from the calculation base of these contributions is brought forward. Lastly, related studies are addressed, studies that answer to the theme, with the purpose to better attribute context to the matter.

2.1 PIS' and COFINS' Legal grounding

The Brazilian Federal Constitutions (BRASIL, 1988), in its article 194^o, states that "social security comprises an integrated set of initiative actions by public authorities and society, aimed to guarantee health related rights, to social welfare and social assistance". Among these actions, the federal jurisdiction taxes are found, relating to the contribution to the program of social integration – PIS is the contribution to the financing of social security – COFINS.

The social integration program – PIS was instituted on September 7th, 1970, throughout the complementary law No. 07/1970, that later went through changes by the complementary law No. 17/1973. As established in the 1st article of law No. 07/1970, PIS was destined to "promote integration of the employee in life and in the development of companies", however, with the publishment of the Federal Constitution of 1987, its destination got expanded according to as provided in its article 239^o, which defines that the collection to contribute to PIS begins, from that day on, to finance actions of social welfare and among them, unemployment insurance.

With regard to the contribution to financing social security – COFINS, this succeeded to the contribution to FINSOCIAL (Social Investment Fund), that got declared unconstitutional by STF, being removed by the complementary law No. 70 from December 30th, 1991, a law that instituted COFINS. The 1st article of referred law clearly states that this contribution is due by legal entities and it is destined exclusively to expenses in the health sector, social welfare and assistance, without prejudice to the collection of the contribution to the PIS.

Law No. 9.718 of November 27th, 1998, in its articles 2nd and 3rd, establishes that PIS' and COFINS' contributions must be calculated based in the revenues of the company, and by "revenue", it corresponds to gross revenue. In the 12th article of Law-Decree No.1.598, of December 26th, 1977 (in the wording given by law 12.973/2014), the concept of gross revenue on which contributions should apply is clarified:

Art. 12. Gross revenue corresponds to:
 I – the product of the sale of goods in operations of their own account;
 II – the price of services overall;
 III – the earned result in operations of other’s accounts; and
 IV – the revenue of an activity or of a main object from a legal entity not present in items I to III

PIS and COFINS are considered contributions practically united, and up to 2002, they were cleared only in the cumulative system, therefore, independently of the taxing regime, credit discounting was forbidden (Thomson Reuters, 2019). But, with the aim to alter this scenario, both Law No. 10.637/2002 of December 30th, 2002, and No. 10.833/2003 of December 29th, 2003 were created. They introduced a non-cumulative system to PIS and COFINS, respectively.

Legal entities governed by private law, and those who to them are paired, that calculate the income tax based in taxing through the real profit, are framed, as general rule, in the non-cumulative system. In this regiment the rates, minus the exceptions foreseen by the law, such as, companies linked to finances, hospital activities among others, are of 1,65% to PIS and 7,60% to COFINS, being allowed the appropriation of credit in relation to costs, expenses and legal entity charges (Zanluca, & Silva, 2018).

2.2 Judicial strife regarding ICMS’ deletion from PIS’ and COFINS’ calculation bases

For two decades, the Supreme Federal Court discussed the unconstitutionality of the inclusion of placing fees over the movement of goods and services – ICMS in the calculation base of the social integration program – PIS and the contribution to the financing of social security – COFINS, that finally got its judgment concluded in 2017, although there’s still need of clarity about two subjects on this theme.

This discussion began in the year 1999 when a contributor engaged in the first court action that dealt with the subject, and that later, got taken to STF for judgement through the extraordinary resource (RE), that, according to Bidoia (2020), is the instrument by which the STF is challenged to a judicial decision handed down by a state or federal court, under allegation of contradiction directly to any device of the Constitution of Brazil or declaration of unconstitutionality of federal law. The extraordinary resource has as its objective, uniformity in interpretation of constitutional objective norms, not to the defense of subjective interest of litigants.

The referred to RE is No. 240.785, that got granted, in the sense of recognizing the unconstitutionality in the inclusion of ICMS in the calculation base of PIS and COFINS. Nevertheless, the judgment was interrupted by a request to review the case, and only in 2006 STF’s court deliberated that said judgement was to resume, still precursor to the procedural reform that brought the figure of the judgement of the extraordinary resources by STF to the general repercussion systematic (Stocco, 2019).

Considering that STF’s decision was in favor of the contributor, the then General Attorney of the Union judged, on October 10th, 2007, the ADC – Direct Action of Constitutionality No.18 that had aimed to recognize the constitutionality of the inclusion of ICMS in the calculation base of PIS and COFINS and require a suspension, in all of the Judicial body, from the processes that were being discussed the matter (Migalhas, 2017).

After the judgement of ADC No. 18, the Supreme ministers, on April 4th, 2008, determined by judgement though the extraordinary resource No. 574.706 under the general repercussion systematic, that was implemented by STF in the second semester of 2007 and is a

method “by which it’s reserved for STF the judgement of themes brought in extraordinary resources that present relevant issues under the economic aspect, political, social or judicial. And that go beyond the subjective interests of the cause” (STF, 2018). If general repercussion is recognized in a certain theme, STF’s decision establishes the position that courts subordinate to it must adopt when judging similar cases to the one judged by the supreme court.

After approximately nine years of uncertainty, the plenary of the supreme court, on March 15th, 2017, up played the extraordinary resource No. 574.796 and, under general repercussion rite, the following phrase fixated: “ICMS doesn’t compose the calculation base for the incidence of PIS and COFINS” (STF, 2017). On October 2nd of the same year, the decisive judgement was published, exposing the grounding of the votes and, among all manifestations, the determining motive that stood out was the fact that the value of ICMS is not integrated into the patrimony of the contributor, not being able to be characterized as revenue, once the gathered value has an eminently transitory nature, in other words, it enters with a provisional title and is totally passed on to State Fisco (Stocco, 2019).

Against Supreme decision, General Prosecutor’s office of the National Treasury – PGFN opposed embargoes of declaration, alleging contradictions and obscurity in the value to be considered in the exclusion from the calculation base of PIS and COFINS fixed on the thesis, if the ICMS highlighted in the invoice or if the portion of collected ICMS. According to Silveira (2019), “in view of the possibly harmful consequences that would result to public powers if the decision was to be applied retroactively, generating an obligation to pay the reinstatement that would result in a considerable outlay to the state” PGFN also requested the modulation of the effects of the decision, so that the produced effects would only occur after the analysis of the embargoes.

Although favorable to pretension from contributors, it is understood that STF’s decision admits various interpretations in regards to the value of ICMS that has to be deleted from the calculation base of PIS and COFINS. If on the one hand, the major understanding of contributors and taxpayers is that the whole value of incident ICMS in the selling operation must be excluded from the calculation base of PIS and COFINS, on the other hand, the Brazilian Internal Revenue Office positioned itself towards the deletion of the value of collected ICMS (Baeta, 2018).

As it so happens, on October 18th, 2018, through the General Taxation Coordination (Cosit), the Brazilian Internal Revenue Service published the Internal Consultation Solution n° 13/2018 that deals with the exclusion of ICMS from the calculation base of contributions and has by purpose to orient inspectors on how to proceed. In this aspect, in line with COSIT n° 13/2018, the value to be deleted from the calculation base must be the collected ICMS and not the ICMS highlighted on the invoice, as cited below:

For the purpose of complying with judicial res judicata that verses on the exclusion of ICMS from the calculation base of contribution [...], under cumulative or non-cumulative regime, the following procedures must be observed:

a) the sum to be deleted from the monthly calculation base of contributions is the monthly value of ICMS to be gathered, according to major understanding established when judging the Extraordinary Resource n° 574.706/PR, by the Supreme Federal Court.

It is worth mentioning that the inclusion of ICMS in the calculation base of PIS and COFINS was declared unconstitutional by the STF and that the calculation base for the gathering of these contributions is on gross revenue, thus, focusing on ICMS highlighted on the invoice. The understanding is that Brazil’s Internal Revenue Service throughout Cosit 13/2018

intended to give a new interpretation about STF's decision and, with that, restrict the rights of contributors. However, the Union's stance is conflicting, in court, through the Declaration Embargoes, pleads that the Supremes' judgement does not clarify which value is to be deleted; administratively, through Brazilian Internal Revenue Service, orients its inspectors that collected ICMS must be deleted from the calculation base of PIS and COFINS (Amaral et al., 2019).

Faced with this scenario of uncertainty and until the modulation of RE No. 574.706 does not occur, countless judicial personnel have issued actions toward Federal Regional Courts to retrieve the values of PIS and COFINS calculated over the calculation base that considered ICMS.

2.3 Studies in relation to the theme

All research is born from the desire to find answers to a certain question, enabling the researcher the acquisition of a new piece of knowledge, considering that the problem (of the research) is linked to previous knowledge, built by other scholars (Mendonça, 2014).

Velloso (2016), tackles the exclusion of ICMS from the calculation base of PIS and COFINS, a theme that is in constant discussion by contributors. The constitutionality of the thesis and the unfounded incorporation of ICMS to the concept of revenue is considered to be one of the items that most requires a solid and secure decision, for it deals with misappropriations that can and should be refunded by companies being of great expectation its resolution. As a result of his research, he points out that "the constitutionality of the inclusion of ICMS into the calculation base of COFINS and PIS is considered the most important tax issue pending judgement in Supreme Federal Court".

Broetto, Silva e Gugel (2017), develop their studies about the deletion of ICMS from the calculation base of PIS and COFINS on a food distributor. According to them, the position is dissonant among the various entities that must deal with the situation on their day to day lives, that is because, those who defend the inclusion are supported by legislative lapse that is left with the wordings of devices facing the subject. In their results, they bespoke that such action presented positive reflections on the statements of the studied company, proving the relevance of the matter to Brazilian companies.

Silveira's research (2019) brings reflections on the RE 574.706, the pronouncement of revenue in the internal consultation solution No. 13/2018 and on the value that should be considered as base reducer of the studied contributions, facing up to the decision of the Supreme Federal Court with the instructions given by the Internal Revenue Service. It can be concluded that the main doubt is regarding what value of the ICMS should be excluded, because, with multiple unique interpretations, there is a huge legal uncertainty on the behalf of taxpayers who intent to recover their debts: "[...] It was inquired what would be the amount attributed to ICMS that appears in the thesis of the Supreme Court, if the ICMS presented in the billing (ICMS of the outgoing notes) or the ICMS actually paid through the calculation for non-cumulation of the tax". Silveira (2019) defends the idea that the ICMS paid at each stage of the movement of goods is the value that should be pointed out as a reducer of the calculation base of the two contributions.

Stocco (2019), sought to analyze the effects from the decision given in the judgement of RE nº 574.706 and pointed out that the majority of taxpayers request the exclusion of ICMS highlighted in the invoice, which is what is literally linked with the cash called billing, that is,

with the basis of calculation of PIS and COFINS contributions. He highlights his position that: "The entirety of the ICMS highlighted in the invoice should be excluded from the calculation bases of PIS and COFINS, and also reinforces that "the amounts related to the portions of ICMS do not definitively integrate the assets of the legal entity, since they are tax burdens, corresponding to a tax that is passed on by the legal entity to state coffers", therefore these values should be recognized as revenues from states and not from legal entities.

Souza, Vargas e Batista (2019) deal in their bibliographic and documentary research with the unprecedented effects that the change in the calculation base of federal taxes PIS and COFINS might cause, because they evaluated the impact of taxes on the profitability of industries in the plastics and dairy industries. Although the companies are in different sectors, results were promising and brought financial benefits to both.

In the case study of Teixeira and Machado (2018), It is evidenced that the exclusion of ICMS from the calculation base of the contributions PIS and COFINS, following RE 574.706 that establishes that ICMS is not characterized as billing, it can bring to the company in the footwear business a right to credit of amounts paid improperly. The research displayed a satisfactory result and the authors highlighted: "if the process and exclusion of ICMS from the contribution base was already allowed, the company would've achieved, in 2016, a reduction of 11,18% in the calculation basis of contributions".

With the presented studies, it was possible to verify that the exclusion of ICMS from the calculation base of PIS and COFINS is a matter of great complexity and that, although the decision is favorable to contributors, it still pend from clarity as to the value of ICMS to be deleted from the calculation base of these contributions, as well as if modulation will be had, making the decision generate effects only proceeding the date of the judgement on the declaration embargoes.

3 Methodological Procedures

For the analysis and identification of the amounts unduly paid by a company in the food business, due to the decision that excludes ICMS from the calculation base of PIS and COFINS, descriptive research was carried out, based on a case study and of quantitative approach. The period covered by the present study contemplates the competencies from January 2012 to March 2017.

The descriptive research has as its primary objective to describe the characteristics of a given population of phenomenon or, then, the establishment of relations between variables, one of its most significant characteristics lies in the use of standardized data collection techniques. (Gil, 2002)

According to Mendonça (2014), this type of research analyses, observes, records and correlates aspects (variables) that involve facts or phenomena, sans handling them. For Sousa and Diesel (2008), the main contribution of this type of research is to present a faithful and precise description of a given object of phenomenon, that is of interest to science and society.

In relation to the procedures, the case study method was used, that, according to Fonseca (2002), is an investigation that assumes itself with particularism, and seeks the essential and characteristic. In scientific investigation, the real aspect that proves hypothesis is tackled, describe it or explore it, being that the case study aims to know in depth the "how" and its "whys".

Case studies can also be defined as exhaustive studies, deep and extensive of one or a few units, empirically verifiable, in a way that enables broad and detailed knowledge (Mendonça, 2014).

The present study characterizes itself as a case study for it tackles particular information from the selected company, the data used was extracted without handling, enabling a deeper dive in the studies with information that is reliable, characteristic, faithful and precise.

In this article, we used research of a quantitative approach, which, for Fonseca (2002), focuses on objectivity, this type of research uses mathematical language to describe the causes of a phenomenon and the relationships between variables, that is, it is scientific research where the results can be quantified.

Carlomagno and Rocha (2016) describe that it is common to have divergence of opinions on qualitative or quantitative approaches, especially because in certain aspects of the Brazilian academy there is resistance and even prejudice against the quantitative term. Some individuals may find that quantitative refers only to measurements, exclusively quantities and that, when collecting data that refers to qualities, such as the arguments used in some medium, then, because they refer to the qualities of this object, the study would be qualitative, but it is not.

The company of the study in question is included in the Real Profit tax regime and had an average annual turnover of approximately R\$ 100.000.000,00 (one hundred million Reais). Situated in Osasco – SP and active in the food business, had two subsidiaries and operated in the processing of meat since 1981, being incorporated in 2017 to an international company.

On February 29th, 2008, the company of this study filed a security warrant, with the goal to guarantee the right to have suspended the enforceability of tax credit from the contribution to PIS and COFINS unduly incident to amounts related to ICMS regarding its future operations and also, that the definitive security was granted safeguarding the net right of reinstating and/or compensating undue payments made by way of these contributions in the last ten years, retroactive to the date of filling of the referred action, with any due taxes administrated by Federal Revenue, values updated monetarily from the date of improper payments, through the application of Selic Fee, or other index that may replace it.

The final judgment of the action took place on July 25th, 2019, leaving the company entitled to exclude the value of ICMS from the calculation base of PIS and COFINS and also to reclaim the amounts collected improperly in the 10 years prior to the application of the demand. However, the statute of limitations for claiming the repetition of undue payments is 5 years counting from the filling of the demand and as the protocol occurred on February 29, 2008, undue payments made before March 1st, 2003 would be prescribed. However, due to lack of documentation to prove the right for the period of 2003 to 2011, the company chose to calculate the debit and compensate only the competencies from 2012 and on.

Thus, the period covered by the present study is from 01/2012 to 03/2017 since from march of 2017, with the fixation of the thesis by the STF, the company began to exclude ICMS from the calculation base of PIS and COFINS. The values to be reinstated/compensated were adjusted monetarily up to august, 2020.

4 Presentation and analysis of results

The present section portrays the case study conducted, being extremely important the absorption of the bibliographic content contained in this article together with a clear comprehension of the quantitative results and calculation criteria used to actually understand the breadth and the impact of the decision given by the Supreme Court. Thus, to demonstrate practically, the following paragraphs detail the analysis of the information obtained from the collection of data and its effective result.

The results presented here, promote, an important contribution in the construction of the discussion about the economic impact generated by tax legal uncertainty in Brazil. It is the observance of how the production of goods and wealth is affected and, the businesses weakened by the predatory system of tax collection. It's not just about the tax burden, it's about how obscure the rules and laws related to the business environment are. In the case presented, the impact on the organization's cash flow is evident and the damage is not easily measurable.

4.1 Calculation base used by the company

As soon as it acquired the right, the company began the calculation of the undue payment. In the period covered by the calculation, in addition to the ICMS bookkeeping being subject to the SPED-Fiscal, the PIS/COFINS calculations began to be registered in the EFD-Contributions (Digital Tax Bookkeeping of PIS/COFINS). To identify these values, it was necessary to consult the following documents provided by the company: EFD-Contributions files, EFD-ICMS/IPI files, DACON until December/2013 and the calculation history of PIS/COFINS calculations.

In possession of these accounting and tax documents, it was possible to identify all transactions taxed by PIS, COFINS and ICMS, since they contain sales revenue, canceled sales, sales taxes, unconditional discounts, sales rebates, among others that may impact the company's revenue.

Hereafter it is possible to identify the composition of the calculation base of PIS and COFINS, thus, revenue, still with ICMS's incidence:

Table 1

Calculation base of PIS and COFINS used by the company before the exclusion of ICMS

Phase	Sales Revenue	Sales Returns	Billing (Calculation Base)	PIS	COFINS	Total
				1,65%	7,60%	
2012	174.616.853,20	(3.674.090,42)	170.942.762,78	2.820.555,59	12.991.649,97	15.812.205,56
2013	188.886.190,37	(2.689.034,64)	186.197.155,73	3.072.253,07	14.150.983,84	17.223.236,91
2014	95.306.027,55	(1.992.102,60)	93.313.924,95	1.539.679,76	7.091.858,30	8.631.538,06
2015	79.176.602,29	(2.462.061,63)	76.714.540,66	1.265.789,92	5.830.305,09	7.096.095,01
2016	98.194.324,46	(902.155,25)	97.292.169,21	1.605.320,79	7.394.204,86	8.999.525,65
2017	56.148.532,92	(1.699.963,10)	54.448.569,82	898.401,40	4.138.091,31	5.036.492,71
Total	692.328.530,79	(13.419.407,64)	678.909.123,15	11.202.000,53	51.597.093,36	62.799.093,89

Source: *Research data.*

4.2 Calculation of PIS and COFINS indebt

According to RE No. 574.706, ICMS does not compose the basis for calculating PIS and COFINS, that is, it does not integrate the company's revenue, since it has only a transitory character. However, there is legal uncertainty as to the calculation criterion to be used in compensation of the indebt, whether by highlighted ICMS or collected ICMS.

With regard to the exclusion of highlighted ICMS, it is necessary to identify the number of sales actually taxed by PIS and COFINS, that is, the one highlighted in the invoice, as demonstrated in Table 2.

Table 2
ICMS value highlighted in the invoice

Period	ICMS value on sales	ICMS value on sales returns	Total ICMS to delete
2012	20.356.944,84	(349.230,84)	20.007.714,00
2013	22.509.079,53	(304.004,87)	22.205.074,66
2014	11.239.780,13	(218.607,92)	11.021.172,21
2015	9.567.491,97	(316.604,03)	9.250.887,94
2016	11.313.187,62	(103.584,18)	11.209.603,44
2017	2.624.544,99	(43.837,49)	2.580.707,50
Total	77.611.029,08	(1.335.869,33)	76.275.159,75

Source: Research data.

The total value of ICMS to be excluded, shown in Table 2, is the basis for calculating the amounts of unduly collected contributions, to which the rates of 1,65% for PIS and 7,60% for COFINS apply. The values were updated through the rate of the Reference System of Settlement and Custody – SELIC, established by COPOM – Monetary Policy Committee of the Central Bank, applied the monthly rate and presented the aliquot annually or accumulated, as tables 3 and 4 demonstrate:

Table 3
Calculation of undue payments of PIS– Excluding ICMS highlighted

Period	Calculation Basis for undue payments	Aliquot	Primary	Cumulative Rate (SELIC)	SELIC interest until 08/2020	Total PIS in 08/2020
2012	20.007.714,00	1,65%	330.127,29	67,61%	234.930,55	565.057,84
2013	22.205.074,66	1,65%	366.383,74	59,79%	234.243,69	600.627,43
2014	11.021.172,21	1,65%	181.849,36	49,39 %	99.980,10	281.829,46
2015	9.250.887,94	1,65%	152.639,64	36,85 %	65.015,07	217.654,71
2016	11.209.603,44	1,65%	184.958,45	23,65%	53.835,36	238.793,81
2017	2.580.707,50	1,65%	42.581,66	14,76%	9.234,11	51.815,77
Total	76.275.159,75	-	1.258.540,14	-	697.238,88	1.955.779,02

Source: Research data.

Table 4
Calculation of undue payments of COFINS– Excluding ICMS highlighted

Period	Calculation Basis for undue payments	Aliquot	Primary	Cumulative Rate (SELIC)	SELIC interest until 08/2020	Total COFINS in 08/2020
2012	20.007.714,00	7,60%	1.520.586,26	67,61%	1.082.104,22	2.602.690,48
2013	22.205.074,66	7,60%	1.687.585,67	59,79%	1.078.940,56	2.766.526,23
2014	11.021.172,21	7,60%	837.609,09	49,39 %	460.514,30	1.298.123,39
2015	9.250.887,94	7,60%	703.067,49	36,85 %	299.463,35	1.002.530,84
2016	11.209.603,44	7,60%	851.929,86	23,65%	247.968,94	1.099.898,80
2017	2.580.707,50	7,60%	196.133,77	14,76%	42.532,85	238.666,62
Total	76.275.159,75	-	5.796.912,14	-	3.211.524,22	9.008.436,36

Source: Research data.

It can be seen that by the criterion of the ICMS highlighted, the sum of undue payments of PIS and COFINS that the company is entitled to compensate is R\$ 10.964.215,38, this value is the result of the sum of the total of PIS and total COFINS present in tables 3 and 4, updated monetarily until august 2020.

On the other hand, in order to calculate the amount unduly paid by the collected ICMS method, it is necessary to make compensation between the debits and tax credits. It is also notable that for this criterion, the ICMS value on the revenues actually taxed by PIS and COFINS is also used. Therefore, from the total value of the ICMS collected, the portion inferred on untaxed revenues was deducted, according to table 5:

Table 5*Composition of the calculation base of undue payments – ICMS collected*

Period	Total Value of ICMS Collected	Value of ICMS collected on revenues not taxed by PIS/COFINS	Total Calculation Base of undue payments
2012	1.646.424,80	(1.095.795,59)	550.629,21
2013	6.621.607,93	(4.102.947,96)	2.518.659,97
2014	1.851.057,57	(1.273.236,26)	577.821,31
2015	-	-	-
2016	1.477.191,48	(1.174.440,67)	302.750,81
2017	3.465.649,93	(2.770.571,45)	695.078,48
Total	15.061.931,71	(10.416.991,93)	4.644.939,78

Source: Research data.

The rates of 1,65% for PIS and 7,60% for COFINS apply to the found value of ICMS, resulting in the sum of undue payments that is duly updated by SELIC rate until august 2020, according to tables 6 and 7:

Table 6*Calculation of undue payments of PIS – Excluding ICMS collected*

Period	Calculation Basis for undue payments	Aliquot	Primary	Cumulative Rate (SELIC)	SELIC interest until 08/2020	Total PIS in 08/2020
2012	550.629,21	1,65%	9.085,38	67,61%	6.397,76	15.483,14
2013	2.518.659,97	1,65%	41.557,89	59,79%	26.517,76	68.075,65
2014	577.821,31	1,65%	9.534,05	49,39 %	5.446,08	14.980,13
2015	-	1,65%	-	36,85 %	-	-
2016	302.750,81	1,65%	4.995,39	23,65%	1.199,99	6.195,38
2017	695.078,48	1,65%	11.468,79	14,76%	2.289,39	13.758,18
Total	4.644.939,78	-	76.641,51	-	41.850,98	118.492,49

Source: Research data.

Table 7*Calculation of undue payments of COFINS– Excluding ICMS collected*

Period	Calculation Basis for undue payments	Aliquot	Primary	Cumulative Rate (SELIC)	SELIC interest until 08/2020	Total COFINS in 08/2020
2012	550.629,21	7,60%	41.847,82	67,61%	29.468,44	71.316,26
2013	2.518.659,97	7,60%	191.418,16	59,79%	122.142,45	313.560,61
2014	577.821,31	7,60%	43.914,42	49,39 %	25.084,97	68.999,39
2015	-	7,60%	-	36,85 %	-	-
2016	302.750,81	7,60%	23.009,06	23,65%	5.527,23	28.536,29
2017	695.078,48	7,60%	52.825,96	14,76%	10.545,08	63.371,04
Total	4.644.939,78	-	353.015,42	-	192.768,17	545.783,59

Source: Research data.

Utilizing the criteria of ICMS collected, the sum of undue payments of PIS and COFINS that the company has the right to is equal to R\$ 664.276,08, that is the sum of the total of PIS and COFINS found in tables 6 and 7, updated monetarily until the month of august 2020.

In order to compare the results of the calculations, table 8 was elaborated, which demonstrated the exorbitant difference between the default values if calculated by different methods.

Table 8*Comparison of calculation criteria*

Tribute	ICMS Featured	ICMS Collected	Difference (RS)
PIS	1.955.779,02	118.492,49	1.837.286,53
COFINS	9.008.436,36	545.783,59	8.462.652,77
Total	10.964.215,38	664.276,08	10.299.939,30

Source: Research data.

It can be seen that if the company chooses the highlighted ICMS criterion, it will have a higher value to compensate, corresponding to 17,46% of what was actually paid in respect of the contributions in the period covered by the study, while the calculation of the undue payments by the collected ICMS criterion represents only 1,06% of that value. If we compare the final results, there is an approximate variation of 1.550% between one method and another.

In the understanding of the Brazilian Internal Revenue Service, the amount to be excluded is the collected ICMS, which among the criteria presents the lowest result, that is, the lowest disbursement to the Union. On the other hand, taxpayers and tax authorities advocate the exclusion of the highlighted ICMS, because it is the one that is effectively linked to billing, being the basis of calculation for contributions, and consequently results in a higher tax credit to companies. In any case, regardless of the method used, this decision is of great scope, because it is the waiver of collection of millions of reais that are intended for the maintenance of the public machine.

To better bespeak of the impact, it is compared with the results obtained by Teixeira and Machado (2018) whose company in question was in the footwear business, which identified a total of R\$ 2.640.712,26 that was unduly paid as contributions and an average reduction of 11,18% in value due to the non-incidence of ICMS.

The study of Souza, Vargas and Batista (2019) also obtained good results, since in both forms of calculation companies obtained financial benefits. When compared to the present

study, it makes it even more evident that the undue payments calculation is different and its results vary significantly.

In the study of Broetto, Silva and Gugel (2017), it can be said that taxes earned directly on revenues are the main sources of government revenue, and for companies they are largely responsible for reducing the result of their commercial operations and it is based on this premise that companies must seek and deepen knowledge in this subject, in order for their results to improve.

The present study, as the ones cited above, deals with a company taxed by real profit that showed different results among the calculation criteria, but obtained tax advantage in both. Analyzing the benefits that the company obtained, the amount found is relatively high, which brings to the public vaults a reduction in collection, for cases that start to exclude from the base of calculation these contributions and a to-do with taxpayers who ensured the right to restitution and compensation of amounts already paid, also as in the study by Silva et al. (2019), which identified a 25.8% reduction in revenue from federal taxes collected without exclusion.

The contributions of this study are notorious with regard to the tax environment, because for years this legal indecision pends definition and many companies end up unduly paying these taxes without knowing the possibility of excluding the ICMS from the calculation base of PIS and COFINS or, many times, with the complexity of the Brazilian tax system, there is no interest in the issues of restitution due to the enormous legal uncertainty that taxpayers have when it comes to tax disputes, which is why they believe that the effort to achieve it is not worth it, but the results presented in this study show that it is possible and very advantageous.

5 Conclusion

The present case study sought to analyze the impact of the exclusion of ICMS from the calculation base of PIS and COFINS in a company of the food business under the Real Profit regime and present the value of the undue payments made referring to contributions from 01/2012 to 03/2017.

Specifically, the legal basis of PIS and COFINS was shown and the breadth of STF's decision was analyzed, both for the company in question that paid a large sum unduly as well as for public vaults that must refund high amounts, due from RE 574.706, that excludes ICMS from the calculation base of both contributions. And yet, it has shown divergency in opinions between fisco and contributors with regard to the calculation criteria to be used.

For the composition of values, accounting and inspectorial files of the company relating to ICMS, PIS and COFINS were consulted and statements were developed to calculate the undue payments by the highlighted ICMS method and by the collected ICMS, which evidenced the effective value that the company is entitled for refund. Finally, it was possible to confront the results between two calculation criteria, being found the value of R\$ 10.964.215,38 by the highlighted ICMS criteria in the invoice and R\$ 664.276,08 with the collected ICMS case, amounting to a difference of 1.550%.

The results of this study resemble the study by Souza, Vargas and Batista (2019), in the sense that, even with the huge discrepancy identified between both values of undue payments if calculated by different criteria, both cases bring financial benefits to the company. The correlation with the research of Klein and Plastina (2018) was also recognized, it instated grand reduction in tributes in case of non-occurrence of ICMS in the calculation base of PIS and COFINS.

For Broetto, Silva and Gugel (2017), the enabling of action to secure the right for refund presented satisfactory results in a way to consider this value a reductor of accumulated prejudice and yet, for the values impact directly on costs, they themselves could reduce and consequently lower their prices, which leads to a rise on the volume of sales and this reinforces yet again the relevance of the decision proffered by the Brazilian Supreme Court and the positive results presented in this study.

According to the judicial decision, it is noted that ICMS doesn't compose the calculation base of contributions, however, up to the moment of conclusion of this study, STF didn't judge the declaration embargoes defining which is the ICMS to be excluded from the calculation base, thus preserving insecurity towards this matter.

It is suggested for future research, the implementation of studies on the new tax thesis that emerged onwards from the decision of the exclusion of ICMS from the calculation base of PIS and COFINS, similarly to the exclusion of ISS and IPI from the calculation base of these contributions, the exclusion of ICMS from the calculation base of IRPJ and the exclusion of PIS and COFINS of its own calculation base.

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