Tax levied on the transfer of inter vivos real estate: matrix rule of incidence and historical aspects

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

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RESUMO

O presente trabalho tem como objetivo analisar os elementos da regra matriz de incidência do Imposto sobre a Transmissão de Bens Imóveis *Inter Vivos (*critério material, temporal, espacial, pessoal e quantitativo), correlacionando-as com a análise dos seus aspectos histórico-legislativos, visando fornecer aos operadores do direito uma melhor compreensão quanto aos contornos do instituto.

Palavras-Chave: ITBI. Imposto. *Inter vivos.* Regra Matriz. Histórico.

ABSTRACT

The present work aims to analyze the elements of the matrix rule of incidence of the Tax on the Transmission of Inter Vivos Real Estate *(*material, temporal, spatial, personal and quantitative criteria), correlating them with the analysis of its historical-legislative aspects, aiming to provide the operators of the law a better understanding as to the contours of the institute.

Keywords: ITBI. Tax. *Inter alive.* Matrix Rule. Historic.

INTRODUCTION

The Tax Levied on the Transfer of *Inter Vivos* Real Estate is commonly the object of studies by those who work in tax practice, especially because the jurisprudential divergences still exist with respect to its contours.

Proof of this is that only in recent years, the High Courts have been forming binding precedents regarding existing celeumas around the ITBI.

Only in February 2022 did the Superior Court of Justice judge, under the system of repetitive appeals - theme No. 1113 (BRAZIL, 2022a) - the definition of the basis of calculation of said tax and some of its aspects (such as the absence of link to the basis of calculation of the IPTU, presumption of veracity of the value declared by the taxpayer and the need for an administrative procedure to remove this presumption).

Likewise, only in February 2022 the Federal Supreme Court judged, in terms of general repercussion, issue No. 1124 (BRAZIL, 2022b), defining the ITBI generating event as the transfer of property in the real estate registry office, which is still pending a final decision.

Also, in October 2020, the Federal Supreme Court judged, in terms of general repercussion (theme No. 796), the "scope of the *tax immunity of the ITBI, provided for in article 156, § 2, I, of the Constitution, on real estate incorporated into the assets of a legal entity, when the total value of these assets exceeds the limit of the capital stock to be paid"* (BRASIL, 2015). On 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 return to some basic premises that, if observed, could avoid unnecessary celeumas.

This paper aims to analyze the elements that make up the matrix rule of incidence of the Tax on the Transmission of *Inter Vivos Real Estate (*material, temporal, spatial, personal and quantitative criteria), correlating them with the analysis of its historical aspects.

This joint verification of the matrix rule and the historical-legislative development of the institute allows 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 TRANSFER OF *INTER VIVO REAL ESTATE*.

Although with a different name, and comprising a much more comprehensive generating fact, the transfer tax has been provided for in the legal system since the colonial period.

Through the Charter of June 3, 1809 (BRAZIL, 1809) the Prince Regent of Brazil established the creation of the siza tax, incident on the purchase and sale of real estate. It remained established that "of all purchases, sales and auctions of real estate, which are made throughout this State and Overseas Domains, 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. Tax on the transfer of real estate and the surplus value in the payment to the capital stock of the legal entity: (Re)questioning from the judgment of RE 796376 (Theme No. 796). Digital Library Tax Law Forum Magazine (Online), v. 111, p. 137-156, 2021.

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

> Article 9 - It is the exclusive competence of the States to decree taxes:
> [...]
> 3rd) on transfer of ownership;
> [...]

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 (BRAZIL, 1934) inaugurated the existing separation between the taxes due due to the transmission of property *causa mortis* and *inter vivos, maintaining*, however, the private competence of the States with respect to both:

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

Only with the Constitutional Amendment No. 5, of November 21, 1961 (BRAZIL, 1961), that the tax levied on the transmission of inter *vivos property came to be the competence of the Municipalities, according to its art. 29, item III, while the* causa mortis *continued to fall under the jurisdiction of the States (art. 19, I).*

With the Reform of the Tax System established by Constitutional Amendment No. 18, of December 1, 1965 (BRAZIL, 1965), the tax jurisdiction for the tax on the transmission of real estate, in any capacity, returned to the States, disappearing the division existing since 1934 between those *inter vivos* and *causa mortis*:

> Art. (9) It is incumbent upon the States to impose on the transfer, in any capacity, of immovable property by nature or by physical assignment, as defined by law, and of rights in rem on immovable property, except for rights in rem of guarantee.
> § 1 - The tax shall be levied on the assignment of rights relating to the acquisition of the goods referred to in this article.
> § 2 - The tax does not affect the transfer of the assets or rights referred to in this article, for their incorporation into the capital of legal entities, except for those whose preponderant activity, as defined in a complementary law, is the sale or lease of real estate property or the assignment of rights related to its acquisition.
> [...]

The Constitutional Amendment No. 18/1965 (BRAZIL, 1965), served as the basis for the publication of the National Tax Code - Law No. 5,172, of October 25, 1966 (BRAZIL, 1966), which maintained the unification of the tax of transmission of real estate (either *inter vivos* or *causa mortis*) in a single tax type, of competence of the states.

> Art. 35. The tax, which falls within the competence of the States, on the transfer of immovable property and rights related thereto has as its generating event:
> I - the transfer, under any title, of the property or useful domain of immovable property by nature or by physical accession, as defined in civil law;
> II - the transfer, in any capacity, of rights in rem over real estate, except for rights in rem of guarantee;
> III - the assignment of rights relating to the transmissions referred to in items I and II.
> Single paragraph. In the transmission's causa mortis, there are as many distinct generating events as the heirs or legatees.

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

> Art. 24 - It is incumbent upon the States and the Federal District to decree taxes on:
> I - transfer, in any capacity, of immovable property by nature and physical accession, and of rights in rem over real estate, except those of guarantee, as well as over rights to the acquisition of real estate;
> [...]

The Constitutional Amendment No. 01, of October 17, 1969 (BRAZIL, 1969) maintained, in its article 23, item I and § 3, similar wording.

Only with the current wording of the Federal Constitution of 1988 (BRAZIL, 1988) that the Tax levied on *inter vivos* transmission became the exclusive competence of the Municipalities (art. 156, II, of the CF/88), separating to the competence of the States the tax on the transmission causa mortis (art. 155, I, of the CF/88).

Check out the constitutional provision of the ITBI, which is the responsibility of the Municipalities:

> Art. 156. It is incumbent upon the Municipalities to institute taxes on:
> [...]
> II - transmission "inter vivos", in any capacity, for pecuniary interest, of immovable property, by nature or physical accession, and of rights in rem over immovable property, except those of guarantee, as well as assignment of rights to its acquisition;
> [...]

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

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

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

Although it has long existed in the Brazilian legal system, the ITBI has undergone several transformations, having its feature defined as currently known only after the Federal Constitution of 1988.

It is a consolidation of a new format for the tax that can be considered recent, since the National Tax Code itself – forged under the aegis of Constitutional Amendment No. 18/1965 (BRAZIL, 1965) –, although in full force, provides for the ITBI and the ITCMD as a single tax type of competence of the States, which must be observed by the interpreter at the time of its reading.

The enforcer of the right will have a greater interpretative burden, because the National Tax Code brings a normative unification of the ITBI and the Transmission Tax *causa mortis*, "and it is up to the interpreter to identify the devices that refer to one and the other tax″ (CONTI, 2001, p. 100/111).

3 ITBI INCIDENCE MATRIX RULE.

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

Among the tax powers conferred on the Municipalities, there is that of legislating regarding the tax levied on the *inter vivos transmission in* any capacity by onerous act, both of immovable property and of rights in rem over them, except those of guarantee, as well as assignment of rights to their acquisition, according to article 156, II, of the Federal Constitution.

For the institution of said tax, the Municipalities must observe the dictates provided for in the Federal Constitution, as well as in the Complementary Law responsible for establishing the general rules on tax legislation, especially the definition of taxes and their kinds, the respective generating facts, bases of calculation and taxpayers, as provided for in article 146, III, "a", of the Federal Constitution.

It is, therefore, the need for observance, on the part of the Municipalities, not only of the provisions contained in the Federal Constitution, but also of the norms brought by the National Tax Code (accepted by the Federal Constitution as a Complementary Law).

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

Therefore, it is necessary to analyze the criteria inherent to the incidence matrix rule, 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 persons, individuals or legal entities"

(CARVALHO, 2000, p. 251/253). It is, in the terms used by article 114, of the National Tax Code "the situation defined by law as necessary and sufficient for 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 taxable person" (CARVALHO, 2000, p. 259).

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

The personal criterion indicates the subjects of the legal-tax relationship, dividing into active subject and taxable person. It reveals, then, the person "holder of the subjective right to demand the pecuniary benefit" CARVALHO, 200, p. 294) which 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 calculation basis and the aliquot (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 in percentage incident on the basis of calculation, and may be proportional, progressive or regressive (SCHOUERI, 2018, p. 550/566).

An analysis of each of these criteria will then be carried out.

The material criterion of the ITBI is defined in article 35 of the National Tax Code, having as hypotheses of incidence: i) the transfer, in any title, of the property or the useful domain of immovable property by nature or by physical accession, as defined in civil law; (ii) the transfer, in any capacity, of rights in rem in immovable property; except for rights in rem of guarantee; iii) the assignment of rights relating to the transmissions previously referenced.

It is a basic rule of tax law that the institutes of private law must be understood according to the definitions that are conferred on it by the other branches of law to which they belong, since the tax law is not given to change concepts, under the terms of article 110, of the National Tax Code (BRAZIL, 1966).

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

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

In the analysis of the material criterion, the rule in force in Brazilian law gains relevance, in the sense that the transfer of properties between living persons, or of the rights in rem over real estate, is only effective

through the registration of the title in the Real Estate Registry Office, under the terms of articles 1,227 and 1,245, both of the Civil Code (BRASIL, 2002):

> Art. 1.227. The rights in rem over real estate constituted, or transmitted by acts between living, are only acquired with the registration in the Real Estate Registry Office of the said titles (articles 1.245 to 1.247), except in the cases expressed in this Code.
>
> Art. 1.245. The property is transferred between the living through the registration of the translative title in the Real Estate Registry.

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

It is differentiated, therefore, from the useful domain, since this is related to the powers arising from the enfiteuse or aforamento (ROCHA, 2015, p. 256).

Although the Civil Code of 2002 prohibits the constitution of new emfiteuses in its art. 2.038 (BRAZIL, 2020), it preserves the enfiteuses already 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 (BRAZIL, 1988).

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

With regard to the useful domain, the Federal Supreme Court has an understanding – signed at the time of the previous Civil Code – exposed in the summary statement No. 326, in the sense that "the incidence of the imposition of inter vivos transmission on the transfer of the useful domain is legitimate" (BRASIL, 1964).

As Caliendo (2019, p. 874) teaches, the immovable property by nature is the soil and everything that is incorporated into it in a natural way; in turn, the immovable property by physical access is everything that is artificially incorporated into it, as provided for in article 79 of the Civil Code (BRASIL, 2002).

The rights in rem over real estate, under the terms of article 1.225 of the Civil Code (BRAZIL, 2002), are the property, surface, easements, usufruct, use, housing, the right of the prospective buyer of the property, the concession of special use for housing purposes, the granting of real right of use and the slab, and the real rights of guarantee (mortgage, pledge and anticrese), under the terms of article 156, II, of the Federal Constitution (BRAZIL, 1998).

The aforementioned normative provisions of articles 1,227 and 1,245, both of the Civil Code (BRAZIL, 2002), in the sense that the transmission of real rights over real estate, and of the property is only perfected with its registration in the Real Estate Registry Office, already explain the content of the temporal criterion of the tax analyzed.

This means that the drafting of the Public Deed of Purchase and Sale is not among the hypotheses foreseen for the incidence of the tax in question, even though it is common for municipal laws to choose this fact as the moment for collection of the exaction, given the practicality and greater control.

The Superior Court of Justice, at the time of the judgment of the Special Appeal 1809411 / MS (BRAZIL, 2019) and the Federal Supreme Court in the judgment of the Appeal in Extraordinary Appeal 934091 (BRAZIL, 2016) have already manifested themselves in the sense that the generating fact of the ITBI is only perfected with the registration of the transmission before the Real Estate Registry Office.

The Federal Supreme Court, in February 2022 judged, in terms of general repercussion, issue No. 1124, defining the ITBI generating event as the transfer of ownership in the real estate registry office, which is still pending a final decision.

As taught by Leandro Paulsen (2019, p. 421), it is not possible to confuse the *inter vivo transmission,* which occurs by virtue of a legal business, with that resulting from the original acquisition of property, since in the latter there is no transmission, and as a consequence, there is no hypothesis of incidence of the tax.

The spatial criterion of the ITBI indicates that it will be due in the Municipality in which the property object of the transmission is located, according to article 156, § 2, item II, of the Federal Constitution (BRASIL, 1988). Thus, although article 41 of the National Tax Code (BRASIL, 1966) provides for the supposed competence of the States to collect the ITBI, its reading must be seen in the light of the Federal Constitution.

When dealing with the personal criterion, article 42 of the National Tax Code (BRAZIL, 1966) is clear in providing that the taxable person will be any of the parties to the transfer transaction, according to the applicable municipal law, the active subject being the Municipality of the place of the situation of the property transferred (article 156, § 2, item II, of the CF/88).

The quantitative criterion of the incidence matrix rule, in turn, "must always be explicit by the combination of two entities: calculation basis and aliquot" (CARVALHO, 2000, p. 320/322).

As provided for in article 38 of the National Tax Code (BRAZIL, 1966), the basis of calculation of the ITBI will be the "market value of the assets or rights transferred". In view of the fact that it is a tax subject to the mode of entry by declaration, it will be up to the local legislation to stipulate the form of measurement of the calculation basis.

In a recent judgment on issue No. 1113 of repetitive appeals, the Superior Court of Justice held that:

> 1) The basis of calculation of the ITBI is the value of the property transmitted under normal market conditions, not being linked to the basis of calculation of the IPTU, which cannot even be used as a tax floor;
> 2) The value of the transaction declared by the taxpayer enjoys the presumption that it is consistent with the market value, which can only be removed by the tax authorities through the regular initiation of its own administrative proceedings (Article 148 of the National Tax Code – CTN);
> 3) The municipality may not previously arbitrate the basis of calculation of the ITBI with support in reference value established by it unilaterally.

As Leandro Paulsen (2019, p. 422) points out, there is no obligation of the tax authorities, or the right of the taxpayer, to see used the value contained in the basis of calculation of the IPTU, based on the Generic Plans of Values, for the purpose of collecting ITBI.

Local legislation shall fix the tax rates, which may not be progressive. This is because, as already decided by the Federal Supreme Court, the ITBI is a tax of a real nature, which are not subject to progressivity, under the terms of article 145, § 1, of the Federal Constitution.

There is even a summary statement of no 656 of the Federal Supreme Court (BRAZIL 2003) regarding the matter: "it is unconstitutional the law that establishes progressive rates for the transfer tax "inter vivos" of real estate - ITBI based on the sale value of the property".

It is noteworthy, however, that the Praetorium Excelso, at the time of the judgment of the Extraordinary Appeal 562045 (BRAZIL, 2013a), has already revised its understanding regarding the impossibility of progressive rates in the case of taxes of a real nature, in discussion regarding the tax levied on the *transmission causa mortis*, being possible the revision, also, in the case of the ITBI (PAULSEN, 2019, p. 421).

The rate 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, pursuant 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, pursuant to Law No. 1,364, of December 19, 1988 (RIO DE JANEIRO, 1988).

4 BRIEF CLOSING

Although its origins date back to imperial legislation, the ITBI has undergone a major transformation over the years, especially through the bifurcation defined by the Federal Constitution of 1988 of the tax levied on the transmission of immovable property, providing for those occurring *inter vivos* as the competence of the Municipalities and those occurring *cause mortis* under the jurisdiction of the States and the Federal District.

There is still great divergence in case law as to the defining elements of the ITBI. It is enough to analyze the judgments that have taken place under the system of binding precedent formation by the Superior Courts in recent years to verify that basic issues regarding the very definition of the tax are not yet pacified.

A return to the matrix rule of tax incidence with a concomitant analysis of the historical-legislative aspects that provided its current normative framework allows a deeper understanding of the institute's surroundings.

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