Tax on inter vivos real estate transfer: The main incidence rule and historical aspects

Imposto incidente sobre a transmissão de bens imóveis inter vivos: Regra matriz de incidência e aspectos históricos

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ABSTRACT
This paper aims to analyze the elements of the matrix rule of incidence of the *Inter-Vivos* Real Estate Property Transfer Tax *(*material, temporal, spatial, personal and quantitative criteria), correlating them with the analysis of its historical-legislative aspects, in order to provide operators of the law with a better understanding of the contours of the institute.

Keywords: ITBI, Tax, *Inter vivos*, Matrix rule, Historical.

1 INTRODUCTION

The Tax on *Inter-Vivos* Real Estate Property Transfer is commonly studied by those who work in the tax practice, especially because of the jurisprudential divergences that still exist with regard to its contours.

Proof of this is that only in the last few years have the Higher Courts been forming binding precedents regarding existing disputes over ITBI.

Only in February 2022 the Superior Court of Justice judged, under the system of repetitive appeals - theme No. 1113 (BRASIL, 2022a) - the definition of the calculation basis of the aforementioned tax and some of its aspects (such as the absence of connection to the IPTU calculation basis, presumption of truthfulness of the value declared by the taxpayer and the need for an administrative procedure to rule out this presumption).

Likewise, it was only in February 2022 that the Federal Supreme Court judged, with general repercussion, issue No. 1124 (BRASIL, 2022b), defining the taxable event

of ITBI as the transfer of property in the real estate registry office, which is still pending a definitive decision.

Also, in October 2020, the Federal Supreme Court judged, with general repercussion (topic No. 796), the "*reach of ITBI tax immunity, provided for in art. 156, § 2, I, of the Constitution, on real estate incorporated into the assets of legal entities, when the total value of these assets exceeds the limit of the capital stock to be paid in*" (BRASIL, 2015). About this judgment, we have already had the opportunity to write on a previous occasion[1] .

In view of the various existing discussions, it is necessary to go back to some basic premises that, if observed, could avoid unnecessary discussions.

The present work aims to analyze the elements that make up the matrix rule of incidence of the *Inter-Vivos* Real Estate Property Transfer Tax *(*material, temporal, spatial, personal, and quantitative criteria), correlating them with the analysis of its historical aspects.

This joint verification of the main rule and the historical-legislative development of the institute allows for a deeper understanding of its contours and can serve as a premise for the solution of issues still pending definition.

2 HISTORICAL ASPECTS: FROM THE "SIZA TAX" TO THE TRANSMISSION OF REAL ESTATE *INTER VIVOS*

Although it has a different name, and comprises a much more comprehensive taxable event, the transfer tax has been foreseen in the legal system since the colonial period.

Through the Alvará of June 03, 1809 (BRASIL, 1809), the Prince Regent of Brazil established the creation of the siza tax, levied on the purchase and sale of property. It was established that "of all purchases, sales and auctions of property, which are made throughout this State and Overseas Domains, a siza will be paid to my Royal Treasury, which will be ten percent of the purchase price.

[1] RODRIGUES, S. B. M. L.; MACHADO, A. A. L. Imposto sobre a transmissão de bens imóveis e o valor excedente na integralização ao capital social da pessoa jurídica: (Re)questionamentos a partir do julgamento do RE 796376 (Tema Nº 796). Biblioteca Digital Revista Fórum de Direito Tributário (Online), v. 111, p. 137-156, 2021.

With the Federal Constitution of 1981 (BRASIL, 1891), the first to be enacted under the republican regime, it was established in its article 9, item 3, the competence of the States to enact taxes on the transmission of property, *verbis:*

> Article 9 - It is the exclusive competence of the States to enact taxes:
> [...]
> 3º) on the transmission of property;
> [...]

Caliendo (2019, p. 872) teaches that in this period, property transfer taxes (*inter vivos* or *causa mortis*) were unified into a single tax type.

The Federal Constitution of 1934 (BRASIL, 1934) inaugurated the existing separation between the taxes due on the transmission of property *causa mortis* and *inter vivos*, maintaining, however, the private competence of the States regarding both:

> Article 8 - It is also privately up to the States:
> I - decree taxes on:
> [...]
> b) transmission of property *causa mortis*;
> c) transmission of real estate property *inter vivos*, including its incorporation to the company's capital;

Only with the Constitutional Amendment no.º 5, of November 21, 1961 (BRASIL, 1961), that the tax levied on the transmission of property *inter vivos* became the competence of the municipalities, according to its art. 29, item III, while the *causa mortis* continued to be the competence of the States (art. 19, I).

With the Reform of the Tax System established by Constitutional Amendment No.º 18, of December 1, 1965 (BRASIL, 1965), the tax competence for the tax on the transmission of real estate property, for any reason whatsoever, returned to the states, eliminating the division that had existed since 1934 between those *inter vivos* and *causa mortis*:

> Art. 9º The States are responsible for taxing the transmission, for any title, of real estate by nature or by physical transfer, as defined by law, and of real rights over real estate, except for real guarantee rights.
> § 1 - The tax is levied on the assignment of rights related to the acquisition of the goods referred to in this article.
> § 2º The tax is not levied over the transmission of goods or rights referred to in this article, for their incorporation to the capital of legal entities, except for those whose preponderant activity, as defined in complementary law, is the sale or rental of real estate property or the assignment of rights related to their acquisition.
> [...]

Constitutional Amendment nº 18/1965 (BRASIL, 1965), served as a basis for the publication of the National Tax Code - Law nº 5.172, of October 25, 1966 (BRASIL, 1966), which maintained the unification of real estate transfer taxes (whether *inter vivos* or *causa mortis*) in a single tax type, under the jurisdiction of the states.

> Art. 35 - The tax, which falls under the jurisdiction of the States, on the transmission of real estate property and rights related thereto has as its triggering event:
> I - the transmission, for any title, of the property or of the useful domain of real estate by nature or by physical accession, as defined in the civil law;
> II - the transmission, for any reason, of real rights on real estate, except for real guarantee rights;
> III - the assignment of rights related to the transmissions referred to in items I and II.
> Sole paragraph. In causa mortis transmissions, there are as many distinct taxable events as there are heirs or legatees.

The 1967 Constitution (BRASIL, 1967), in turn, maintained this same tax logic:

> Article 24 - The States and the Federal District are responsible for enacting taxes on:
> I - transmission, at any title, of real estate by nature and physical accession, and of real rights on real estate, except those of guarantee, as well as rights to the acquisition of real estate;
> [...]

Constitutional Amendment no.º 01, of October 17, 1969 (BRASIL, 1969) kept, in its article 23, item I and § 3º, similar wording.

It was only with the current wording of the 1988 Federal Constitution (BRASIL, 1988) that the tax on *inter vivos* transfers became the exclusive competence of the municipalities (art. 156, II, of CF/88), while the tax on *causa mortis* transfers (art. 155, I, of CF/88) was separated to the competence of the states.

Check out the constitutional prevision of the ITBI, of competence of the Municipalities:

> Art. 156. It is up to the municipalities to institute taxes on:
> [...]
> II - transmission "inter vivos", at any title, by onerous act, of real estate, by nature or physical accession, and of real rights over real estate, except for guarantee rights, as well as the assignment of rights to its acquisition;
> [...]

In turn, the ITCMD provision, which is the competence of the States and the Federal District:

> Art. 155. It is up to the States and the Federal District to institute taxes on:
> I - transmission causa mortis and donation, of any goods or rights;
> [...]

The distribution of tax competence to the Municipalities must be seen as a way of federative balance, with distribution of tax competence and the revenues resulting from it.

Although ITBI has existed in the Brazilian legal system for a long time, it has undergone several transformations, and only took on its current form after the 1988 Federal Constitution.

This is a consolidation of a new format for the tax that may be considered recent, since the National Tax Code itself - forged under the aegis of Constitutional Amendment no. 18/1965 (BRASIL, 1965) -, although in full force, provides for the ITBI and the ITCMD as a single tax type under the jurisdiction of the States, which must be observed by the interpreter when reading it.

The law enforcer will have a greater interpretative burden, since the National Tax Code brings a normative unification of the ITBI and the Causa *Mortis* Property Transfer Tax, "being the interpreter responsible for identifying the provisions that refer to one tax and the other" (CONTI, 2001, p. 100/111).

3 MATRIX RULE OF ITBI'S INCIDENCE

The Constitution of the Federative Republic of Brazil of 1988 (BRASIL, 1998) grants competence to the Federal Entities to legislate regarding the institution of taxes (SCHOUERI, 2018, P. 243).

Among the tax competencies conferred to the Municipalities is the one to legislate on the tax levied on the *inter vivos* transmission for any reason, by onerous act, of both real estate properties and rights in rem thereon, except for collateral, as well as the assignment of rights to their acquisition, according to article 156, II, of the Federal Constitution.

In order to institute the aforementioned tax, the municipalities must follow the dictates provided for in the Federal Constitution, as well as in the Complementary Law responsible for establishing general rules on tax legislation, especially the definition of taxes and their types, the respective triggering events, tax bases and taxpayers, as per the constitutional call provided for in art. 146, III, "a", of the Federal Constitution.

It is, therefore, the need for municipalities to comply not only with the provisions contained in the Federal Constitution, but also with the rules brought in the National Tax Code (approved by the Federal Constitution as a Complementary Law).

A joint analysis of these normative diplomas will make it possible to understand the main rule of incidence of the *inter vivos* transfer tax and all the elements that compose its normative antecedent and consequent.

To this end, it is necessary to analyze the criteria inherent to the principal rule of incidence, as systematized by Paulo de Barros Carvalho (2002, p. 124/135), namely, material, temporal, spatial, personal and quantitative criteria.

The material criterion of the tax hypothesis is composed of the elements that describe the fact object of taxation, in which there is "reference to a behavior of people, individuals or legal entities" (CARVALHO, 2000, p. 251/253). It is, in the terms used by art. 114 of the National Tax Code "the situation defined by law as necessary and sufficient to its occurrence" (BRASIL, 1966).

The temporal criterion corresponds to the moment, defined by law, "from which the obligation is considered constituted" (SCHOUERI, 2018, p. 537), signaling the emergence of a "subjective right for the State (in the broad sense) and a legal duty for the taxpayer" (CARVALHO, 2000, p. 259).

The spatial criterion is composed of the "necessary and sufficient elements for us to identify the circumstance of place that conditions the occurrence of the legal fact (CARVALHO, 2002, p. 130), so that the tax law expresses the place where the fact must occur in order to suffer the tax levy.

The personal criterion indicates the subjects of the legal-tax relationship, being divided into active subject and taxpayer. It reveals, then, the person "holder of the subjective right to demand the pecuniary benefit" (CARVALHO, 200, p. 294) to whom it will be given to collect the tax and the one who should be subject to its payment.

The quantitative criterion will be explained by the conjunction of the tax base and the rate (CARVALHO, 2000, p. 320/322). The first is revealed as the quantitative element of the hypothesis of tax incidence, while the second will usually be expressed as a percentage levied on the tax base, and may be proportional, progressive or regressive (SCHOUERI, 2018, p. 550/566).

An analysis of each of these criteria will be performed next.

The material criterion of the ITBI is defined in art. 35 of the National Tax Code, and its hypotheses of incidence are: i) the transmission, for any reason, of the ownership

or of the useful domain of real estate by nature or by physical accession, as defined in the civil law; ii) the transmission, for any reason, of in rem rights over real estate, except for the in rem guarantee rights; iii) the assignment of rights related to the aforementioned transmissions.

It is a basic rule of tax law that private law institutes must be understood in accordance with the definitions given to them by the other branches of law to which they belong, since the tax law is not allowed to change concepts, in the terms of art. 110 of the National Tax Code (BRASIL, 1966).

Therefore, in order to understand the material criterion of the ITBI, it will be necessary to import some concepts from Civil Law, since "they have long been established by private law and were used by the Federal Constitution to define tax competencies, so that they cannot be altered by the tax legislator. (MACHADO and MACHADO SEGUNDO, 2001, p. 110/124).

Therefore, concepts such as "transmission of property", "ownership", "useful domain", "real estate by nature" or "by physical accession", "real rights over real estate", "real guarantee rights" and "assignment of rights" will be imported.

In analyzing the material criterion, the rule in force under Brazilian law is of relevance, in the sense that the transfer of property between living persons, or of real rights over real estate, is only effective upon registration of the deed of transfer at the Real Estate Registry Office, under the terms of articles 1.227 and 1.245, both of the Civil Code (BRASIL, 2002):

> Article 1.227. Real rights over real estate that have been constituted, or transmitted by acts between living parties, are only acquired with the registration of said titles in the Real Estate Registry Office (articles 1.245 to 1.247), except in the cases expressed in this Code.
>
> Art. 1.245. Property is transferred between living persons by means of the registration of the translating title in the Real Estate Registry Office.

Property is conceptualized by civilists Pablo Stolze Gagliano and Rodolfo Pamplona Filho (2019, p. 160) as the "real right to use, enjoy or fruition, dispose of and claim the thing, within the limits of its social function."

It differs, therefore, from the useful domain, since the latter is related to the powers arising from the emphyteusis or easement (ROCHA, 2015, p. 256).

Although the 2002 Civil Code prohibits the formation of new emphyteusis in its article 2,038 (BRASIL, 2020), it preserves the emphyteusis that had already been

registered, in accordance with the previous Code, as well as the application of the institute with respect to marine lands, as a result of the provisions of article 49, § 3, of the ADCT, of the CF/88 (BRASIL, 1988).

It is a limited real right that gives someone the perpetual useful domain over his property, upon payment of a consideration known as rent (FARIAS and ROSENVALD, 2015, p. 661/663). Therefore, the domain is fragmented between the emphytee, holder of the useful domain and the landlord holder of the eminent domain (GAGLIANO, 2008, p. 19/20).

In relation to the usable domain, the Federal Supreme Court has an understanding - established at the time of the previous Civil Code - expressed in the summary enunciation no.º 326, to the effect that "the levy of the inter vivos transfer tax on the transfer of the usable domain is legitimate" (BRASIL, 1964).

As taught by Caliendo (2019, p. 874), real estate by nature is the soil and everything that is incorporated into it naturally; in turn, real estate by physical accession is everything that is artificially incorporated into it, as provided by art. 79, of the Civil Code (BRASIL, 2002).

The real rights over real estate, in the terms of art. 1.225, of the Civil Code (BRASIL, 2002), are the property , surface , the easements , the usufruct , the use , the habitation , the right of the promissory purchaser of the property , the concession of special use for housing purposes , the concession of real right of use and the slab, with the exception of the real guarantee rights (mortgage, pledge and antichresis), pursuant to art. 156, II, of the Federal Constitution (BRASIL, 1998).

The aforementioned normative previsions of art. 1.227 and 1.245, both of the Civil Code (BRASIL, 2002), in the sense that the transmission of in rem rights over real estate, and of property is only perfected with its registration in the Real Estate Registry Office, already explain the content of the temporal criterion of the tax under analysis.

This means that the execution of the Public Deed of Sale and Purchase is not among the events foreseen for the levy of the tax in question, although it is common for municipal laws to choose this fact as the moment to collect the tax, given the practicality and greater control.

The Superior Court of Justice, on the occasion of the trial of Special Appeal 1809411/MS (BRASIL, 2019) and the Federal Supreme Court in the trial of Agravo em Recurso Extraordinário 934091 (BRASIL, 2016) have already manifested in the sense

that the taxable event of ITBI is only perfected with the registration of the transmission before the Real Estate Registry Office.

In February 2022, the Federal Supreme Court judged, with general repercussion, issue No. 1124, defining the taxable event of ITBI as the transfer of property in the real estate registry office, which is still pending a definitive decision.

As Leandro Paulsen (2019, p. 421) states, one cannot confuse the *inter vivos* transmission, which occurs by force of a legal transaction, with the one resulting from the original acquisition of property, since in the latter there is no transmission, and consequently no hypothesis of tax assessment.

The spatial criterion of the ITBI indicates that it is due in the Municipality where the real estate that is the object of the transfer is located, pursuant to article 156, paragraph 2, II of the Federal Constitution (BRASIL, 1988). Thus, even though article 41 of the National Tax Code (BRASIL, 1966) foresees a supposed competence of the States to collect the ITBI, its reading must be seen in light of the Federal Constitution.

When dealing with the personal criterion, article 42 of the National Tax Code (BRASIL, 1966) is clear in providing that the taxpayer will be any of the parties to the transmission transaction, according to the applicable municipal law, and the active taxpayer will be the Municipality where the transmitted property is located (article 156, §2, II of CF/88).

The quantitative criterion of the principal rule of incidence, in turn, "must always be explicit through the combination of two entities: tax base and tax rate" (CARVALHO, 2000, p. 320/322).

As provided in article 38 of the National Tax Code (BRASIL, 1966), the tax basis of the ITBI will be the "appraised value of the assets or rights transmitted. Since this is a tax that is subject to the declaration mode of assessment, it is up to the local legislation to stipulate the form of assessment of the tax base.

In a recent judgment on theme number 1113 of the repetitive appeals, the Superior Court of Justice defined that

> 1) The ITBI tax base is the value of the property transmitted under normal market conditions, and is not linked to the IPTU tax base, which cannot even be used as a tax base;
>
> 2) The transaction value declared by the taxpayer enjoys the presumption that it is consistent with the market value, which can only be ruled out by the tax

authorities by means of a proper administrative proceeding (article 148 of the National Tax Code - CTN);

3) The municipality cannot previously arbitrate the ITBI tax base based on a reference value it establishes unilaterally.

As Leandro Paulsen (2019, p. 422) points out, there is no tax authorities' obligation, or taxpayers' right, to use the value of the IPTU tax base, based on the Generic Value Plants, to collect ITBI.

The local legislation must set the tax rates, which cannot be progressive. This is because, as already decided by the Federal Supreme Court, the ITBI is a tax of a real nature, which is not subject to progressivity, pursuant to article 145, § 1º , of the Federal Constitution.

There is, inclusively, a summary enunciation of the Federal Supreme Court (º 656) (BRASIL 2003) on the matter: "a law that establishes progressive rates for the "inter vivos" real estate transmission tax - ITBI based on the property's nominal value is unconstitutional.

It is noteworthy, however, that the Supreme Court, on the occasion of the trial of Extraordinary Appeal 562045 (BRASIL, 2013a), has already reviewed its understanding regarding the impossibility of progressive rates in the case of taxes of a real nature, in a discussion regarding the tax levied on the transmission *causa mortis*, being possible the review, also, in the case of the ITBI (PAULSEN, 2019, p. 421).

The aliquot for transmissions in general is 2% (two percent) in the Municipality of Vitória/ES, according to Law nº 3.571, of January 24, 1989 (VITÓRIA, 1989), 2% in the Municipality of Vila Velha/ES, according to Law nº 2.449, of December 28, 1988 (VILA VELHA, 1988), 3% (three percent) in the Municipality of São Paulo, according to Law nº 11.154, of December 30, 1991 (SÃO PAULO, 1991) and 3% (three percent) in the Municipality of Rio de Janeiro, according to Law nº 1.364, of December 19, 1988 (RIO DE JANEIRO, 1988).

4 BRIEF CLOSING

Although its origins date back to the imperial legislations, the ITBI has undergone a great transformation over the years, especially through the bifurcation defined by the Federal Constitution of 1988 of the tax levied on the transmission of real estate, providing

for those occurring *inter vivos* as the competence of the municipalities and those occurring *causa mortis* under the competence of the States and the Federal District.

There is still great divergence in jurisprudence with respect to the defining elements of the ITBI. It is enough to analyze the judgments that have occurred under the system of binding precedents set by the Superior Courts in recent years to verify that basic issues regarding the very definition of the tax have not yet been settled.

A return to the main rule of levy of the tax with a concomitant analysis of the historical-legislative aspects that led to its current normative framework allows for a deeper understanding of the surroundings of the institute.

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