

## What criteria determine whether or not to allow the deduction of materials or goods in the ISS calculation basis?

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### ABSTRACT

The purpose of this research is to present the context and relevance of the theme that circumvents the deduction of materials in the ISSQN calculation basis in the civil construction sector. Initially, an analysis of the applicable legislation will be presented, including Complementary Law 116/2003 and the consultation carried out in documents such as lawsuits, grievances, among others, in order to establish the foundations that will guide the analysis and discussion to be developed throughout the work. The methodology used will be qualitative, made through documents and in a descriptive way. The importance of understanding the different interpretations and legal positions on this subject will be highlighted, as well as the realization of case studies that will serve to illustrate the issues discussed. The results will bring the majority of the STJ's understanding, and relevant information will be exposed for the understanding of the results. The conclusions and final considerations will be presented, with the aim of contributing to the clarification and deepening of the debate on this topic.

**Keywords:** Tax Accounting, Tax Planning, Budgeting.

### INTRODUCTION

The Service Tax (ISS) is a tax that has as a taxable event the provision of services that are on the list attached to Complementary Law No. 116 of July 31, 2003, according to Machado dos Santos, et al. (2024); Guimarães; Ferreira Júnior, (2022). It is a Brazilian tax instituted and/or modified by municipalities throughout the national territory (Art. 156, III, Federal Constitution/1988), under municipal competence and the Federal District, it can also be called Service Tax (ISS) as part of Complementary Law No. 116 of July 31, 2003 given that only the services available in the list attached to LC 116/2023 (Vendrame 2020) are available.

The ISS is an important source of municipal revenue, being fundamental for the maintenance of various public services, its importance is also related to the ability to stimulate the economic development of municipalities according to Machado dos Santos, et al. (2024); Guimarães; Ferreira Júnior, (2022). Complementary Law No. 116/2003 is the basic rule that governs the ISS measures, each municipality must issue decrees regarding the withholding of the ISS, which guides the withholding of the tax, as long as it does not violate the State guidelines, as well as those of the Union (Lima, 2020; Brazil, 2003).

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Gomes (2015) brings the concept of service as "the intangible (immaterial) good in the stage of economic circulation. For there to be a service, it is necessary that the activity is provided to third parties and not to oneself." (Gomes, 2015, p.11). According to LC No. 116/03, Art.7 "The basis for calculating the tax is the price of the service" (BRASIL, 2003). Dantas (2020), addresses the concept of goods as "materials used in civil construction of the ISS calculation basis, as provided for in Complementary Law No. 116/03, covers both materials supplied by the service provider itself, as well as those acquired from third parties, precisely because ICMS is already levied on these materials, in the operation of circulation of goods, provided that they have been produced outside the place of provision of services." (Dantas, 2020).

In Reis (2003) it brought the subject of the ISS tax reform due to Constitutional Amendment No. 18/1965, being considered a new tax for those who worked in the tax area at the time. In 2010 GOMES brought theoretical and practical aspects related to the ISS, brings with it concepts about what the service would be for tax purposes, while Hungaro (2015) addressed the BC regarding the ISS that is levied on civil construction in the light of the national jurisprudence, comments on the ISS in the Federal Constitution, emphasizing that it is the supreme and fundamental law, and that it should always be considered above due to hierarchy.

In Dantas (2020), he raised the question of whether the deduction from BC of the amounts referring to materials used in civil construction was allowed. And in Oliveira (2024) he will bring an analysis of the ISS and the deduction of materials in the BC, with a focus on verifying and understanding the basis of the decisions that were made, and which serve as guidance for decision-making in the calculation of taxes, the impact it causes and understanding the reasons for when the BC deduction of goods from the ISS occurs or not.

Civil construction is a type of service that is included in the attached list of Complementary Law No. 116/2003, framed in item 7.02 and 7.05, and can be deducted from the calculation basis, collect where the service is provided and is still subject to ISS withholding, the activities carried out by organizations and self-employed professionals, as builders, contractors, architects, and engineers (Roitman, 2024). According to Complementary Law No. 116/2023 article 3, the ISS is "due at the place of the providing establishment or, in the absence of an establishment, at the place of domicile of the provider, except in the cases provided for in items I to XXV" (Brasil, 2003), when the tax will be due at the location, which in the case of civil construction is highlighted in item "III - the execution of the work, in the case of the services described in sub-item 7.02 and 7.19 of the attached list" (Brasil, 2003). Therefore, the ISS is due at the place where the service occurred (Roitman, 2024).



## RESEARCH PROBLEM

In some municipalities, during the regularization process, it is possible to apply deductions in the calculation of the ISS, considering amounts previously paid for outsourced services during construction (Passos, 2023). "This possibility, however, depends on the specific rules of each municipality and requires a careful analysis of local regulations" (Torrás, 2024), in which it was vetoed by LC 116/2023 and its amendments (LC No. 123, of 2006); LC No. 157, of 2016; LC No. 175, of 2020; ADIN 3142 as well as the CF/1988, since it is not possible to tax twice.

The basis for calculating this service is the total value highlighted in the note, this value includes the costs of materials and labor, the rate is determined according to what is established by the municipality according to local legislation, which can vary between 2% and 5%. As a rule, the calculation basis is the total value of the invoice, however the service 7.02 is included in the exception that allows the deduction of the value of the materials used in civil construction from the calculation basis (Toma, 2024), provided that they are produced by the service provider outside the place where the service provision occurred or will occur, and that are subject to ICMS.

According to Complementary Law No. 116, Article 7, paragraph 2, not to include as deductions from the Calculation Basis (BC), the supply of goods by the service provider that are determined in the list attached to the complementary law. More specifically, the values of the materials supplied in the civil construction services (items 7.02 and 7.05 of the attached list) (Brasil, 2003).

As Dantas (2020) presents, the deduction from the ISS calculation basis of the values of materials used in civil construction covers the materials supplied by the service provider itself and the materials acquired from third parties, as the Tax on Transactions related to the Circulation of Goods and on the provision of interstate transport services is levied on these goods, intermunicipal and communication (ICMS), as long as they have been produced outside the place of service provision (Dantas, 2020).

The deduction of BC materials from ISS is a mechanism to reduce the amount of tax owed by companies that provide services, Complementary Law 116/2003 allows this deduction in cases where the materials used in the provision of services are owned by the customer and are transferred to him after their use. This deduction is important, as it avoids the collection of tax on an amount that does not effectively represent the revenue earned by the company, so the calculation of the tax becomes fairer and provides economic activity. The BC deduction also has a positive impact on the competitiveness of companies that provide services in the field of civil construction.



Prior to Complementary Law 116/2003, the rule that pleaded for the calculation of the ISS on civil construction was DECREE-LAW No. 406, OF DECEMBER 31, 1968. This decree stated that:

Article 9 - The basis for calculating the tax is the price of the service.

Paragraph 1 - In the case of the provision of services in the form of the taxpayer's own personal work, the tax shall be calculated, by means of fixed or variable rates, according to the nature of the service or other pertinent factors, not including the amount paid as remuneration for the work itself.

Paragraph 2 - In the execution of hydraulic or civil construction works, the tax shall be calculated on the price deducted from the corresponding installments:

- a) the value of materials purchased from third parties, when provided by the service provider;
- b) the value of subcontracts already taxed by the tax

In this way, it was understood that the value of the materials would be deducted as long as they were acquired from third parties but were supplied by the service provider, LC 116/2003 came later and superimposed this information, informing how the ISS calculation basis should be made, which brought in item 7.02 Execution, by administration, contract or subcontract, of civil, hydraulic or electrical construction works and other similar works, including surveying, drilling of wells, excavation, drainage and irrigation, earthmoving, paving, concreting and the installation and assembly of products, parts and equipment (except for the supply of goods produced by the service provider outside the place where the services are rendered, which is subject to ICMS) (Brazil, 2003). Thus, they are produced by the service provider, no longer from third parties, and that it should be produced outside the place of service provision, since in this case these materials would already be subject to ICMS.

In this context, the present research problem has as a research problem what is the criterion for allowing or not the deduction of goods in the ISS (Tax on Services of Any Nature) calculation basis, considering the current legislation and the interpretations adopted in different municipalities and states?

## JUSTIFICATION

Based on previous works authors such as Camilla Fagner de Carvalho e Costa, Jeferson de Castro Vieira, Josenildo dos Santos, José Francisco Ribeiro Filho, among others, who address issues related to taxation, tax auditing, and the management of the ISS, this research seeks to contextualize the application of the tax and its deductions within a practical and normative panorama. For instance:

The TTO (Theory of Optimal Taxation) is mentioned to highlight the importance of inclusion and social responsibility in public policies for tax management, suggesting that the



differentiated treatment of economic agents may impact the application of the ISS.

The analysis of specific cases, such as that of an advertising company using the Newcomb-Benford Law, shows how auditing techniques can be applied to evaluate the process of deduction of goods in the ISS calculation basis.

The research is relevant, because it seeks to understand the factors that influence the way the ISS is applied, especially in relation to the deduction of materials. This understanding contributes to the formulation of fairer and more efficient public policies, in addition to providing subsidies for companies and public managers in tax decision-making.

The study is based on the analysis of Public Processes and Consultations, in order to verify the decisions made for the resolution of the cases. Information on municipal and state legislation is collected, as well as information available on transparency portals and public databases.

## DELIMITATION OF THE RESEARCH

The research is limited to the temporal aspect in relation to the time it took to have a decision regarding the deduction of materials from the ISS calculation basis. In the legal aspect regarding the legislation, Complementary Law No. 116, of July 31, 2003, and Decree-Law 406, of December 31, 1968.

The services mentioned that will be analyzed are legally covered by Complementary Law No. 116, of July 31, 2003, as follows:

List of services attached to Complementary Law No. 116, of July 31, 2003.

7 – Services related to engineering, architecture, geology, urbanism, civil construction, maintenance, cleaning, environment, sanitation and the like.

7.02 – Execution, by administration, contract or subcontract, of civil, hydraulic or electrical construction works and other similar works, including surveying, well drilling, excavation, drainage and irrigation, earthmoving, paving, concreting and the installation and assembly of products, parts and equipment (except for the supply of goods produced by the service provider outside the place where the services are rendered, which is subject to ICMS).

7.05 – Repair, conservation and renovation of buildings, roads, bridges, ports and the like (except for the supply of goods produced by the service provider, outside the place where the services are provided, which is subject to ICMS).

From the spatial point of view and considering the legal delimitation, it is the scope of the National Congress, and the competence falls on the Municipalities and the Federal District with the responsibility of issuing decrees that complement the sanctioned guidelines and collecting the tax. In addition, decisions of the STF on the deduction of materials from the ISS calculation basis that will be used for analysis are:



- ACCORDING TO SG.REG. IN EXTRAORDINARY APPEAL 603,497 MINAS GERAIS;
- SPECIAL APPEAL Nº 1,916,376 – RS (2021/0011137-9);
- AGINT NO ARAVO IN SPECIAL APPEAL NO. 1009715 – SP (2021/0146993-3);
- CON PROCESS – 07/0035295 – TAX CONSULTATION; and
- PROCESS NO. 6130/2023 – CONSULTATION SOLUTION NO. 02/2023.

From a thematic aspect, the research will focus on the deduction of materials from the ISS calculation base in the civil construction service. An analysis of the current legislation, which regulates this deduction, and how it is applied will be made, observing the jurisprudence and recent decisions of the STF that influence the composition of this calculation basis.

## ORGANIZATION OF THE RESEARCH

In order to organize the work and thus have a better understanding of the study, this research will be distributed in five (5) chapters. In the first chapter is the introduction, problem and objectives, and justification.

In the second chapter, the tax system will be presented, which brings the tax burden and the service tax, clarifying what this tax system is, how it is composed, what the tax burden refers to and what it can entail when it is high or very low, deals with the importance of taxes, discusses the ISS calculation basis, cites the law that governs this tax, also brings studies that are related to the theme of this research.

The third chapter deals with the methodology that was used in the development of the research.

The fourth chapter is presented and discussed the data that were chosen for the research, on the deduction of materials from the ISS calculation basis in civil construction services.

And finally, in the fifth chapter, the conclusion is described, bringing the outcome of the problem, the objectives and limitations of the theme addressed, and finally the recommendations for future research.

## OBJECTIVE

The objective is to analyze the criteria that determine whether or not to allow the deduction of goods in the ISS calculation basis, based on the current legislation and the interpretations adopted in different municipalities and states.

In order to achieve the general objective, the following specific objectives are defined:



- Verify the selected documents. Each process/appeal will be analyzed to differentiate the decisions;
- compare the decisions on the deduction of the calculation basis, the objective is to find a certain index that allows this analysis to be made;
- identify in the decrees and laws if there is any motivation for the decisions that were made. This will be done through text searches of the decrees in search of justifications, news regarding the subject will also be searched on portals available on the internet.

## **THEORETICAL FOUNDATION**

In this section, in order to improve the understanding of the research, the theoretical basis that will support the development of the rest of the work will be presented.

### **THE TAX SYSTEM**

"The term tax system refers to a group of rules that organize all taxation in a country" (Gonçalves, 2024, p 4), that is, its objective is to generate revenues for Public Sector Entities, which are used to finance government activities and provide public services to the population. "In Brazil, there are several types of taxes, each with its own specific characteristics and purposes." (Zuppane, 2023, p 10).

According to Law No. 5,172, of October 25, 1966, Art.3 "Tax is any compulsory pecuniary payment, in currency or whose value can be expressed therein, which does not constitute a sanction for an unlawful act, instituted by law and collected through a fully linked administrative activity." (Brazil, 1966).

The Brazilian Tax System "is composed of three spheres of government - Federal, State and Municipal - and has a complex and diversified structure" (Silva, 2024, p 18), each sphere has its tax authority and is responsible for collecting taxes, fees, social contributions.

For Orair and Gobetti (2018, p. 216), the tax system is "the set of legal rules that governs the exercise of tax power by the various public agencies in the form of taxes levied in the country and, notoriously, controversial in Brazil and elsewhere" (Orair and Gobetti, 2018, p.216).

Taxes are necessary for the functioning of the country, as they are the ones that finance goods and the provision of public services.

According to Ishida and Martelli (2015, p.1) "The National tax system is determined by the Federal Constitution, which establishes the Union, states and municipalities with the competence to create, institute, collect and supervise the payment of taxes by taxpayers."



(Ishida; Martelli, 2015, p.1).

The Brazilian Tax System is also considered complex and bureaucratic, it undergoes constant changes, which makes it difficult for taxpayers to understand their obligations and rights, another factor that makes it difficult to understand is the lack of transparency, in addition to having a high tax burden compared to other countries. "The complexity of the tax system is amplified when we look at the number of taxes in force and their rates." (Gonçalves, 2024, p 2).

## **Tax Burden**

The tax burden refers to the total amount of taxes, fees, and contributions, which are collected by the government in relation to the income, production, and consumption of goods and services in the country. "It is important because it helps finance the functioning of the government and the services it offers to society. The higher the tax burden, the more resources are being allocated to financing various government activities, such as infrastructure, security, health, and education" (Neves and Santana, 2024, p 1). The tax burden can vary according to the structure of the country, such as the level of economic development, the size of the public sector, the efficiency of tax systems, and the fiscal policies adopted. "The tax burden consists of all the taxes that the government collects from taxpayers. Whether they are individuals or legal entities. To it, there is also the so-called GDP, which is the country's Gross Domestic Product." (Almeida 2022).

The high tax burden can be seen as a source of funds for the government to finance public services and social programs, but it can also affect the country's competitiveness and the ability of companies to invest and grow, "taxes take a good portion of the resources earned by Brazilians, whether by individuals or companies. Therefore, there is a limitation of their investment or consumption capacity, hindering economic growth." (Alves, et al, 2012, p,44 and 45).

A very low tax burden can cause financing problems for the government, and harm the quality and scope of public services.

According to Almeida (2022), in Brazil, the tax burden is considered very high, and despite this, it is not always appropriately allocated to the population. "According to research, the value is lower than many countries classified as developed. On the other hand, the Brazilian Institute of Tax Planning carried out a study and revealed the following information: the Index of Return of Well-Being to Society is the lowest among the countries that entered the survey." (Almeida 2022).





## Taxes

According to Almeida (2022), taxes are taxes collected by the levels of government, they are divided into Federal that include Income Tax, Taxes on Industrialized Products (IPI), Tax on Financial Operations (IOF), and the Social Integration Programs (PIS) and the Contribution to Social Security Financing (COFINS); State Taxes, which include the Tax on the Circulation of Goods and Services (ICMS), and finally the Municipal Taxes, which include the Tax on Services of Any Nature (ISS) (Almeida, 2022).

The taxable event is an important factor that must be understood to know when the ISS will be levied. According to Alvez "The taxable event of the ISS is to provide the services that are on this list. Who can collect this tax are the municipalities. As it is a tax, the ISS has no specific destination, it goes to the municipality's coffers and makes up its budget." (Alvez, 2021).

Taxes are a government collection tool, but they can also be a factor that affects the competitiveness of companies and the distribution of society's income. Some taxes have their rates diversified, as in the case of ICMS, which has different rates in different states, and ISS, which receives a different rate, in which Complementary Law No. 116 in article 8, paragraph II, establishes that the maximum rate will be 5% and article 8-A that the minimum rate will be 2%, for each service provided for in the annex listed in Complementary Law No. 116/2003. "Municipalities are free to define ISS rates within the minimum parameter of 2% and maximum of 5%. Therefore, it is common for a certain service to be taxed at different rates between two municipalities." (Alvez, 2021).

These rates are applied to a calculation basis, more specifically the ISS calculation basis is according to the total value of the service provided provided for in article 7 of LC No. 116/2003, there are some cases provided for in LC No. 116/2003 in which the value of the service also involves the supply of materials that will not be taxed by ISS, in this case, the ISS is not levied on the value of the parts applied in maintenance, which are taxed by the ICMS (Brasil, 2003). The ISS is levied on the provision of services by both legal entities and individuals, as long as they carry out activities subject to the tax. "The ISS is levied on the provision of services, but not on the simple activity itself, it falls on the onerous transfer of an intangible asset to a third party, since only the transportation provided to third parties constitutes a provision of services." (Guimarães and Ferreira, 2022, p 4).

According to LC No. 116/03 Art 1 § 2 "Except for the exceptions expressed in the attached list, the services mentioned therein are not subject to the Tax on Transactions Related to the Circulation of Goods and Provision of Interstate and Intermunicipal Transport and Communication Services – ICMS, even if their provision involves the supply of goods." (BRAZIL,



2003).

## RELATED STUDIES

A very recurrent subject is tax reform, mainly because Brazilian taxes have a great complexity, one of the taxes that has a difficulty to be understood is the ISS, this is due to it being municipal and having different rates for all services listed in Complementary Law No. 116/2003, which is the rule that provides for the ISS, However, it is the duty of the municipalities to issue decrees to establish some complementary criteria to the law, as the law discusses the services as a whole, and the municipalities have their peculiarities, being adjusted by these decrees.

Felippe (2022) addresses the difference between ICMS and ISS, identifying their taxable events, taxpayers, and brings the mixed operations in which companies provide installation, assembly, among other services, and, at the same time, supply the goods to their customer. These are provided for in the services in the list of services, attached to Complementary Law 116/03 (Pedrozzo, 2022).

Camilla and Jeferson (2021) set out to present classic and contemporary foundations of the theory of optimal taxation (TTO) and problematize its presence and possibilities in the debate on tax policy in Brazil. They concluded that "it is possible to reconcile social welfare with taxation, that efficiency and equity are premises for tax policies, that the State must be intelligent in planning and management, allowing the perception of tax policy to be changed. In this way, it ceases to be the citizen's thing, a misfortune for companies and the obstacle to development" (Costa and Vieira, 2021, p 13 and 14).

Josenildo and other members (2007) proposed to "evaluate whether the model based on the Newcomb-Benford Law (NB-Law) is applicable to the ISS inspection work in order to identify a more effective instrument for tax inspection and incorporate it into digital audit procedures. They concluded that it is possible to invert the view of signaling fraud that was previously only based on confrontation with the data of service takers, to the generation of indicators of deviations only with the information of the taxpayers themselves inspected (Josenildo and other members" (SANTOS et al. 2007, p 14).

Marlei, Alex and Josiane (2017) identified the tourism service as something to be studied "pointing out a direct relationship with the provision of services, in which the taxation of ISS is levied. Through municipal tax collection in which goods and services were generated for society. Thus, the research aimed to verify the performance of ISS collection in the period from 2012 to 2016, in the five municipalities of the destination inducing the regional tourism development of

Hortênsias, in the state of Rio Grande do Sul. It is concluded that the collection of ISS does not participate significantly in the total collection of current revenues, that is, even if the municipalities analyzed have an economy based on the provision of services resulting from the Brazilian Journal of Management and tourism activity, in general, the ISS has a low percentage in the collection of current revenues" (Mecca et al 2017, p 186,187,189).

Danilo addressed the STJ's understanding: "The ISS calculation basis is the price of the contracted civil construction service. From it, it is only possible to deduct the value of the material used if it was produced by the provider outside the construction site and if it was sold by him with the incidence of ICMS. With this understanding, the 1st Panel of the Superior Court of Justice confirmed the pacification of a tax controversy that lasted a decade, but recently came to an end through a decision of the Federal Supreme Court." (Vidal, 2023).

In the end, Danilo brought in his study "In the case judged by the 1st Panel of the STJ, the taxpayer's special appeal was denied because the company did not allege, much less prove, that it sold separately the materials used in the concreting services and submitted their value to ICMS taxation. The vote was unanimous" (Vidal, 2023).

Gabriela brought how the ISS works in civil construction "In Civil Construction, the Service Tax (ISS) is levied on a wide range of activities carried out by organizations and self-employed professionals, such as construction companies, contractors, architects and engineers. This municipal tax has its particularities and direct implications for the operation of these professionals in Brazil." (Torres, 2024).

Table 1: Previous studies

Author(s)	Newspaper	Results
Camilla Fagner de Carvalho e Costa Jeferson de Castro Vieira (2021)	Journal of Contemporary Administration	The text draws attention to the fact that the TTO manages to bring social issues to the discussion of public policies for tax management in a structured way, with the perspective of inclusion and social responsibility, based on the importance of a differentiated treatment of economic, physical and legal agents, their needs and possibilities.
Josenildo dos Santos, José Francisco Ribeiro Filho, Umbelina Lagioia, Bartolomeu Figueiredo Alves Filho and Ivson José Caldas de Araújo (2009)	Accounting & Finance Magazine	The results from the case study of the advertising company showed the applicability of the model based on the <i>Newcomb-Benford</i> Law to the ISS tax audit process.
Marlei Salete Mecca, Alex Eckert and Josiane Menegat (2018)	Brazilian Journal of Management and Innovation	The municipality of Gramado was the one that had the most evolution in the collection of ISS over the 5 years, obtaining a total growth of 117.5%. The municipality that had the lowest collection was Picada Café, with a drop of 13.19%. It can be said that the economic and financial crisis did not affect



		Gramado, since it is a municipality with greater tourist infrastructure, while Picada Café, which does not have so many tourist attractions, was more Affected
Felippe Pedrozo (2022)	Filed	There are no results, as it is only a subject matter.
Danilo Vidal (2023)	Legal Consultant	It addresses the BC of the ISS and the position of the STJ. Along with the text is one of the rulings that will be used in the analysis.
Gabriela Torres (2024)	Sienge	It brings how the ISS works in civil construction. It has no results per se tractor of a matter

Source: Survey data (2023 and 2024).

Felippe brings the difference between ICMS and ISS, in what allows us to identify in the context of civil construction, the taxable event of ISS is linked to the provision of services. The tax legislation establishes that, although the service may involve the supply of materials, what characterizes the tax obligation is the provision of the service. The discussion about the deduction of materials from the ISS calculation basis is impacted by the definition of when the ICMS has to be levied. If a construction company provides materials as part of the service, there may be overlap in tax obligations. The way this service is categorized can affect the way ISS is calculated. The correct interpretation of mixed transactions is essential to ensure that companies do not pay double tax.

Danilo comments on the STJ's understanding, which will be one of the necessary points for the understanding as the basis for calculating the ISS for the civil construction service.

This is directly in line with the research, which seeks to understand how these criteria affect the taxation of civil construction services. The research explores how the interpretation impacts the practice of civil construction service providers, considering the implications of allowing or not allowing the deduction of materials from the ISS calculation basis.

Camila and Jeferson address how the provision of services works in civil construction, the understanding that the civil construction service provider is, as a rule, a taxpayer only of the ISS, emphasizes the need for efficient management and tax compliance. This is related because providers must be aware of the legal implications to avoid tax surprises.

## **METHODOLOGY**

In the topic, the research methodology is presented, which encompasses the classification of the research, the collection of data and, finally, the treatment of data.

Classification: The methodology used for this research is qualitative in nature, in which it "guides research procedures on objects of study that require non-numerical descriptions and analyses of a given phenomenon." (Carlini, 2022), is framed as a documentary research,



seeking information in Processes, Special Appeals, Appeals and consultations, intended to explain "the phenomena and context, not being able to statistically generalize the results to a population or to other different contexts." (Machado, 2023), and descriptive, thus being "a thorough analysis of an object of study (a company, problem-situation or a certain region)." (<https://doity.com.br/blog/metodos-de-pesquisa/>).

This is a documentary research, as it will have as its object of analysis documents that deal with the deduction or not of materials in the ISS calculation basis in relation to the services mentioned in article 8, item 1 of Complementary Law 116, of 2003, which are 7.02 and 7.05. Situations in which the deduction of goods from the ISS calculation basis was or was not allowed may be due to addressing a correct alignment with what is expressed in the rules that express about the ISS, or by obtaining a misinterpretation of what is in the rule that addresses the ISS. "Documentary research has the annual nature of gathering, classifying and distributing documents of all kinds from the different domains of human activity" (FERRARI, 1982, p. 224).

The study will also present characteristics regarding the results as a qualitative research. "Qualitative research is characterized by the conceptual development of facts, ideas or opinions, and the inductive or interpretative understanding based on the data found." (SOARES, 2019, p. 1). It will be a descriptive research, as it will collect more detailed information regarding the subject, and describe it. According to Salgado (2023), descriptive research seeks to describe and explain what is being researched and does not make explicit the reasons why this happens.

The research sample is composed of case analyses that show how different cases on the same subject and their peculiarities were approached. Data collection will be done by direct observation. From the analysis of the data, it is intended to identify the conclusions reached regarding the deduction in the calculation basis of ISS materials on the economic activity in the municipalities, contributing to the debate on the effectiveness of the main issues that occur the lack of this deduction in the BC or the undue deduction.

Population: Documents selected according to the subject to be addressed - With a study limitation for the deduction of material from the calculation basis specifically of the service tax.

Sample: Corresponds to the total number of documents that will be analyzed the decision on the deduction of the ISS merchandise calculation basis – to make the analysis and comparisons of the selected processes.

Data collection: It will be done through the analysis of municipal decrees and Complementary Laws. Such documents will serve as a basis for understanding the decisions and being able to make the analyses.

Categories: Deductible services according to LC 116/03 art. 7, which are services 07.02



and 07.05. The year in which the decisions regarding the decrees in the part that deals with the deduction of goods from the ISS calculation basis.

Chart 2 - Categories and Subcategories of the study.

Category	Subcategory	Source
Decrees	Decrees	Decree-Law No. 406, of 31 December 1968.
Laws	Laws	Complementary Law No. 116 of July 31, 2003.

Source: Prepared by the author.

Research instrument: Documentary research - Will be done manually.

Table 3: Study characteristics

Specific Objective	Variable	Treatment	References
Check the selected documents. Each process/appeal will be analyzed to differentiate the Decisions.	Consider the decision made for a given case that will be included in the analysis and comparison.	Distinguish each case, which will be analyzed and compared. Relate the cases so that the comparisons.	Grievances, appeals and processes
To compare the decisions on the deduction of the calculation basis, the objective is to find a certain index that allows this analysis to be made.	Consider the processes being analyzed.	Verify that the data is consistent with reality by removing incorrect data, Irrelevant and doubtful.	Laws related to the subject.
Identify in the decrees and laws if there is any motivation for the decisions that were made. This will be done through text searches of the decrees looking for justifications, it will also be searched news on the subject on portals available on the internet.		Organization of the data into categories that are relevant to make the analyses.	

Source: Prepared by the author.

## DEVELOPMENT

The research developed here has as its object of analysis five (5) processes with decisions made by the STJ, in relation to the deduction of BC materials from the ISS, in the civil construction service. The cases were selected with the purpose of exploring and identifying the criteria for the interpretation applied by the courts on the exclusion of BC materials, as provided for in item 7.02 of the list attached to Complementary Law No. 116 of July 31, 2003.



## PRESENTATION AND DISCUSSION OF DATA

The results show the relevance of the decisions for the civil construction sector, demonstrating the legal and fiscal aspects that imply the appropriate application of tax legislation. The detailed analysis of the processes seeks to provide a clearer perception of the legal and practical implications of the inclusion or exclusion of materials in the ISS calculation basis, collaborating to facilitate the understanding of the jurisprudence established within the scope of the STJ and its potential implications in the tax planning of companies in the civil construction sector.

### Presentation of data

The relevant information of each situation studied is displayed below, taken from several published processes.

Table 4: Decision of the Case 01

<b>Case Study 01</b>
<b>According to Ag.Reg. In Extraordinary Appeal 603.497 Minas Gerais</b>
<b>Date: June 29, 2020</b>

Source: Process Data (2024).

The process analyzes the decisions of the STJ, regarding the deduction of BC materials from the ISS, as far as it involves the taxpayer and the conflicting with the Federal Revenue Service's understanding of the due taxation. This lawsuit takes place between the parties Topmix Engenharia e Tecnologia de Concreto S/A (taxpayer), which is the civil construction company, against the municipality of Betim.

The legislation used for this case was Decree-Law 406/1968, which deals with the permission to exclude the value of materials from the ISS calculation basis, produced outside the place where the work took place and were subject to ICMS taxation. Initially indicating that it did not establish an interpretation or analysis of the subsistence of the rule that succeeded it LC 116/2003.

The related legislation, specifically Decree-Law 406/1986, determines that the calculation basis of the Service Tax is the total value of the service provided, which normally includes the labor and materials used. The central point of the debate is about which materials are allowed to be deducted from BC.

In article 9, paragraph 2, paragraph "a" of the aforementioned decree, it ratifies that materials produced by the provider outside the place of execution of the work are included in the BC, which are subject to ICMS". In this case, the Supreme Court of Justice had to interpret



whether the deduction applies to any material or only to those that meet certain criteria, one of these criteria being to have been sold with the incidence of ICMS.

The recent decision of the STF established the position that civil construction service providers are not allowed to exclude materials used in the works, which do not meet the legal requirements, determined in the rules that regulate this tax. And the final decision was partially granted to the appeal, to reaffirm the thesis of the reception of article 9, paragraph 2, of DL No. 406/1968 by the 1988 Constitution.

Table 5: Decision of the Case in Case 02

<b>Case Study 02</b>
<b>Special Appeal No. 1.916376 – RS (2021/0011137-9)</b>
<b>Date: March 14, 2023</b>

Source: Process Data (2024).

This process has as conflicting parties the company Superbloco Concretos Ltda, in this case as the appellant, on the other hand, the Municipality of Ivoti as the respondent, The company Superbloco Concretos Ltda, seeks to deduct BC materials from the ISS and seeks to refund the amounts overpaid.

The STF has established its understanding on the BC of the ISS in civil construction, the materials acquired from third parties and produced at the place of provision of the service must be part of the tax calculation basis, with the exception of materials produced outside the site of the work, which are subject to the incidence of ICMS, which can be excluded from the BC of the ISS.

The decision was based on Complementary Law No. 116/2003, article 7, paragraph 2, which specifies the BC of the ISS, and the decision considered Precedent 167 of the STJ, which specifies that the supply of concrete is subject to the ISS, article 9, paragraph 2, of Decree Law 406/1968 was also used as a basis, reaffirming the jurisprudence on the impossibility of deducting materials from the ISS calculation basis.

The STF decided to dismiss Superbloco's appeal, it was reaffirmed that the tax calculation basis is the total price of the contracted service, thus not allowing the deduction of the value of the materials, thus the court reaffirmed the position and strengthened the case law of the STJ.

Table 6: Decision of the Case 03

<b>Case Study 03</b>
<b>AgInt in the Interlocutory Appeal in Special Appeal No. 1900715 – SP (2021/0146993-3)</b>
<b>Date: February 21, 2022</b>

Source: Process Data (2024).





In this case, the Municipality of Jundiaí (Aggravating Party) argues that the total value of the service should be taxed, as it argued that the concreting service did not fall within the exception provided for in Decree-Law 406/1968, while the company Concrebase Serviços de Concretagem Ltda (Aggravated), argues that the materials used should be deducted from the BC of the ISS, and that if the materials were included in the BC, there would be an undue incidence of the tax on the materials that have already been taxed by ICMS.

The case was based on the decision of the STJ in extraordinary appeal 406.947/MG (case study 01), which had recognized the possibility of excluding BC materials from the tax used in civil construction, and on Decree-Law 406/1968. Minister Herman Benjamin emphasized the understanding in the STF and STJ, that in civil construction services, there is the possibility of deducting from the ISS calculation basis the values related to the materials supplied by the service provider.

The decision of the Second Court of the STJ, unanimously, dismissed the Municipality's appeal, remaining in favor of the company Concrebase. Thus, confirming again the possibility of deducting materials from the tax calculation basis, in the concreting service, establishing the understanding that the tax should not be levied on the goods used in the work, as the ICMS taxation has already occurred.

Table 7: Decision of the Case in Case 04

<b>Case Study 04</b>
<b>CON – 07/00352295, Tax Consultation</b>
<b>Date: October 24, 2023</b>

Source: Process Data (2024).

This consultation aims to clarify the correct value of the BC of the ISS, whether the cost of the material used in the provision of the service can be deducted from this value, for the calculation of the tax, in civil construction. It was developed by the Santa Catarina State Secretariat of Finance, represented by Sérgio Rodrigues Alves, and was clarified by the Court of Auditors of the State of Santa Catarina (TCE-SC). The subject arose from various interpretations of the implementation of the legislation and established jurisprudence.

The interested parties are the Municipalities of Santa Catarina and companies in the civil construction sector, which are directly impacted by the decision on the taxation of materials used in the works.

The consultation was based on Complementary Law No. 116/2003, which established general rules on ISS tax legislation, including the definition of the tax calculation basis. And in several precedents of the STJ, which formed the position that the materials used in the provision



of the civil construction service.

The Court of Auditors initially decided that the materials should be included in the BC of the ISS, since they were part of the service provided, as the STJ adopted the understanding that companies that provide services in the civil construction sector, when they acquire materials and use them as inputs in their services, they are not ICMS taxpayers, because the act of merchandising does not occur. Therefore, it should fall on the ISS operation, as LC No. 116/2003 does not contemplate the merchandise used as inputs in the work within the scope of civil construction.

However, the consultation proposed a review of the decision, arguing that LC No. 116/2003 allows the deduction of materials, as long as they meet the requirements that are in the law, which was adapted to the decision of the STJ, which had already recognized the possibility of excluding the cost of BC material from the tax, provided that they were produced outside the site of the work.

As a conclusion, the court decided that the inputs used do not fit into the concept of circulation of goods, for the incidence of ICMS, so this value has to be part of the ISS calculation basis, except when produced outside the place of the service provided, and which were subject to ICMS.

Table 8: Decision of the Case 05

<b>Case Study 05</b>
<b>Process No. 6130/2023, Consultation Solution</b>
<b>Date: July 17, 2023</b>

Source: Process Data (2024).

The consultation solution brings the criterion for the deduction of materials from the ISS calculation basis, using as a basis the federal legislation such as LC No. 116/2003 and the interpretation of courts such as the STJ. LC No. 116/2003 establishes the calculation basis, and allows the deduction of the cost of materials, provided that it meets the criteria defined by it previously mentioned throughout the research.

It is necessary that the materials are registered in a state invoice, so that the incidence of ICMS is proven, because when they appear in a municipal tax document, the ISS taxation on the value of the materials can be avoided, excluding these costs. The objective is to avoid double taxation, that is, if the ICMS has already been levied on the value of the materials, the ISS should not be taxed again on top of this value, but if the ICMS has not been taxed, this value must be included in the ISS calculation basis.

It was concluded that the deduction of materials is possible, as long as it is produced



outside the place of provision of the service, and by the service provider, and as long as the commercialization as a commodity is highlighted with the incidence of ICMS, and with the issuance of an invoice, according to state regulation.

## **Discussion of Data**

It is important to highlight the focus, which is to understand when there is the possibility of having the deduction of the value of materials from the calculation basis of the Tax on Services of Any Nature, the cases presented were chosen because it is this possibility and because some of them become a reference for the solution of other processes and studies.

The most up-to-date case law formed by the STJ, in harmony with the decisions of the STF, states that the deduction of materials should occur only when these materials are produced outside the place where the work took place, and that they were sold separately, with ICMS taxation.

In case study 01, at first the decision was in favor of allowing the exclusion of the costs of the materials used in the provision of service, thus becoming beneficial to the taxpayer, but the understanding is that for the materials used at the site of the work, it cannot be deducted, the decision evidenced Decree-Law 406/1968 associating Complementary Law No. 116/2003, which establishes the taxation of the import on service. The process has evolved by establishing the understanding that only materials made outside the service site can be excluded from the ISS calculation basis, distinguishing the inputs used in the work, the other cases support this same interpretation.

In case study 02, the STF dismissed the company's appeal, determining that in this case the materials should include the ISS calculation basis, stating that the materials obtained from third parties or prepared at the site of the work must be aggregated in the BC, as the exclusion is allowed only when the goods are produced outside the place where the service is provided, made by the provider itself and that there was the incidence of ICMS. With this case it is possible to iterate the understanding of case study 01, what differentiates the cases is that in case 02, it was dismissed based on the precedents of Precedent 167 of the STJ, which discusses the supply of concrete, by contract.

In case study 03, the STJ had its decision in favor of the company, reiterating that the materials used in the services have the possibility of being excluded from the BC of the Service Tax, as long as it meets the stipulated criteria. The decision was equivalent to the understanding of the RE 406.947/MG process. In which it is equal with case study 01 to 02.

In case study 04, the TCE-SC claimed that the materials used in civil construction works



should be part of the BC of the ISS, except when produced outside the place of service and taxed by the ICMS, in this consultation different interpretations of LC No. 116/2003 and Decree-Law 406/1968 were exposed. Initially, the TCE-SC imposes a firmer position, considers that the values of the materials should be included in the BC of the ISS, after a reassessment of the jurisprudence, aligned itself with the precedents of the STJ, allowing the exclusion of materials, only produced outside the place of the service provided.

In case study 05, the consultation solution discussed the tax documentation, which is necessary for proof, to allow the deduction of the costs of BC materials from the tax, because the issuance of the invoice proves the incidence of ICMS, if this issuance does not occur, the materials must be part of the ISS calculation basis. In this study brings the technical and documentary parameters to evidence the exclusion of the values, complementing the previous decisions, the documentary evidence through the issuance of the state invoice, was an aspect that had not been deeply investigated in past cases.

The cases studied present the evolution that began with the permission of the deduction of the materials, in favor of the taxpayer, and which was later reversed being more restrictive to this exclusion, the case study 01 and 02, do not allow the complete deduction of materials used in civil construction services.

In 2020, the understanding that was established is that the exclusion of the costs of goods was limited to specific cases, in which the taxpayer was subject to ICMS and that the materials were sold with the taxation of this tax. This conception is correlated with case study 05, which emphasizes the need for documentary evidence in order for the deduction to be allowed. It is also consistent with case study 03, which revalidates that the materials used in concreting services must be included in the tax calculation basis, if it does not meet the established criteria.

The decisions influence the way companies in the construction industry manage taxation, the lack of understanding about legislative rules is capable of causing tax discussions and legal uncertainty. The case studies present the debate on the BC of the tax, and whether or not the materials used in the works should be part of the BC value for ISS calculation, as well as the previous studies, in this work it was also analyzed the decisions made by the STJ, and how this had an impact on the decision of other processes.

The impossibility of deduction without proof arose both in the research of previous studies, such as in the study of case 01, where the appeal was denied to the taxpayer, as it was unable to present evidence that the materials were sold separately and subject to ICMS taxation, and in case study 02, in which the company also had its request for refund of the amount paid, for not being able to adequately prove that the materials had been sold with the incidence of



ICMS. And that interconnects with the consultation solution, in case 05, which proves the need to have these purchases documented for proper proof.

The previous studies contribute to the differentiation of understanding when there is an ICMS levy and when there is an ISS levy, clarifying when each tax should be levied, and who are the taxpayers of each tax. Bringing that the ICMS is levied on the supply of goods made outside the place of provision of the work, in which the study study 05 indicates that the materials must be registered in the best way to have proof so that in this way it can make the deduction from the ISS calculation basis.

## ANALYSIS OF THE RESULTS

To compare the results of the research with previous studies, we can highlight advances, similarities and gaps found in the different analyses. As for the aspects that advanced, the present research was unable to evolve.

In relation to similarities with previous studies, regarding the interpretation of Complementary Law No. 116/2003: Both the study and the works of Camilla Fagner de Carvalho e Costa Jeferson de Castro Vieira (2021) and Marlei Salete Mecca, Alex Eckert and Josiane Menegat (2018) address the application of tax legislation. In the case of his research, he focuses on the implications on the deduction of materials, while the other studies deal with the collection and public policy related to the ISS, especially in local and specific scenarios.

ISS Calculation Basis in the context of civil construction: The analysis of the inclusion of materials in the ISS calculation basis in the research reflects discussions present in recent and previous decisions, such as the study by Danilo Vidal (2023), which also discusses the ISS in the context of STJ decisions, and Gabriela Torres (2024), which discusses the ISS in civil construction, but without bringing conclusive results.

As for the aspects that do not advance the research, in relation to the impact of the economic crisis on ISS collection: Studies such as Marlei Salete Mecca, Alex Eckert and Josiane Menegat (2018) bring an analysis of ISS collection in tourist municipalities and the influence of economic crises. This aspect, about the economic impact on tax collection, was not directly addressed in the survey, which focuses more on the issue of deduction of materials.

Case studies related to the application of the Newcomb-Benford Law: The application of models such as the Newcomb-Benford Law in tax audits, as discussed in the study by Josenildo dos Santos et al. (2009), is not directly related to the focus of the research, but may be an interesting aspect for future investigations in the field of tax auditing.



## **FINAL CONSIDERATIONS**

In view of the analyzes carried out, it is identifiable the difficulty in understanding the tax legislation, involving the issue of the calculation basis of the tax on services of any nature, especially in relation to the deduction of materials in the services of the civil construction sector. Complementary Law No. 116/2003, Decree-Law 406/1968, and jurisprudence expressed by the higher courts were used to verify the possibility of deducting BC materials from the ISS, reaffirming the requirement of clearer criteria to ensure the correct incidence of taxes.

This issue causes a fiscal impact, the decisions affect the tax burden of construction companies, since excluding or not the value of the calculation basis significantly implies costs, this doubt on the subject, generates a lack of knowledge about the rules, and complexity in legal interpretation, thus creating conflicts between taxpayers and the Revenue, which leads to a greater need for specialized legal advice. Companies must be aware of the implications of decisions to optimize their tax burden and avoid tax assessments.

Based on the decisions expressed by the STJ, there is legal certainty, both for municipalities to adjust the taxation of the sector, increasing collection, and for companies to be able to do tax planning.

## **REGARDING THE RESEARCH PROBLEM**

The criteria for allowing the deduction of materials in the ISS calculation basis must take into account some aspects, these materials must be produced by the service provider and outside the place where the work is provided, and must have been subject to the incidence of ICMS, these are the factors defined by the standards, another point that helps is the validation of documentary form, the issuance of a state invoice in which it specifies that there was an ICMS levy on the materials used in the provision of services, even if later the costs of the materials are integrated into the municipal invoice, there is proof that the goods have already been taxed, and thus can be excluded from the calculation basis for the calculation of the service tax.

It is essential to understand the difference between materials and inputs, as materials can be deducted from the ISS calculation basis as long as they comply with the established parameters, but inputs are part of the provision of services and must have their costs included in the BC of the ISS. Precedent 167 expresses on the supply of concrete by contract, for the civil construction service, which are subject to the incidence of ISS, so they should also be part of the BC of the tax.

It is possible to identify the research problem in item 1.1 Problem and Research Objective, the criteria are identified in the section of the Related Studies (item 2.2), Presentation



and Discussion of Results (item 4.1), in the Analysis of Results (item 4.2), which present Complementary Law No. 116/2003, Decree-Law 406/1968, the jurisprudence and case studies that contributed to the understanding of the criteria.

## REGARDING THE RESEARCH OBJECTIVES

The selected documents were analyzed separately, based on consistent rules and jurisprudence, identifying each decision made, comparisons were made between the cases, and with related studies, finding similar and different points for each decision, it was verified how each case was based to reach the final decision.

The research made progress in clarifying how essential tax documentation is for proof, and in equating the legal and administrative interpretation on the subject studied, the decisions remained cohesive, strengthening legal certainty for those involved in this issue.

The objectives of the research are found in the Problem and Research Objective section (item 1.1), and the case studies in the Presentation and Discussion of Results section (item 4.1), the comparison in the Analysis of Results section (item 4.2), which present the standards used.

## LIMITATIONS

The study focused mainly on jurisprudential decisions on the deduction of BC materials from the ISS in specific cases of civil construction services, however there was a lack of places for consultations on the subject in specific, many researches use the same aggravation to study about, because there are few processes found more reliable on the subject, there was a limitation in the understanding, because it is a dominant part of the decisions analyzed by the STJ and STF, without further study of other forms of consultations on the subject.

It was not possible to deepen the analysis of the practical criteria of documentary evidence, used to prove the possibility of deducting materials from the calculation basis, which limits the understanding of the challenges that companies normally face.

## RECOMMENDATIONS FOR FUTURE RESEARCH

For future research, it is recommended to seek normative applications on the subject in a practical way, analysis of the economic and fiscal impacts on decisions, especially in relation to the reduction or increase of the costs of the tax burden for companies. Research proposals for legislative changes, which can bring greater legal certainty to the parties involved and greater understanding of how taxation should be done.



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