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Constitutional Analysis of the Goiás Infrastructure Contribution and Its Impact on Agribusiness

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ABSTRACT

This article examines the constitutional implications of the contribution created by Law No. 21,670 of December 6, 2022, which established the Infrastructure Development Fund (FUNDEINFRA) in the State of Goiás. The study aims to clarify the legal nature of this contribution and assess its alignment with constitutional tax principles, particularly regarding the allocation of revenues to specific funds—an action generally restricted by the Brazilian Federal Constitution. Given the crucial role of agribusiness in Brazil's economy and food security, the financial burdens placed on agricultural producers through such contributions warrant close legal scrutiny.

The article explores whether the contribution imposed by the state represents an undue fiscal burden, potentially disguised as voluntary, and analyzes whether it qualifies as a tax under a different name. It also assesses whether this contribution violates constitutional principles, including the prohibition on binding tax revenues to specific purposes, as outlined in Article 167, IV of the Constitution. Additionally, the paper discusses the implications of the pending Direct Actions of Unconstitutionality (ADIs No. 7,363 and 7,366) before the Supreme Federal Court, which challenge the legitimacy of this contribution.

Using a deductive methodology, along with documentary research and case analysis, the article offers a critical overview of the potential constitutional defects of the law and its broader implications for state taxation and agricultural policy.

Keywords: Constitutional Law, Taxation, FUNDEINFRA, Agribusiness, Goiás State Law.

INTRODUCTION

Agribusiness is an important driver of the Brazilian economy, with the sector's share of the Gross Domestic Product reaching successive records in 2020 and 2021. This two-year period was considered one of the best in the recent history of Brazilian agribusiness.

However, according to data released on 03/17/2022 by CEPEA (Center for Advanced Studies in Applied Economics), from Esalq / USP, in partnership with CNA (Confederation of Agriculture and Livestock of Brazil), the GDP of Brazilian agribusiness fell 4.22% in 2022.

One of the reasons for the downward scenario in 2022 is the sharp rise in input costs in the sector, both in agriculture and agro-industries, which has contributed to the drop in GDP throughout the production chains.

Added to this issue are: (i) difficulties in accessing credit, (ii) high production costs, (iii) high tax burden, (iv) adverse weather conditions inherent to agriculture, (v) tightening of environmental legislation, which aims at the much-desired sustainable production, but in return creates obstacles in the production and commercialization of agricultural activity, among several other factors.

Based on these considerations, it is clear that agribusiness continues to be a protagonist in the national economy, with its share still representing around 1/3 of the total Gross Domestic Product.

According to data provided by Cepea - Center for Advanced Studies in Applied Economics (2023), from Esalq / USP, in partnership with Abiove (Brazilian Association of Vegetable Oil Industries on 08/22/2023 - The total GDP of the soybean and biodiesel chain is expected to grow 19.88% in 2023 compared to 2022, according to an estimate made by Cepea .

Cepea / Abiove researchers, this performance demonstrates the estimated growth in all GDP segments, of 6.2% for inputs, 38.47% for soybeans at the farm gate, 3.88% for agroindustry and 15.66% for agroservices .

Thus, the value of GDP aggregated by the production chain could reach R$691 billion in 2023, representing 28.5% of the Brazilian agribusiness GDP and 6.3% of the country's total GDP.

In view of the tax legal regime that involves agricultural production, it was established as problematic to verify the constitutional aspects of the “contribution” destined to the Infrastructure Development Fund (FUNDEINFRA) instituted by the State of Goiás through Law 21,670 of December 6, 2022.

There is a clear need for analysis and discussion on the topic. For example, since its inception, FUNDEINFRA has raised R$405 million, until it was suspended by the preliminary injunction in Direct Action of Unconstitutionality No. 7,363 issued on April 3, 2023. These amounts were reported by the State Secretariat of Economy to the newspaper O Popular on April 24, 2023.

To this end, the general objective was to address the legal aspects involving FUNDEINFRA, in addition to demonstrating whether the burdensome nature of the contribution significantly impacts agricultural production; presenting possible unconstitutional flaws in the state law; addressing aspects of fundamental rights aimed at food security; defining whether or not the contribution is a tax disguised by alleged voluntariness; in addition to addressing the consequences of Direct Actions of Unconstitutionality No. 7,363 and 7,366 filed before the Federal Supreme Court. The deductive method was used, in addition to documentary research and case analysis, which resulted in two topics (Agência, 2023).

In the first topic, the power to tax and the constitutional limits for the development of this state activity were contextualized.

In the second part, the main aspects of FUNDEINFRA were addressed, reserving two subchapters for the reflection of the two Direct Actions of Unconstitutionality that were submitted to the Superior Court for constitutional interpretation.

The topic generated several controversies with wide coverage in the media, and the analysis and in-depth study of the constitutional aspects of FUNDEINFRA can contribute to the legal and political confrontation of problems related to agricultural production.

This is because the recent position of the Federal Supreme Court, when revoking the injunction granted by Minister Dias Toffoli and reestablishing the collection of FUNDEINFRA in the State of Goiás, may create precedents for the institution of the same contribution in all states of the country, which will possibly trigger a new look to Brazilian Tax Law.

CONSTITUTIONAL LIMITATIONS ON THE POWER TO TAX

The Magna Carta imposes limits on the power to tax. In other words, they are limits on state action when establishing and collecting a given tax.

These limits derive, basically, from the principles and immunities of a tax nature provided for in the constitutional text, specifically in articles 150, 151 and 152 of the Federal Constitution.

In this sense, according to Eduardo Sabbag, constitutional tax principles are considered constitutional limitations to the power to tax and all Tax Law must be considered through the exercise of state sovereignty.

Among the facets of State sovereignty, it is important to consider the power to tax as a relevant fragment of that sovereignty.

Noberto Bobbio's (1982) concept of power , in which power “is a relationship between two subjects where one imposes his will on the other and determines, even against his will, his behavior”.

This research, as will be explained below, demonstrates that the institution of FUNDEINFRA in the State of Goiás is a tax, called a contribution, disguised by the supposed voluntariness or optionality that would be available to the taxpayer, provisions that disregard several constitutional limits.

In other words, its institution goes beyond constitutional limits and is at odds with the legal nature of a tax, given that compulsory payment is precisely one of the elements of its legal nature in the sense that a tax is any

compulsory pecuniary payment, in currency or whose value can be expressed in currency, which does not constitute a sanction for an unlawful act, established by law and collected through a fully linked administrative activity.

Based on this premise, it is noted that the power (ius imperium), inherent to social organizations, unfolds in interactions of wills, one necessarily overriding the other through financial sovereignty, whose holder is the people, who transferred this ownership to a limited extent to the State through the constitutional contract, allowing it to collect and manage public finances.

In other words, the collection and management of public finances are essential state functions of a government to ensure the functioning of public services, economic development and the well-being of the entire society. In this sense, the collection of revenues and the allocation of these resources to all social segments are of paramount importance.

Therefore, through this social pact, the constitutional provisions, among other attributions, are intended to establish the powers and limits of the government in relation to the collection and management of public finances. These provisions include rules on budget approval, transparency in the use of resources, and fiscal responsibility, and such aspects are of great relevance to the unfolding made here.

From this perspective, it is worth highlighting that the taxation relationship assumes the form of a “legal relationship”, and not a “relationship of force”, given that, according to the precepts of Norberto Bobbio, the fact that the possibility of resorting to force is the element that distinguishes political power from other forms of power does not mean that political power is resolved through the use of force: “The use of force is a necessary but not sufficient condition for the existence of political power”.

Thus, the power to tax is, in essence, a power of law, supported by the constitutional contract and the consent of the people, recipients of patrimonial invasion by the State, which ultimately aims to collect the tax.

In this way, even if it acts through coerciveness , this portion of force has a legal character due to the social pact.

Therefore, the power to tax is, in truth, a power of law, based on the consent of citizens, recipients of the patrimonial invasion, tending to the collection of the tax. If there is a portion of force in its use, it is institutionalized, endowed with legality.

It is known that the State needs (and should) co-opt financial resources in its main activity, in order to provide citizens with the provision of their collective needs, in addition to, evidently, maintaining the state structure.

To create FUNDEINFRA, the Government of Goiás submitted two bills to the Legislative Assembly. The fund has administrative, financial and accounting autonomy, and the amounts collected are exclusively allocated to infrastructure works, especially paving and maintenance of Goiás highways.

After the reestablishment of the collection of the tax, the Government of the State of Goiás announced on August 11, 2023 the execution of 32 road works with an investment of more than R$ 2 billion from the State Infrastructure Fund (Fundeinfra). Fundeinfra resources and works are managed jointly by the Government of Goiás and the productive sector through the Management Council.

On the other hand, even if the revenue is reflected in works that benefit the entire Goiânia society, this power to tax must follow constitutional limits and parameters.

According to Hugo de Brito Machado (2008), Tax Law exists to delimit the power to tax, transforming the tax relationship, which was previously simply a relationship of power, into a legal relationship.

For this reason, this power relationship within the scope of state collection and invasion of the taxpayer's assets is presented through the path of compulsion , which must be closely linked to the principle of legality, which demonstrates the tax relationship as a clear legal relationship, and not a “power relationship”.

In other words, state sovereignty is not absolute. It must be guided by constitutional provisions that delimit state action in its inevitable exercise of taxation and patrimonial invasion, which can trigger arbitrary attitudes on the part of the State.

That is to say, the Federal Constitution describes the modus operandi for exercising this power, without interfering in the freedom and property of citizens, so that it occurs in a fair and balanced manner.

It is established that taxation relations between the State and the taxpayer must occur within the space modulated by the constitutional text, that is, in accordance with the legal norm that delimits the power to tax.

This delimitation is externalized through (i) legal norms of tax jurisdiction and (ii) constitutional tax

principles.

The legal rules of tax jurisdiction are intended to delimit the power to tax, so that excessive actions by the state power do not occur.

In this sense, the Constitution itself distributes the state's taxing power among legal entities under Public Law: the Union, member states, municipalities and the Federal District, in a clear and precise manner (arts . 153, 155 and 156).

On the subject, Carrazza (2008) teaches that the state taxing force does not act freely, but in accordance with the precepts of positive law. Adds that political persons do not have taxing power (manifestation of ius imperium of the State, but rather tax jurisdiction (manifestation of the autonomy of the political person and, therefore, subject to the constitutional legal system). Thus, tax jurisdiction is determined by constitutional rules, which are of a higher order than legal rules, and which provide for specific tax obligations.

It should be added that the constitutional tax principles, provided for in arts . 150, 151 and 152 of the Federal Constitution are based on values explicitly stated in the constitutional norm.

The constitutional guarantees of the citizen are evident despite the ius imperium , which assume a position of clear constitutional limitations on the power to tax, that is, the power that the State has to tax suffers limitations that are treated as stone clauses. Therefore, they are not susceptible to suppression or exception , even by Constitutional Amendment.

In conclusion, the Constitution brought several rules that seek to inhibit the power of the State in the tax aspect, through rules of tax immunity and those prohibiting privileges and tax discrimination.

In the present case, we must question, in the tax sphere, how this relationship between the taxpayer and the State of Goiás works, and whether this action is guided by constitutional principles and limitations on the power to tax.

FROM FUNDEINFRA

The State of Goiás, through Law No. 21,670/22, created the State Infrastructure Fund (FUNDEINFRA) to “raise financial resources for the economic development of the State of Goiás”.

The fund in question aims to generate resources from, among other sources, agricultural, livestock and mineral production, as well as to implement, in such unit, certain policies and administrative actions.

Article 5 of the law brought the revenues for the said fund:

“Contribution required under the Tax on Transactions Related to the Circulation of Goods and on the Provision of Interstate and Intermunicipal Transportation and Communication Services (ICMS) as a condition for: a) the enjoyment of a tax benefit or incentive; b) the taxpayer who opts for a special regime aimed at controlling the exit of products destined abroad or for the specific purpose of export and proof of effective export; and c) the tax due by tax substitution for previous transactions is: 1. paid by the taxpayer accredited for such purpose at the time of the subsequent exit; or 2. determined together with that due for the exit operation itself of the establishment elected as substitute, which will result in a single debit per period". It is charged "at a percentage not exceeding 1.65% (one whole and sixty-five hundredths percent) on the value of the transaction with the goods specified in the tax legislation; or per unit of measurement adopted in the marketing of the goods.”

The products that were chosen to be subject to this contribution are mostly those related to the agribusiness sector, as shown in Annex XVI of the Goiás Tax Code Regulation (RCTE) as amended by Decree No. 10,187/2002.

The contribution destined to FUNDEINFRA is charged at a percentage of up to 1.65% on the value of the transaction with goods specified in the tax legislation or per unit of measurement adopted in the commercialization of the goods.

For example, the aforementioned annex lists the percentage of contribution per commodity to the State Infrastructure Fund. Of note is the percentage allocated to soybeans: 1.65%; sugarcane: 1.2% and corn: 1.1%.

According to Decree No. 10,258, it was determined that the amount of the productive sector tax be fully allocated to the works defined by the Management Council of the State Infrastructure Fund (Fundeinfra).

This determination was made due to the provision of the Unlinking of State Revenues (DRE), provided for in art. 39 of the Act of Transitional Constitutional Provisions (ADCT) of the State Constitution.

The rule establishes a separation of 30% of all revenues linked to agencies and entities, funds or expenses. However, this same provision allows that, through an act of the Chief Executive, the unlinked resources can be

used freely.

With the new decree, the State of Goiás sought to demonstrate to rural producers, recipients of the charge, that the collection of the agricultural tax is fully allocated to the aforementioned fund and used in works defined by the Management Council.

At the federal level, there is also the unlinking of revenues, created in 1994, under the name of the Social Emergency Fund (FSE), established to stabilize the economy after the Real Plan.

In the early 2000s, the name was changed to Unlinking of Federal Revenues (DRU) and, in 2016, the institute previously restricted to the Union was extended to States and Municipalities, through Federal Constitutional Amendment No. 93/2016.

The institution of the “optional” or “voluntary” contribution generated great dissatisfaction in the agribusiness sector, leading to demonstrations in the Legislative Assembly of the State of Goiás, where farmers questioned the legality of the charge, and the measure taken by the State Governor Ronaldo Caiado was widely publicized.

For example, the Brazilian Mining Institute (Ibram), which represents the largest mining companies operating in the country, when presenting the sector's quarterly financial statement carried out on 04/19/2023, the entity's CEO, Raul Jungmann, stated that taxation on exports is unconstitutional.

Demonstrating the dissatisfaction of the entire agribusiness sector, Ibram stated that, in Brazil, there is a consensus not to tax exports, which is extremely important for the trade balance and for the industrial development of all sectors.

The law approved in Goiás, and analyzed in this article, has a huge impact on the mining sector, because it removes economic competitiveness and market positioning, in addition to reducing investments and bringing legal uncertainty, which is not recommended in a Democratic State of Law.

In other words, legal certainty is based on ensuring that society, specifically taxpayers, can plan their actions and business based on existing tax rules, without fear of arbitrary or unpredictable changes in legislation, as occurred in this case. In other words, in a reflexive way, there was an affront to the protection of individual rights and the maintenance of trust in the government.

Therefore, in the face of excessive taxation, it will be up to the interpreter of the rule to undertake the difficult task of delimiting the “confiscation effect”, analyzing its real content and applicability, and using the normative elements, constitutionalized or not, namely, the tax principles that are relevant to the topic – tax equality, tax capacity, reasonableness and proportionality –, in addition to attention to the right to property, considered to be of fundamental importance.

In this sense, there is a fine line between excessive taxation (prohibition of confiscation), in which the optimal level of taxation must be analyzed, in which the tax is possible and reasonable, reaching the opposite extreme, the point of patrimonial invasion, from which it will be excessive, going beyond the contributory capacity of the affected individual, which, in the present case, involves the entire productive sector of agribusiness.

For sizing purposes, in the mining sector alone, according to an estimate by Ibram , the contribution to Fundeinfra would generate an impact of R$160 million per year on the mineral production of ferroalloys, copper and gold.

The State Government of Goiás (2023) justified the charge by arguing that the contribution is restricted to producers who have tax benefits or special tax regimes. In addition, it stated that the “agricultural tax” already exists in other states, such as Mato Grosso and Mato Grosso do Sul.

The topic gained even more prominence in light of the recent Direct Actions of Unconstitutionality filed before the Federal Supreme Court by the National Confederation of Industry (ADI 7,363) and the Brazilian Association of Soybean Producers (APROSOJA BRASIL) (ADI 7,366).

Both actions were distributed to Minister Dias Toffoli , who granted a preliminary injunction in the first ADI to: ad referendum of the Plenary, to suspend the effectiveness of art. 5, I and sole paragraph, of Law No. 21,670/22.

However, on 04/24/2023, the Supreme Court plenary, by 7 votes to 3, revoked the injunction that suspended the contribution on agricultural products, with the dissenting majority winning and the rapporteur's vote being defeated.

The Ministers Luís Roberto Barroso and André voted with the rapporteur. The ministers who formed the majority voted in favor of the constitutionality of the state law: Édson Fachin , Rosa Weber, Carmen Lúcia,

Alexandre de Moraes, Luiz Fux , Nunes Marques and Gilmar Mendes.

This paper seeks to demonstrate that such a “contribution” places an excessive burden on agricultural production, in addition to presenting several constitutional flaws , which, with all due respect, demonstrate the error of the Constitutional Court’s position.

This is because the creation of FUNDEINFRA violates fundamental rights related to food security.

Article 187, I, of the Lex Major determines that, respecting the principle of legality, agricultural policy will be planned and executed with the effective participation of the production sector, involving producers and rural workers, as well as the marketing, storage and transport sectors, taking into account especially credit and tax instruments.

The second point that deserves to be highlighted is that the contribution is a tax disguised by a supposed voluntariness or faculty that does not occur in practice , in addition to disregarding constitutional limits.

It also disrespects the principle of equality/isonomy by focusing on specific products from the agricultural sector (soy, corn, sugar cane, meat).

There is also a lack of alignment with the principle of equality in the selection of products and the percentage of contribution by delegation to the decree, a measure taken without any parameter.

Furthermore, the creation of the fund places a significant burden on products intended for export, in total disagreement with what is advocated in the constitutional text in the sense of not generating, in any way, directly or indirectly, such forms of revenue, in addition to disregarding the limits established in Confaz Agreement 42/2016.

Finally, it demonstrates a distortion of legislative activity, given that it seeks, in an evasive manner through the terms “contribution” and “optionality”, to conceal the rigid Brazilian Tax System, which outlines several forms of limitation to the power to tax, as previously mentioned.

It is clear that this is a controversial issue, not to say polemic, regarding the legal nature of the tax of the "contribution" destined to FUNDEINFRA.

The State of Goiás, as well as the Attorney General's Office itself in opinions drawn up within the scope of the ADI filed with the Supreme Court, argues that the “agricultural tax” would not be a tax as there would be an optionality in its collection.

This is based on the argument that taxpayers could opt out of paying the contribution on transactions that are subject to the contribution.

In another twist, it is known that compulsoriness is an element that configures the tax legal nature.

Even so, the doctrinal position that compulsoriness results from an obligation that obeys the principle of legality is pertinent, and the occurrence of the generating fact or hypothesis of incidence does not depend on the will of the parties.

Indeed, this is a starting point. However, it does not clarify complex and specific issues, especially in relation to state activity, which inevitably adopts arbitrary and excessive attitudes when exercising its sovereign power to tax.

In this sense, it is even necessary to reflect on the new notion of tax, given that the current context requires reflections on its legal nature.

According to Fábio Calcini (2023), the legal nature of the tax must be extracted from a perspective that does not only take into account the legal aspect, but also the coercive nature of the tax requirement, through the ius imperium that generates a pecuniary obligation with a legal link under public law.

According to the aforementioned author, it is necessary to take into account the fact that, at various times, the disguised voluntariness, faculty or option that would be available to the taxpayer, in fact does not remove the notion of compulsion or coerciveness within the normative context .

This legal relationship imposes on the citizen a legal bond of public law, in which the occurrence of the generating fact continues to arise from the principle of legality, which generates a pecuniary obligation that does not allow the weak party in the relationship, solely and exclusively through the autonomy of the will, to evade the law and its collection effects.

It turns out that there are situations, including in the Constitution itself, that deal with optional and voluntary regimes, and that even so do not deviate from the tax legal nature, such as the legal provision that deals with Simples Nacional in the Constitutional Text.

Regarding the contribution destined to the State Infrastructure Fund, it was actually established by law. However, it has the coercive power of the State in its collection through acts of authority and empire, which generates a pecuniary obligation with a public law link, clearly and evidently denoting the coercive aspect of state action.

Another criticism is that this contribution consists of a typical “masked” or “disguised” tax, due to its similarity to an additional tax, notably the Tax on the Circulation of Goods and Services.

This disguise or concealment of the legal nature of a tax arises from several circumstances with the aim of introducing subterfuges into the National Tax System.

The tax nature that one intends to hide or disguise arises from numerous aspects or reasons.

The first aspect is art. 5 of Law No. 21,670/2022, which institutes said constitution. It states that “this contribution will be required within the 'scope' of the ICMS”, that is, the accessory nature in relation to the tax that already taxes the circulation of goods and services is notorious, and one can even speak of the intolerable bis in idem , when the duplicate collection is carried out by the same federative entity, given that the competence to institute the ICMS is state.

The second aspect is that all changes to the law occurred through acts typically of a tax nature involving ICMS, for example in relation to the Goiás Tax Code.

Still in relation to the similarity to ICMS, the hypotheses of incidence of the contribution are related to the "value of the transaction with goods", evidencing the accessory nature in relation to the tax that already collects amounts arising from activities of this nature (article 155, II, of the Federal Constitution).

The definitions of the taxable legal fact of both the contribution destined to FUNDEINFRA and the ICMS have the same form, with the “agricultural tax” having a specific destination and the tax, on the other hand, not having one. Herein lies the central problem of the present research.

State Law No. 21,671/2022, by creating said tax similar to ICMS on exports, violates the fundamental rights of taxpayers, in particular: (i) equality, including in its dimension that prevents discrimination regarding the origin or destination of goods and services; and free competition.

It should be noted that the goods produced in Goiás, which are the subject of Fundeinfra , will have their prices increased due to the taxation on exports, placing the taxpayer from Goiás at a disadvantage in relation to the competition, that is, producers of the same goods. There is therefore an affront to constitutional precepts, by placing the taxpayer from Goiás at a disadvantage in relation to other economic sectors that are also exporters and that are not subject to the Fundeinfra charge.

From this perspective, there should be no distinction between exporters of agricultural and mineral products, primary or otherwise, and those who export other goods, because such a situation represents a differentiation based on function, which is not permitted by the Federal Constitution.

Ricardo Lobo Torres' (2005) doctrine states that any unreasonable ' discrimination' , which means excluding someone from the general tax rule or from a non-odious privilege, will constitute an offense to human rights, given that it will disrespect the equality guaranteed in art. 5th, of the CF.

The affront to equality in taxation by the Goiás contribution destined only for agribusiness and mining products occurs to the extent that there is no constitutional authorization for such goods to lose competitiveness in the national and foreign markets, due to the tax burden.

What happens is exactly the opposite.

The Constitution, in its art. 187, I, determines that the agricultural sector shall benefit from incentives, by providing that the national agricultural policy shall be planned taking into account fiscal instruments.

Furthermore, the Constitution presents agribusiness as an activity of national interest, as it involves issues of food security, which naturally cannot be reduced by the local interest of a single State.

These are objectives of the economic order, which cannot and should not mean a mere recommendation, as this is a constitutional norm, of mandatory observance.

In order to better detail the insurgencies of the entities representing agribusiness, we will now analyze the two Direct Actions of Unconstitutionality filed before the Federal Supreme Court.

From the Direct Action of Unconstitutionality (ADI) No. 7,363

On 03/17/2023, the National Confederation of Industry filed a Direct Action of Unconstitutionality with the Federal Supreme Court (2023) against the legislation of the State of Goiás, arguing that Law No. 21,670/2022 can

be seen as creating a new tax or a separate portion of the Tax on Circulation of Goods and Services (ICMS).

In this sense, even if it is understood to be a new tax, it is in disagreement with the constitutional competence attributed to the States and the residual competence attributed to the Federal Union, in addition to adopting the same taxable event and calculation basis of the aforementioned state tax (ICMS), which is not permitted in the Brazilian legal system.

It was brought up that, if the contribution is understood as a separate portion of the ICMS, there are clear unconstitutionalities in its institution: (i) in the part that deals with tax substitution, since it violates the requirement of complementary law; (ii) in the undue taxation of export operations; and (iii) when allocating a portion of the tax to a fund, all practices prohibited under the terms of the Federal Constitution.

When filing the lawsuit, it was also alleged that the law in question was approved in December 2022 and disregards the principle of novenena and no surprises, in addition to violating the acquired rights of taxpayers who enjoy tax benefits granted under onerous conditions (Torres, 1999).

It pointed out an affront to the principles of tax equality, non-discrimination regarding the origin or destination of goods and services, free competition, tax neutrality, reasonableness and proportionality.

On the other hand, the State of Goiás, as an interested party, argued for the dismissal of the action, highlighting that the contested laws created a merely optional contribution, intended for an infrastructure investment fund, and instituted the FUNDEINFRA.

He claimed that “the legislative technique used to create the contribution consists of a simple ' pick and choose ' different tax benefits or special inspection regimes (in the area of tax collection) to condition them on the contribution to the fund destined for investment in infrastructure”.

When analyzing and granting the preliminary injunction, the reporting Minister Dias Toffoli based his opinion on the firm jurisprudence of the Federal Supreme Court and the content of art. 167, IV, of the Federal Constitution, to the effect that the linking of tax revenue, including ICMS revenue, to a body, fund or expense (except in cases permitted by the constitutional text itself) is unconstitutional.

It brought several precedents from the Court in which this unconstitutionality was verified, such as, for example, ADI No. 1,689/PE, Full Court, Rapporteur Justice Sydney Sanches, DJ of 2/5/03; ADI No. 2,529/PR, Full Court, Rapporteur Justice Gilmar Mendes, DJe of 6/9/07; and ADI No. 422/ES, Rapporteur Justice Luiz Fux , DJe of 9/9/19.

In other words, it was correctly based on the fact that, in the institutional design brought to the separation of powers, the Federal Constitution, in article 167, IV, prohibits the linking of tax revenue to a body, fund or expense.

Thus, it judged perfunctorily that the provisions contested by the National Confederation of Industry, insofar as they are connected with the matter relating to the contribution destined to FUNDEINFRA, violate art. 167, IV, of the constitutional text, as they result precisely in an indirect linking of revenue from ICMS to such fund.

However, after the judgment of the precautionary measure referendum, the rapporteur was outvoted, and, by majority, the plenary of the Supreme Court revoked the injunction in order to reestablish the collection of the contribution destined to FUNDEINFRA.

Direct Action of Unconstitutionality (ADI) 7,366

Soon after the action filed by the National Confederation of Industry, the Brazilian Association of Soybean Producers (APROSOJA BRASIL) also proposed a Direct Action of Unconstitutionality before the Supreme Court.

APROSOJA pointed out the apparently unconstitutional provisions in the Goiás legislation, emphasizing that the articles in question instituted a true tax to fund the State Infrastructure Fund (FUNDEINFRA). However, this tax does not comply with the constitutional provisions, which irreparably tarnishes it.

Claiming basically the same reasons as CNI, APROSOJA asserted that, as a tax, it is necessary to fit the contribution into one of the 5 tax types allowed by the Constitution.

Thus, the amount due as resources for FUNDEINFRA seeks to avoid its tax definition, but is disguised as ICMS or additional ICMS, which is why its unconstitutionality is clear.

As previously mentioned, the contribution is levied on the same ICMS generating event and on the same calculation basis, being the reason for granting a special regime.

Also in operations intended for export, in the event of no contribution, respect for non-cumulativeness is guaranteed only after proof of export and the last link in the chain. However, the factual and legal reality demonstrates the unfeasibility of this scenario.

In the end, APROSOJA argued for the suspension, on a preliminary basis, of the legal provisions given the likelihood of the right and the risk of delay in issuing the decision. The preliminary decision has not yet been issued.

The periculum in mora reported by both CNI and APROSOJA takes into account the great burden on the taxpayer, considering that FUNDEINFRA has already collected R$ 405 million, until the preliminary injunction in ADI No. 7,363 issued on 04/03/2023, values reported by the State Secretariat of Economy to the newspaper O Popular on 04/24/2023.

The collection will continue to be exorbitant, considering that, after the assessment by the Supreme Court Plenary, the collection will be carried out again throughout the State of Goiás.

CONCLUSION

When analyzing the aspects of the creation of the Infrastructure Development Fund established by the State of Goiás through Law No. 21,670 of December 6, 2022, specific questions about the constitutionality of the contribution are noted.

Directly linked to agribusiness, the tax creates yet another burden on the sector, which faces several other difficulties in food production, including climate conditions inherent to agriculture and environmental legislation, which aims at the much-desired sustainable production, but in return creates obstacles to the production and marketing of agricultural activities. However, agribusiness continues to be a protagonist in the national economy, with its share still representing approximately 1/3 of the total Gross Domestic Product.

The study demonstrated that the contribution significantly impacts agricultural production, including issues of food security. It showed unconstitutionality flaws in the state law, and that the contribution is a tax disguised by an alleged voluntariness.

Currently, the injunction granted in ADI No. 7,363 has been revoked by the Supreme Court plenary, and whether or not the "agricultural tax" will be maintained is still uncertain given that there is still no definitive position from the STF.

This study demonstrated the importance and relevance of the topic, especially considering that the creation of the law by the State of Goiás and the recent position of the Federal Supreme Court, when revoking the injunction granted by Minister Dias Toffoli and reestablishing the collection of FUNDEINFRA, may generate precedents for the creation of the same tax in all states of the country, which will possibly trigger a new look for Brazilian Tax Law.

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