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TAXATION AT SOURCE AND ITS EFFECTS ON INCOME TAX

A TRIBUTAÇÃO NA FONTE E OS REFLEXOS NO IMPOSTO SOBRE A RENDA

IMPUESTOS EN LA FUENTE Y SUS EFECTOS EN EL IMPUESTO SOBRE LA RENTA

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ABSTRACT
The article analyzes withholding taxation in Brazil, highlighting its historical evolution, from Roman law to its consolidation in the Brazilian tax system, and its importance for efficient collection. It examines the concept of income, emphasizing the need for increased wealth and constitutional principles such as tax capacity and equality. It discusses the types of taxation (advance and final), pointing out benefits such as reduced tax evasion, but also criticisms, such as the lack of monetary correction and delay in the refund of amounts unduly withheld. It criticizes the system from a social perspective for disregarding tax capacity, negatively impacting tax justice. It concludes by suggesting modernization and simplification for greater equity and efficiency.

Keywords: Withholding taxation. Tax capacity.

RESUMO
O artigo analisa a tributação na fonte no Brasil, destacando sua evolução histórica, desde o direito romano até sua consolidação no sistema tributário brasileiro, e sua importância para a arrecadação eficiente. Examina o conceito de renda, enfatizando a necessidade de acréscimo patrimonial e os princípios constitucionais como capacidade contributiva e isonomia. Discute as modalidades de tributação (antecipada e definitiva), apontando benefícios como redução da evasão fiscal, mas também críticas, como a ausência de correção monetária e demora na restituição de valores retidos indevidamente. Critica socialmente o sistema por desconsiderar a capacidade contributiva, impactando negativamente a justiça fiscal. Conclui sugerindo modernização e simplificação para maior equidade e eficiência.

Palavras-chave: Tributação na fonte. Capacidade contributiva.

RESUMEN
El artículo analiza la retención en la fuente en Brasil, destacando su evolución histórica, desde el derecho romano hasta su consolidación en el sistema tributario brasileño, y su importancia para una recaudación eficiente. Examina el concepto de renta, enfatizando la necesidad de aumentar la riqueza y principios constitucionales como la capacidad tributaria y la igualdad. Analiza los tipos de tributación (anticipada y definitiva), señalando beneficios como la reducción de la evasión fiscal, pero también críticas como la falta de corrección monetaria y la demora en la devolución de montos retenidos indebidamente. Critica al sistema desde una perspectiva social por ignorar la capacidad tributaria, lo que impacta

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negativamente en la justicia fiscal. Concluye sugiriendo su modernización y simplificación para una mayor equidad y eficiencia.

Palabras clave: Retención en la fuente. Capacidad tributaria.

1 INTRODUCTION

The scope of this article is to expose in a clear and systematic manner the passive tax subjection that attributes to third parties the fulfillment of the main obligation to collect the tax credit from the public coffers, the way in which such system has evolved, its peculiarities, the importance for collection and some criticisms of the way it has been used.

In particular, considering the possible forms of taxation of income by the paying source, sometimes as an anticipation of the tax due, sometimes as definitive taxation, the article will start from the taxpayer's perspective to analyze the extent of the duties and obligations of the withholding agent and the tax substitute.

In this sense, the article seeks to: (i) understand the historical aspects of the emergence of withholding taxation, (ii) discuss the concept of income in the Brazilian model and its practical implications, and (iii) evaluate the effects of the withholding taxation model, highlighting its main challenges.

For this, the qualitative methodology was used, since it was based on a documentary and bibliographic analysis, which contemplated the legislation, doctrine and other relevant materials. The study also incorporated the analysis of practical cases to illustrate the challenges and limitations of the current model of taxation on income at source, especially in Brazil.

From this introduction, the article is structured in four more chapters. In the second, a historical overview of taxation on income at source is presented, including its emergence in Brazil and its role in overcoming problems related to tax collection. In the third, the concept of income in the Brazilian model is discussed, examining its theoretical construction and practical implications.

The fourth chapter, in turn, deepens the study on income taxation, addressing its modalities (early and definitive taxation), as well as practical cases that exemplify the challenges of the taxation model, such as the absence of monetary adjustment of the amounts withheld and the lack of adequate forecasts for refunds. This chapter also includes a social and economic critique of the withholding tax mechanism. Finally, the conclusions are presented, synthesizing the main points analyzed and suggesting ways to improve the tax model.

Based on this structure, the article seeks to contribute to the debate on the effectiveness and limitations of the Brazilian tax system, offering reflections that can support future studies and potential reforms in the area.

2 HISTORICAL ASPECTS OF TAXATION AT SOURCE

When establishing taxes, tax rules usually have as their primary purpose the obtaining of revenue for the State. Normally, this objective is achieved through the binding, by law, of the realization of certain legal facts, more specifically the obligation of certain persons to, once the occurrence of the taxable event occurs, pay a sum of money to the State.

The tax is a legal relationship arising from certain facts between two or more people for whom a so-called creditor can demand from the debtor, a certain benefit.

Based on these premises, the tax obligation, in a strictly technical sense, consists of the obligation to pay a sum of money as a tax, but it does not exhaust the number of ties and relationships stipulated by the tax regulations, which, many times, can extrapolate the legal relationship between the taxpayer and the Treasury, as the collecting entity, as well as the main duty consisting of payment – whether in cash or another means of extinguishing the obligation, such as compensation and payment – situations in which the so-called accessory obligations arise. In other words, to ensure compliance with tax obligations, the law may establish several other obligations and relationships by the public administration, also called instrumental duties, which are due even if, in a given situation, the taxpayer is not subject to compliance with the main obligation. considered as

Taxation at source consists of one of these obligations that goes beyond the duty to pay the tax by legislative imposition to third parties who are not directly linked to the material aspect of the taxable event.

Of vital importance for the analysis of the system of taxation at source, it is necessary to seek the moment when it was instituted and, thus, understand its evolution over time.

It is also necessary, at certain times, to resort to comparative law. Corroborating this premise, (2003), a profound scholar on taxation at source, starts from the understanding that in order to know domestic law, it is also necessary to know foreign law in order to understand the influence that one legal system has exerted on the other, using as a model of improvement the modification of incomplete rules or those that need adjustments. Brandão MACHADO . It can also have an influence on the

Thus, when addressing taxation at source, he states that it has not yet been possible to determine exactly in which state this system began to be used (such as MACHADO *taxation at source, imposizione alta sorgente, Quellenbesteuerung, etc.*). In his research, he informs that when studying tax substitution, he transcribed a fragment of the Theodosian Code, a work from the fifth century, in which the occurrence of traces of this taxation in ancient

Roman law was already glimpsed. It also informs that wage taxation already occurred in the Middle Ages, in many cities in Switzerland. Finally, he adds that Weimar has shown that the first law in the city of Basel that taxed the income of subordinate workers dates from the beginning of the fifteenth century. Nicola D'amati ,

2.1 THE BEGINNING OF THE USE OF TAXATION ON INCOME AT SOURCE IN BRAZIL

In Brazil, taxation at source was experimented through , through an extraordinary tax that was deducted from civil servants on their salaries and allowances. This taxation was valid for a single year, returning to the tax system after (BRASIL, 1867). Budget Law No. 317, of October 21, 1843 (BRASIL, 1943) Budget Law No. 1,507, of September 26, 1867

Subsequently, through legislative research, it is possible to highlight Decree No. 4,682, published in the, as the oldest act that deals with withholding tax on salaries, except for the salaries of civil servants. Although it did not provide for the taxation of income tax, the , also known as the Elói Chaves Law, determined that a retirement and pension fund should be created for employees of railroad companies existing in the country. The aforementioned retirement and pension fund should be composed of certain amounts, among which it attributed to the paying source the withholding of three of them /1923 Official Gazette of January 28, 1923 (BRASIL, 1923) Decree No. 4,682 [2] from the salary of their respective employees and the payment to the public coffers.

The first withholding of income tax, in turn, was instituted in 1923, through (BRASIL, 1923) (BRASIL, 1926), which approved the Income Tax Regulation, where the source paying income to residents outside the country became responsible for the tax owed by them. Law No. 4,783 of December 31, 1923 , article 4 § 2, regulated by Decree No. 17,390, of July 26, 1926

Such was its collection efficiency, the withholding tax on income at source gained more and more space in our legal system until, in 1943, the (BRASIL, 1943), reserved an entire title to deal with the collection at source. This topic included, in addition to taxation at source on the income of residents or domiciled abroad, discipline on the withholding and payment of

[2] According to Decree No. 4,682, of 01/28/1923, the railroad companies were obliged to retain from their employees and collect from the public coffers: (i) a monthly contribution from the employees, corresponding to 3% of their respective salaries; (ii) amounts of jewelry paid by employees on the date of creation of Caixa and by those hired later, equivalent to one month's salary and paid in 24 monthly installments; and (iii) the amounts paid by the employees corresponding to the difference in the first month of salaries, when promoted or increased in salaries, also paid in 24 monthly installments. Text of the Decree found at: http://www.planalto.gov.br/ccivil_03/decreto/historicos/dpl/dpl4682-1923.htm. Consultation carried out on 07/09/2019.

tax by the paying source applicable to: (i) shares of fines, (ii) bearer securities; and (iii) exploitation of foreign cinematographic films. Decree-Law No. 5,844 of September 23, 1943

2.2 THE ROLE OF THE WITHHOLDING TAX MECHANISM IN OVERCOMING THE PROBLEMS ENCOUNTERED IN INCOME TAXATION

The State needs resources to meet public expenses with the cost of the public machine and the realization of investments, resources that are obtained mainly through the collection of taxes.

Income taxation, in turn, is one of the most complex, as it has in its materiality riches that are difficult to know by the tax authorities, especially due to the need to obtain information that enters the taxpayer's private activities.

The difficulty in capturing these riches, without the use of mechanisms such as the attribution of tax responsibility to third parties, makes the tax ineffective, as has already been seen at certain times in history. In this regard, (1983) report that the first known income tax in the world, instituted by William Pitt in 1798 in England, resulted in great failure, in the face of shameful evasion by taxpayers. The exaction only became effective in 1803, when Addington, Pitt's successor, established, among other measures, the withholding of the tax from the paying source.GROSSFELD e BRYCE

In this way, withholding tax came to contribute to the possibility of making income taxation viable, making known to the State riches of possible evasion. This is because withholding by the paying source, whether in advance or definitively, provides an increase in the efficiency of the tax authorities in collection.

Laws, by nature, must produce the effects desired by the legislator element. Regarding the need for laws to be effective, (1972) argues that " Alfredo Augusto BECKER *the legal rule only exists (with a legal nature) to the extent of its practicability*".

An adherent of the same understanding, (2017) clarifies that it is necessary for tax laws to be applicable, for the calculation of credits to be feasible and, finally, for the tax authorities to have mechanisms to reduce default and tax evasion, as well as to facilitate inspection and collection. Leandro PAULSEN

In fact, taxation must occur in the simplest, most economical and efficient way possible, thus following the principle of practicability of taxation. It is worth mentioning here that although this practicability is not expressed in any principle of the Constitution, at the same time it is present and intrinsically linked to all Positive Law.

In the same line of understanding, in a study especially aimed at the study of the feasibility and feasibility of the tax law, it understands that it is a principle that designates all the means and techniques used to enable the execution and application of the laws. Thus, the author understands that practicability is present in all constitutional provisions, since nothing would make sense if the laws were not viable, feasible, enforceable and effectively implemented in reality. Misabel DERZI (1989)

Finally, corroborating the understandings reported, (2007) argues that practicability can be conceptualized as " Regina Helena Costa *the set of techniques that aim to enable the adequate execution of the legal system*", as well as the professor (2006) who understands that it is a set of means and techniques used with the objective of enabling the application of laws. César García NOVOA

All the authors cited above are right. Laws were created to discipline and regulate social conduct. It does not seem reasonable to have legal commandments that are not (or cannot be) enforceable. With regard to taxation, the State must adopt techniques that have the lowest administrative expenses and that provide greater collection efficiency, provided that the practices implemented do not affront the individual guarantees of the taxpayer and do not violate stony clauses, such as constitutional principles that limit the State's power of taxation.

The State, by instituting taxation at source by the paying entity, both in cases of withholding income tax, as a simple anticipation or as definitive taxation, as well as in cases of tax substitution, brought greater collection efficiency, reducing tax evasion and reducing inspection costs.

2.3 PRELIMINARY CONCLUSIONS ON THE EMERGENCE OF INCOME TAXATION AND THE ROLE OF THE SOURCE

There is no doubt about the importance of taxing income and proceeds of any nature that may be perceived by taxpayers. Regardless of the amounts that may be collected for the public coffers, income taxation is easily accepted by the general public, as it gives the feeling that people with higher earnings have a higher taxation than others, thus providing social and tax justice.

However, it is a wealth that is difficult for the State to reach. The capture of the set of income and proceeds, the multiplicity of taxpayers subject to taxation, the ease of evasion and fraud and the search to achieve the ideal of taxation by respecting the principles of ability

to pay, isonomy and the prohibition of confiscation, increase the complexity present in income taxation.

Thus, since the beginning of taxation in England, at the beginning of the nineteenth century, the States at a certain point resorted to taxation at source to provide practicality in the collection of the tax and the satisfaction of the public coffers.

In Brazil, withholding tax started late. It had as its starting point the income of civil servants, some time later it passed, already in the form of tax substitution, to taxpayers of difficult access and only later it became generalized and extended to most taxpayers.

Thus, it is demonstrated that our State, by taxing at source only public employees, whose income was already known, was more focused on anticipating revenues for the maintenance of the public machine, than on the effectiveness of income taxation.

Having understood the historical trajectory of taxation at source, from its origins in Roman law to its consolidation in the Brazilian tax system, it is worth evaluating how this practice has contributed to the improvement of tax collection over time. The evolution of the system reflects not only a search for efficiency in fundraising by the State, but also the need to respect constitutional principles and reduce tax distortions.

Thus, it is worth critically analyzing how taxation at source translates into an effective mechanism to minimize tax evasion and maximize revenue, while pondering the challenges and dilemmas that arise from the application of this technique in contemporary Brazil to promote greater tax justice.

3 THE CONCEPT OF INCOME IN THE BRAZILIAN MODEL

Income taxation enjoys several peculiarities, because although it is extremely regulated, several concepts are vague or imprecise, starting with the very definition of what can be considered income and the way it should be taxed.

Income tax has its legal provision in article 153, item III, of the Constitution of the Federative Republic of Brazil of 1988, where the Union is granted the competence to institute taxes on income and proceeds of any nature, and this tax will be informed by the criteria of generality, universality and progressivity, in accordance with the law.

Now, the constitutional diploma gave contours to income taxation, but it did not define what this income would be that could be taxed. Extracting a concept of income in this context is an arduous task, which leads us to infer that the constitutional provision is not by itself able to remove the action of the complementary and ordinary legislator.

However, although the Federal Constitution does not expressly present a concept of income, it gives us the understanding that income and proceeds of any nature must represent gains or wealth that meet and respect the principle of ability to pay and non-confiscation.

Therefore, it was up to the ordinary legislator, among the possible concepts of what income is, to elect the one (s) that lends itself to defining income for the purposes of income tax taxation. (1982) argues that the definition of income for taxation purposes must be able to measure the ability to pay and this characteristic is precisely what differentiates it from other definitions that, such as accounting or strictly economic, pursue purposes such as the comparison between the results of various economic years or the calculation of added value in a production process. Antonio Agulló AGÜERO

The higher courts, however, recognized that the measurement of an asset increase is necessary for the incidence of the tax to be configured. In judging the (STF, 1983), the STF unanimously decided that the expression "income and proceeds of any nature" always means "asset increase". The rapporteur of the case, Justice Carlos Velloso, stated that: "it Recurso Extraordinário n.º 117.887-6/SP*does not seem possible to me to affirm that there can be income or income without an increase in assets*".

The National Tax Code, in turn, in article 43, items I and II, provides that the tax, under the competence of the Federal Government, on income and proceeds of any nature, has as a taxable event the acquisition of the economic or legal availability of income, thus understood, the product of capital, labor or a combination of both, as well as proceeds of any nature, thus understood as equity increases not contemplated as a product of capital, labor or a combination of both.

Subsequently, (BRASIL, 2001), added two paragraphs to the CTN, article 43, with the provision that the incidence of the tax does not depend on the denomination of the revenue or income, the location, legal condition or nationality of the source, the origin and the form of perception. It also established that the law will establish the conditions and the moment in which it will be available for the purposes of income tax. Complementary Law No. 104 of 2001

Several controversies can be traced from the legal provisions, especially in relation to Complementary Law 104/2001. In this study, we will consider that the legislative novation that edited the provisions of article 43 of the CTN should be interpreted restrictively. This is because to admit that the tax may be levied on simple revenues is to suppose that the new law has modified the taxable materiality of the tax. No

Regarding availability, we will start from the premise that economic availability should be understood as the effective and current power to dispose of those who have direct possession of income. Legal availability, on the other hand, is premised that it is presumed by force of law and covers the virtual, and not effective, acquisition of the power to dispose of income.

However, the issue of asset increase, although recognized by the STF as necessary for the perception of income, deserves special attention, as it generates a direct impact on the concept of income and, even today, raises deep doctrinal divergences and impact on the scope of taxation of certain income that will be seen throughout this work.

When the CTN in article 43 considers as proceeds of any nature the equity increases not included in the concept of income, allowing two possible interpretations as to the extension of the first item.

A supporter of the first school of thought, (1994) understands that the CTN in its article 43, item I, when prescribing that income is the product of labor, capital, or a combination of both, was not clear in its definition, as it did not indicate the meaning that should be taken in the expression 'product'. He continues his analysis by stating that in item II of the same article, by defining 'proceeds of any nature' as being the equity increases not included in item I, it allows us to conclude that income provided for in item I must also contain an asset increase. Brandão MACHADO

In this current, the text would enshrine the understanding that income is an increase in assets produced by capital or by labor or by both together, and that earnings are increases in assets derived from any source, but that in all cases it is necessary to have an increase in assets.

Also along these lines, Professor MOSQUERA (1996), in an in-depth study on the concept of income and proceeds of any nature, teaches that within the aspect of dynamic taxation of assets, taxes can be classified into two subspecies: (i) those that are levied on the value of the elements of the assets themselves, regardless of whether or not there is an increase in their elements; and (ii) those that are levied on the value of the mutation of the assets, which constitutes an increase of six elements. It then indicates that the tax on income and proceeds of any nature is levied on the patrimonial element that constitutes an asset increase. It concludes that there is no way to measure the increase in income without a reference for the period. Roberto Quiroga

Therefore, we would not have income without a time lapse where an increase in wealth could be measured. Therefore, the taxation of income instantaneously and exclusively at source would be ruled out. The temporal aspect of the hypothesis of tax incidence must be taken as a fundamental characteristic of the very concept of equity increases.

On the other hand, diverging from , another doctrinal school of thought considers that in the taxation of income provided for in the first item, the increase in assets is possible, however, it is not essential, being necessary only in the taxation contained in the second item. Brandão Machado and Roberto Quiroga

Inserted in this second school of thought is (2010), arguing that the first item is intended for the taxation of income-product, thus considering income as the periodic fruit of a permanent source (or source theory), which may or may not reveal an increase in assets. The author supports this understanding by considering that the second item, when referring to ' Luís Eduardo SCHOUERI *equity increases not included in the previous item'*, allows the interpretation that the income-product dealt with in the first item may or may not result in equity increases, not consisting of a mandatory commandment, but only possible.

In this line, the obligation to have an increase in assets would be contemplated only in the second item that deals with the income-increase in assets, thus understood as the comparison of the asset situation in two different moments.

Schoueri It envisions cases in which there is income-product that implies equity increases, as well as equity increases that are not income-product, citing as examples the income of non-residents and the capital gain on the sale of assets, respectively.

Thus, income paid to non-residents can only be taxed in cases where the increase in assets is not mandatory. This is because the taxation on payments, credits, deliveries, jobs or remittances of income and proceeds of any nature is instantaneous, and it is not possible to make any comparison between the patrimonial situation at different times.

To avoid possible evasion of foreign currency, in addition to facilitating the work of the administrative authority in the inspection, imposition of sanctions and administrative and judicial collections, the legislator attributed to the paying source the tax responsibility for withholding the tax, according to RIR/99, art. 717 (BRASIL, 1999).

3.1 CONCLUSIONS ON THE CONCEPT OF INCOME

The taxation exercised by the tax on income and proceeds of any nature has a prominent place in relation to other taxes, both in Brazil and abroad, given the possibility of achieving tax justice among taxpayers.

However, for this amount to be reached, it is necessary that the infra-constitutional legislation obeys certain constitutional principles, such as the ability to pay, isonomy and the prohibition of confiscation.

This is an arduous task, considering the complexity of defining what income is, without a constitutional concept in the Magna Carta, the difficulty of measuring it and the numerous legislative proposals, with varying interpretations among the law enforcers, whether by administrative authority, doctrine or jurisprudence.

In this context, (2015) expresses its concern with the connection between constitutional precepts and infra-constitutional developments, which cause deviations inherent to poorly elaborated interpretations of constitutional prescriptions and making it difficult for tax authorities and taxpayers to enjoy the resources brought by this form of taxation. Paulo de Barros CARVALHO

As will be seen in the course of this article, almost all of the legal rules that deal with withholding income tax were introduced into positive law, in a sparse way, through infra-constitutional legislation.

Thus, we see that in the hypotheses of withholding income tax at source, Paulo de Barros Carvalho's concern may be aggravated, making even more sense, as it increases the possibility of disconnected rules of the income tax matrix rule, where the withholding made may not materialize as income, thus violating the constitutional principles to which we referred earlier.

For the foregoing, we will consider as income for the purposes of taxation of income tax and proceeds of any nature as being delimited by the need to calculate an increase in assets, respecting the constitutional principles of ability to pay, isonomy and non-confiscation.

4 THE TAXATION OF INCOME TAX AT SOURCE

It has been increasingly common to find laws in tax systems that impose on certain people who appear as payers, the obligation to deduct a part of the amount due, with its payment directly to the public treasury.

In relation to the tax on income and proceeds of any nature, (1985) points out that not only is it becoming more frequent, but what really works is not the tax itself, but the system of withholdings and fractional payments. Lazarte ÁLVAREZ

In fact, we can point out that the legislator's intention in attributing to the paying source the duty to withhold taxes constitutes a mechanism to facilitate the collection of certain taxes, such as the tax on income and proceeds of any nature, reducing from the total to be received by the holder of the income a certain amount by the paying source that collects it directly for the tax authorities.

4.1 ADVANCE TAXATION

When the amount that is withheld is not yet due definitively, but only provisionally, we are facing this type of withholding tax. It is a form of withholding that the law requires the person who makes certain types of payments to withhold and collect from the Tax Authorities a certain fraction of the amount due, an amount that will be computed for the recipient of said payments in the settlement of the tax that may be due in relation to them.

The mechanism of advance taxation allows the Union to have a constant income, while favoring control over the income affected by this obligation.

The incidence of anticipated taxation by the paying source does not occur on income, but on a single income that is dissociated from other income, which would be computed in the verification of the taxable amount at the end of the period, which can be positive (profit or income), or negative (loss).

Analyzing the legal rule of this form of taxation, the calculation basis that makes up the quantitative criterion is an isolated value and the temporal criterion of calculation being the moment of acquisition of the income. In this sense, as well observed by (2010), the paying source is only a person who is in the position of payer, but who does not meet the requirements to be considered as responsible, under the terms of article 128 of the CTN.Alberto XAVIER

Based on this premise, the legal relationship between the Federal Government, as the taxing power, and the source paying the tax is a legal relationship of administrative law, whereby the State incumbents on the paying source the duty to withhold and collect the tax on the income (and not on the income) of the one who has yet to acquire it, under the terms of article 43 of the CTN.

In the conception of (1995) there is a legal relationship of administrative law based on a possible future relationship of tax law, where the taxpayer of the latter, the one who will carry out the fact described in the hypothesis of incidence: earning profit or income, acquires now and only a sign of wealth - income that will enter into the calculation of the former. The tax legal relationship did not take place, and the tax legal fact profit (legal entity) and net income (individual) did not arise, as provided for in article 43 of the CTN. Ângela Maria Motta PACHECO

From the birth of the tax legal relationship, the State has the right as a creditor to receive the amount from the taxpayer as income tax. And the taxpayer has the duty to "give" an amount to the State. The Federal Government created a mechanism to receive in advance the installments of this income, imposing on the paying source the obligation to withhold and collect from the public coffers an amount that can be owed by the taxpayer of the tax legal relationship of income tax.

The author argues that the legal relationship between the Federal Government and the paying source is not a relationship of tax law, but of administrative law. The paying source is compelled to comply with the duties that would be incumbent on the taxpayer of the tax obligation, that is, to comply with an obligation to do. m

According to the above, there would not be a tax legal relationship in this case, since the tax legal relationship with reference to income tax has not yet occurred. As a result, it could not be considered a case of tax liability either.

In fact, from what has been exposed, the tax legal fact, acquisition of income or proceeds of any nature has not yet occurred. If it had occurred, the tax legal relationship would be with the person who earned the income and not with the paying source.

In addition, the liability involves the delivery of own money, either because the taxpayer is in the conditions provided for in article 131 of the CTN, or because it is framed in article 134 of the same law.

The absence of withholding and payment by the paying source incurs the person responsible for the payment of an amount equivalent to the tax itself as if it were a taxpayer. Responsibility, therefore, results from the failure to comply with an express duty of the source itself.

Similar to the 'indirect retention on account' provided for in Spanish law, (1996) explains that a legal relationship of great complexity originates, in which three subjects participate, with different obligations and duties: María Teresa Mories JIMÉNEZ

a) the public entity - active subject of the main tax obligation and recipient of the amount withheld. In the event of repayment, it assumes the position of debtor.
b) the withholder (or tax officer) - person who must withhold the amounts of income tax and the obligation to collect the amounts withheld from the Federal Government (called by the author an '*obligation on account*').
c) the retained (or taxpayer) – creditor of the payments on the rents and obliged to bear the withholding. In cases where the withholding is made in an amount greater than the amount due, the creditor of the refund will be returned or reimbursed.

It is understood that the object of this legal relationship is none other than the delivery of a sum of money by the responsible party that must be deducted from the taxpayer and deposited in favor of the Treasury. For this to be allowed, the law must provide for a series of obligations and ancillary duties that affect the responsible party and the taxpayer.

This legal relationship lies in the main fiscal responsibility that arises between people and the State, to which they are bound, insofar as it depends on it and that its legal effects will necessarily refer to this tax obligation. Compliance with this complex legal relationship of withholding and collection produces a double effect.

The withholding of income tax may be of a definitive nature - payment of the tax - where it appears to be the case of definitive withholding tax, or as an anticipation of the tax on account of the taxpayer's obligation. In this second case, the income can never be considered as payment of the tax, since the taxable event that gives rise to the birth of the main tax obligation has not yet occurred, but must be considered as payment of another different obligation, of a provisional nature, whose taxable event is not yet known if it will arise.

4.2 DEFINITIVE TAXATION

In cases of exclusive withholding by the source paying income tax at source, the legislator elects certain types of income so that it is taxed separately from the taxpayer's other income, in the form of cedular taxation.

Such income does not communicate with the rest of the income, both for individuals when calculating the annual adjustment statement, and for legal entities at the time of calculating the tax calculation basis by the real, presumed, arbitrated or Simples Nacional profit systems. Such income, when reported in the annual statements, has only an illustrative

effect, with the purpose of assisting the Tax Authorities in verifying and justifying the equity increases, but not having any influence on the calculation of the tax due.

Although widely used, this regime of exclusive taxation at source, understood as unconstitutional, is an affront to the principles of generality and progressivity that guide the Income Tax. In view of the definitive nature that the tax assumes in this form of taxation and, considering that neither the income nor the withheld tax will be considered in the calculation of the income tax due, the taxation is exhausted in the act of payment, credit, remittance, delivery or employment carried out by the source. In other words Paulo Ayres BARRETO (2001) Criticism , the legal relationship between the third party obliged to pay the tax and the Federal Government is exhausted at the exact moment in which the encumbrance is withheld and collected from the public coffers.

In this type of withholding, exclusively from source, the anticipation of taxation is not conditioned to the occurrence of any future event, being the taxable event, as well as the calculation of the quantitative criterion. It is, therefore, a definitive occurrence. to the

Considering the possibility that the paying source does not carry out the withholding obligation attributed to it, the income paid, credited, remitted, delivered or used in favor of a certain beneficiary, individual or legal taxpayer, will be considered net of income tax, with the readjustment of the income calculation basis.

In this case, (2011) understands that initially the paying source was a mere withholding agent, however, when it failed to comply with its obligation to make the withholding, a second relationship was born in which it began to assume the posture of a taxable person, in the condition of tax responsible Luís Eduardo SCHOUERI *stricto sensu*.

4.3 PRACTICAL CASES

The Brazilian model of taxation at source brings numerous benefits to the tax authorities, among which we can list:

a) the agility and speed of collection, making it simpler and more economical;

b) the ease of locating the yield;

c) the facilitation of the control and fulfillment of tax obligations;

d) the identification of income beneficiaries;

e) the reduction of the universe of taxpayers to be inspected;

f) the prevention of tax evasion;

g) the possibility of the Tax Authorities carrying out a cedular taxation, sometimes through the system of withholding by the paying source, sometimes determining that the paying source acts as a tax substitute; and
h) works on a current basis, maintaining the permanent cash flow of the Treasury.

However, over the last decades, some factors have been detaching the Brazilian system from the spirit of the source, restricting the taxpayer from some basic rights, as will be discussed below.

4.4 THE ABSENCE OF MONETARY ADJUSTMENT OF THE AMOUNTS ANTICIPATED DURING THE CALENDAR YEAR

The withholdings made by the paying sources, when it is not exclusive source taxation, are not monetarily updated nor are they subject to interest between the time of withholding and the following year.

This lack of updating clearly violates the Principle of Isonomy, both in its vertical and horizontal dimensions, by creating inequality between taxpayers who had amounts withheld and those who were not withheld. Those who were not subject to withholding can freely dispose of these amounts throughout the year, using them for consumption or investment, with the potential to make a profit.

This situation can financially impact taxpayers, since the amount anticipated to the government loses real value until the moment of refund or final payment, in addition to being very common. For example, we can compare two professionals who receive the same monthly amount, however, while one has a single source of payment, the other has five sources of income. The progressive table applied by each paying source will cause a lower withholding in the case of multiple sources, which favors the taxpayer with more sources of income compared to the one who has only one, creating a disparity.

The problem is aggravated when, at the end of the year, the taxpayer discovers that the amounts withheld were higher than what was due. The current legislation allows the updating of these amounts, on which there was no taxable event, only from the delivery of the annual adjustment statement, which occurs in April – that is, at least five months after the last withholding.

This debate on the need to monetarily correct these amounts until the date of the annual adjustment of Income Tax can contribute to greater tax justice and protection of the taxpayer's purchasing power.

4.5 LACK OF PROVISION FOR IMMEDIATE REFUND OF UNDULY WITHHELD TAX

Withholding taxes that exceed the amount actually due are refunded only from the month in which the taxpayer submits its annual adjustment statement, in the year following the withholding. This refund process occurs in sequential batches, organized by the Federal Revenue Service, according to criteria established by the administration itself. During this period, the taxpayer may be included in the so-called "fine mesh", which implies a more detailed review of their return by the IRS. In this situation, the taxpayer must wait to be formally notified to provide the necessary clarifications or rectifications.

This procedure, as pointed out by (2005), can be understood as "an abstraction to the process of verifying inconsistencies in the IRPF and IRPJ tax returns, acts as a kind of "sieve" for the declaration processes that are pending, making it impossible to refund them, and in some cases resulting in a more in-depth investigation of the declaring taxpayer by the Federal Revenue Service". At the end of this procedure, if the taxpayer is right, the refund will be subject to "extra batches", Professor Roque Antônio CARRAZA [3]which generates even more delay in the return of the amounts unduly withheld.

This system shows an imbalance in the relations between the tax authorities and taxpayers. The Brazilian legislator, by allowing such delay, creates a situation of abuse that violates fundamental rights provided for in the Federal Constitution. Let us see what the Magna Carta establishes:

> Article 150. Without prejudice to other guarantees guaranteed to the taxpayer, the Union, the States, the Federal District and the Municipalities are prohibited from:
> (...)
> Paragraph 7 - Taxes withheld at source whose taxable event does not occur must be refunded immediately, which would require the return of the tax, at the latest, when the Income Statement is submitted. (Included by EC No. 3, of 1993)

[3] Law No. 9,250/95:
"Art. 16. The amount of the individual income tax refund, calculated in the income statement, will be increased by interest equivalent to the reference rate of the Special Settlement and Custody System - SELIC for federal securities, accumulated monthly, calculated from the date scheduled for the delivery of the income statement until the month prior to the release of the refund and 1% in the month in which the resource is made available to the bank of the taxpayer."

This constitutional provision, introduced by the , is clear in requiring that taxes unduly withheld, whose taxable event has not occurred, be refunded immediately. The legislation, therefore, recommends that the refund take place no later than the delivery of the income statement, and not in arbitrarily defined batches, according to the convenience of the tax administration. This delay in the reimbursement of the amounts constitutes a violation of the taxpayer's rights and contradicts the principle of efficiency, which should guide the actions of the public administration. Constitutional Amendment No. 3 of 1993 (BRASIL, 1993)

4.6 USE OF THE SAME PROGRESSIVE TABLE, WITH FEWER DISCOUNTS TO BE CONSIDERED THAN TAXATION AT THE END OF THE YEAR

Brazilian tax legislation provides that the withholding tax made by paying sources is calculated based on a monthly progressive table, which represents 1/12 of the table used for the calculation of the annual tax. This system aims to facilitate the continuous collection of taxes, ensuring that taxation occurs in installments throughout the year. However, for the purposes of monthly withholding, not all deductions that the taxpayer is entitled to apply at the end of the fiscal year can be considered during the withholding process, which creates a significant distortion.

In this way, the taxpayer who has only one source of income suffers a withholding higher than the amount actually due. The limitation of deductions considered in the monthly withholding means that the tax withheld throughout the year is, in most cases, higher than what would be calculated in the final calculation, after considering all possible deductions. This occurs, for example, with deductions related to dependents, medical expenses, and educational expenses, which are applied more broadly only in the annual adjustment statement.

This scenario generates a negative impact for many taxpayers, who, throughout the year, see a significant part of their income being allocated to tax withholding, in an amount higher than what would be due if the total deductions were applied immediately. The taxpayer, therefore, ends up advancing resources to the tax authorities, which will only be properly adjusted after the end of the fiscal year, in the annual statement. This not only harms individual financial planning, but also violates the Principle of Ability to Pay, one of the pillars of the Brazilian tax system.

The Principle of Ability to Pay establishes that taxes must be proportional to the taxpayer's economic capacity, that is, they must reflect their real financial situation and their

potential to contribute to the Treasury. However, the monthly withholding higher than the actual amount of the final tax obligation imposes a greater burden on the taxpayer, forcing him to disburse amounts that are above his real ability to pay at that time. This mismatch between the amount withheld and the amount actually due is only corrected after the delivery of the annual adjustment statement, when many taxpayers may be entitled to a refund, but, until then, they have already suffered the financial impact.

Therefore, it is evident that the current withholding tax model, by adopting a monthly progressive table without due consideration of all deductions, disrespects tax equity and burdens the taxpayer. To ensure a fairer system that is compatible with the Principle of Ability to Pay, it would be necessary to review the withholding mechanism, allowing deductions to be applied more completely from the beginning of the process, thus avoiding excessive withholding of taxes and, consequently, the postponement of resources that could be available to the taxpayer throughout the year.

4.7 ANTICIPATED TAXATION BY THE PAYING SOURCE

In addition to the points already discussed, the withholding tax itself is the target of significant criticism by the doctrine. O (1986), one of the leading experts on the subject, argues that the concept of income for the purposes of income tax should be based on the effective increase in assets. According to him, taxable income should only be considered when there is a concrete increase in equity, which presupposes that the amount is available to the taxpayer, either immediately or through a right that can be enjoyed within a reasonable time. Professor Gilberto de ULHÔA CANTO

Canto questions the withholding mechanism, suggesting that it may disregard the legitimate basis for calculating income tax, as defined by article 43[4]. of the National Tax Code. This article establishes that income or proceeds of any nature can only be taxed when there is an increase in assets, that is, when there is economic or legal availability of values.

However, when withholding tax occurs, there is still no guarantee of economic or legal availability. The taxpayer still does not fully enjoy that amount, which raises doubts about the legitimacy of the withholding as a form of immediate tax incidence. Although the system provides for the compensation of the amounts withheld throughout the fiscal year, the

[4] Article 43. The tax, under the competence of the Federal Government, on income and proceeds of any nature has as a taxable event the acquisition of economic or legal availability:
I - income, understood as the product of capital, labor or a combination of both;
II - proceeds of any nature, thus understood as equity increases not included in the previous item.

correction of this imbalance only occurs at the end of the calculation period, which mitigates, but does not eliminate, the irregularity. This compensation process, although legally provided, does not completely resolve the basic issue: the withholding occurs before the configuration of the full taxable event, which would be the equity increase.

Withholding tax, therefore, can be seen as a form of arbitrage of the calculation basis, applying the income tax even before there is certainty about the actual amount that constitutes income for the taxpayer. This practice lacks grounds in the hypotheses of incidence of income tax, because, although it can be argued that there is an apparent economic availability, the assumption of incidence – the increase in assets – was not effectively fulfilled.

The anticipation of income tax due at the end of the fiscal year, which may or may not in fact be due, ends up violating the essential principle of tax incidence, which is based on the increase in assets. By withholding tax on salaries or other income periodically paid throughout the year, the system assumes that the taxpayer immediately has an increase in his assets, which does not always occur. Often, the amounts paid or credited do not yet represent an effective increase in the individual's assets, being only a part of a continuous flow of income that will be properly calculated at the end of the fiscal year.

However, there are situations in which withholding tax is accepted as an appropriate measure, especially in cases where the tax authorities cannot directly verify the taxpayer's asset increase. A clear example is cases where the beneficiary of the income is resident or located abroad. In these situations, article 148 of the CTN provides for the arbitration of the calculation basis, with an instantaneous taxable event and the exclusive withholding of source, carried out by the service taker. This mechanism aims to ensure taxation even in circumstances where it would be difficult or impossible to monitor the taxpayer's assets in a direct and efficient manner.

4.8 SOCIAL AND ECONOMIC CRITICISM OF THE MECHANISM THAT HAS BEEN USED IN RECENT DECADES

The taxation that has been used in recent decades of withholding tax in Brazil, although effective to ensure regular collection, allows for some significant social distortions by not properly considering the individual's ability to contribute, which compromises "tax justice". By applying a simplified monthly progressive table for withholding, our system limits the deductions that are allowed, since they do not enter the concept of income, especially

impacting taxpayers with lower incomes. These taxpayers often have difficulties deducting essential expenses, such as medical and education expenses, since they can only be fully applied in the annual adjustment statement. Thus, the monthly withholding disregards the particularities of the expenses that influence the net income, resulting in a taxation higher than the amount that actually reflects your ability to contribute.

In the economic aspect, the absence of a forecast for monetary correction of the amounts withheld throughout the year further accentuates inequalities and limits the purchasing power of taxpayers. These amounts, when allocated to the Government in advance and without readjustment, suffer a loss of real value due to inflation, representing a kind of "compulsory loan" that financially penalizes taxpayers. Meanwhile, the Government benefits from the advance withholding to finance the public machine, but the taxpayer only has access to the refund after the delivery of the annual return, in a lengthy process subject to the fine mesh. This imbalance is particularly harmful to salaried and middle-class workers, who end up anticipating values that could be directed to consumption or personal investment, affecting the economic cycle and the generation of private wealth.

It should also be noted that the definitive taxation for some types of income, without the possibility of compensation or adjustment throughout the year, creates a disparity in the treatment of taxpayers and reduces the progressivity of the system. This practice of "definitive" taxation for some income ends up ignoring the principle of equity, as it equally taxes people with different financial capacities, without adjusting the tax to the real economic situation of the taxpayer. This model compromises the objective of Social Justice that should guide the tax system, as it concentrates the tax burden on groups that do not necessarily have a greater ability to pay, resulting in a regressive impact and contributing to the perpetuation of economic inequalities in Brazil.

5 CONCLUSIONS

The withholding tax mechanism over time has played, and continues to play, a crucial role in the functioning of income taxation in the Brazilian tax system, promoting greater efficiency in collection and facilitating the fight against tax evasion. Since its historical implementation, its effectiveness has been highlighted, especially in contexts of economic complexity, considering that direct taxation on the taxpayer would be difficult to administer. It should be noted, however, that while successful in many respects, it also raises concerns that cannot be ignored.

Despite its feasibility and contribution to revenue efficiency, the withholding tax system is not without challenges. The complexity and bureaucracy involved in the withholding process generate additional compliance costs for individuals and businesses. This bureaucratization is sometimes a barrier that discourages formalization and, ultimately, can undermine the effectiveness of the tax system itself. The focus of the legislator and the tax administration should therefore be to simplify processes and modernize collection mechanisms, using digital technologies and solutions that reduce administrative costs and encourage voluntary compliance.

In terms of tax substitution, an ongoing debate is needed to assess the extent to which this model is fair and efficient, especially when it involves taxpayers who suffer early withholdings with no guarantee of future revenue. Although tax substitution has been important for mitigating tax evasion, its application needs to be refined to avoid injustices and distortions that could compromise the principle of ability to pay.

Finally, the modernization of the tax system, combined with the digitization and automation of inspection and collection processes, can open up new opportunities for a fairer, more transparent, and more efficient tax system. Improving withholding tax, without disregarding the socioeconomic impacts and the challenges of practicability, will be fundamental to ensure that our country continues to pursue tax collection that respects constitutional principles and promotes true fiscal and social justice.

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