ALVES, Henrique Napoleão; COELHO, Eduardo Junqueira. Is there a right to modify the tax regime in view of high oscillation of exchange rates? Legal analysis of article 30, §§ 4 and 5 of MP 2.158-35/2001. 15 July 2014. Retrievable at: < http://sachacalmon.com.br/biblioteca/artigos/>.

Is there a right to modify the tax regime in view of a high oscillation of exchange rates?

Legal analysis of article 30, §§ 4 and 5 of MP 2.158-35/2001

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1. Introduction

Article 30, para. 4, of MP 2.158-35/01 states that companies are entitled to chance their regime when facing a "high oscillation of the exchange rate". The following paragraph, however, provides that the Executive Branch must define what a "high oscillation" is.[1] Since the enactment of such clauses, which were inserted in MP 2.158-35/2001 by Federal Law n. 12.249/2010, the Executive Branch has not done so.

Such scenario poses a crucial legal question: does the right to modify the regime depend upon further regulation by the Executive Branch? If not, then what should be considered the meaning of "high oscillation" for the purpose of exercising such right?

The answers to both questions depend on a more sophisticated analysis that encompasses: the role of the Executive branch and the function of executive ordinances; an investigation on the legal efficacy of norms subject to further regulation; the relation between article 30 of MP 2.158-35/01 and the legal system as a whole (particularly constitutional principles); the juridical relevance of State's omission vis-à-vis the duty to enact ordinances; and, finally, how the concept of "high oscillation" should be interpreted in the absence of an Executive branch definition.

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[1] See the legal texts in Portuguese: "*Art. 30. […] § 4º A partir do ano-calendário de 2011: I - o direito de efetuar a opção pelo regime de competência de que trata o § 1o somente poderá ser exercido no mês de janeiro; e II - o direito de alterar o regime adotado na forma do inciso I, no decorrer do ano-calendário, é restrito aos casos em que ocorra elevada oscilação da taxa de câmbio. § 5º Considera-se elevada oscilação da taxa de câmbio, para efeito de aplicação do inciso II do § 4º, aquela superior a percentual determinado pelo Poder Executivo.*"

2. The classical role of the Executive branch and the function of executive ordinances

As many other Western capitalist democracies, Brazil also adopts the classic *trias politica* principle on Constitutional terms, and its Executive branch is similarly defined as the one responsible for executing and enforcing the law *par excellence* (not creating it).[2] In this sense, article 5 (II) of the Constitution establishes the supremacy of the legislator in great clarity:

> "*Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: […] II - no one shall be obliged to do or refrain from doing something except by virtue of law;*" [3]

In Tax law domain, the same rationale is reinforced by Article 150 (I) of the Constitution:

> "*Article 150. Without prejudice to any other guarantees ensured to the taxpayers, the Union, the states, the Federal District and the municipalities are forbidden to: I - impose or increase a tribute without a law to establish it;*"

Additionally, article 146 of the Constitution affirms that only a "supplementary" law[4] can:

> *"… establish general rules concerning tax legislation, especially with regard to:*
> *a. the definition of tributes and their types, as well as, regarding the taxes specified in this Constitution, the definition of the respective taxable events, assessment bases and taxpayers:*
> *b. tax liability, assessment, credit, limitation and laches;,*
> *c. adequate tax treatment for the cooperative acts of cooperative associations."*

Based upon these norms, the regulation of specific tax regimes related to CIT can only take place through the enactment of a legislation by the Union (Federal Government), which is the government level responsible for corporate income taxes (hereinafter "CIT").

There is a federal law regulating both the regimes and establishing a right to modify the chosen regime during the fiscal year when the taxpayer faces a "high oscillation of the exchange rate". Additionally, the same federal law gives the Executive branch an instruction to give a detailed definition of "high oscillation".

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[2] See, for instance, article 2 of the Brazilian Constitution: "The Legislative, the Executive and the Judicial, independent and harmonious among themselves, are the powers of the Union."

[3] There is a version of the Brazilian Constitution in English, edited / translated by the Massachusetts Institute of Technology (MIT), available at <http://web.mit.edu/12.000/www/m2006/teams/willr3/const.htm>. Readers must bear in mind that it may not be updated.

[4] A specific type of federal legislation.

Since executive ordinances cannot and do not create new law, when following such legislative instruction the Executive branch can only make a pre-existing law clearer or more detail-oriented.

Therefore, the right which would be detailed by the ordinance pre-exists the ordinance itself, *ergo* does not depend upon the ordinance to start producing legal effects.

3. The concept of legal efficacy and its relation to the matter

According to classical legal scholarship, a norm can be examined in consideration of three interrelated but conceptually independent aspects: (i) validity, which is basically whether the norm belongs or not to a certain legal system; (ii) justice, which concerns whether the norm fits conceptions of justice, morality and fairness or not; (iii) finally, social efficacy, or effectiveness, which deals with empirical observance of the norm.[5]

Brazilian scholarship traditionally adds a fourth basic aspect which is central to the present case: legal efficacy, which deals not with validity in terms of being a part of the legal system, but the norms' ability to produce legal effects immediately or not.

Indeed, it is possible for a norm to be valid, and yet not conducive to legal consequences in the present. This is the case when a norm is enacted but it textually states that it will only start producing legal effects or consequences after a certain period of time. This can also be the case of a norm that requires further regulation.

In the Brazilian Constitution, there are many examples of the latter. A notorious legal scholar, professor José Afonso da Silva, even developed a theory to explain the different types of constitutional norms according to legal efficacy.

According to Silva[6], there are three major types of constitutional norms under such criterion:

> a. Norms with *full legal efficacy*, i.e., norms that are ought to be applied and observed immediately, regardless of further legislation/regulation, since its meaning and content does not depend upon it.

[5] Bobbio, Norberto. *Teoria della Norma Giuridica*. Torino: G. Giapichelli, 1958.
[6] See: Silva, José Afonso da. *Aplicabilidade das Normas Constitucionais*. 5th ed. São Paulo: Malheiros Publ., 2001, pp.89-151.

b. Norms with *(a possible) restrained legal efficacy*, i.e., the ones that establish rights but authorize further enactments to *conceivably* limit the exercise of such rights. The classic example is the norm in article 5, XIII, of the Constitution: "the practice of any work, trade or profession is free, observing the professional qualifications which the law shall establish".

c. Finally, norms with *limited legal efficacy*, which are norms that rely entirely on further norms to produce all the consequences or goals intended by the legislators. The classic example is the norm in article 33, *caput*, of the Constitution: "*Article 33. The law shall provide for the administrative and judicial organization of the territories*".

Even though the theory was initially conceived to make sense of constitutional norms, similar legislative techniques were used and are frequently used in other norms, and this is precisely the case of MP 2.158-35/2001's article 30, para. 4 and 5.

Art. 30, para. 5 states that an Executive Branch ordinance will provide for the concept of "high oscillation of the exchange rate", which can be read as indicating a c. type norm.

However, it contains a b. type norm for two main reasons:

- *First*, constitutional norms of limited legal efficacy are often norms related to the organization of the State and its powers, branches and other arms, and not norms affirming subjective rights.

- *Second*, despite the differences in wording between, say, art. 30 para. 4 and 5 of MP 2.158-35/2001 and art. 5, XIII, of the Constitution, the former is nonetheless more similar to the latter than to c. type norms.

Based on the classification of the norm on analysis as a b. type norm, and given the fact that Silva's theory is largely accepted among competent lawyers, scholars and judges[7], one must conclude that there is a right to modify the tax regime, and that this right can be delimited or constrained by further regulation.

[7] In terms of legal theory, Silva's concepts of legal efficacy are the closer one could get to a consensus. In fact, a simple research on both the Brazilian Supreme Court (Supremo Tribunal Federal, the highest court regarding constitutional matters) and the Brazilian Superior Court (Superior Tribunal de Justiça, the highest court regarding federal legislation)'s websites in each of their bodies of precedents reveal no less than 22 decisions in the first case and 57 decisions in the last case containing the expression "eficácia contida" (restrained legal efficacy) in their summary (research conducted on 19/05/2014 on the following websites: http://www.stf.jus.br/portal/jurisprudencia/ and http://www.stj.jus.br/SCON/jurisprudencia/). .

4. Relevant case law supporting the theses 2 and 3 *supra*

Besides the existence of many legal precedents affirming the validity of Silva's theory in general (see supra note 4) and many others reaffirming the supremacy of the legislator principle both generally and in Tax Law, there are a number of particular cases which can support both the theses presented *supra* in a particularly sound manner.

In this sense, there are important precedents reaffirming the supremacy of the legislator and the non-creative nature of Executive branch ordinances, such as the following rulings of Supremo Tribunal Federal (STF)[8] and Superior Tribunal de Justiça (STJ)[9]:

> "*… the norm authorizing the use of a non-legislative act [executive ordinance] to modify the tax rate does not give the Executive branch powers that are broader to the ones assigned to the Legislative branch, especially because such power must be exercised under the conditions and limitations established by law, according to article 153, para. 1, of the Constitution*" (STF, case ADI 4.661-MC).[10]

> "*The validity of executive ordinances ([which are] secondary normative acts) requires the strict observance of the limits imposed by primary normative acts which are hierarchically superior (laws, treaties, international conventions et caterva); such ordinances are ought to be deemed illegal every time they bring up in their legal text an interpretation contrary to their hierarchically superior counterpart*." (STJ, case REsp 1225018/PE).

Additionally, in STF cases RE 343.446, AI 625.653-AgR, AI 744.295-AgR, RE 567.544-AgR and AI 592.269-AgR, two laws enacting tax obligations – Law 7.787/1989 and Law 8.212/1991 – were rendered constitutional on the grounds that they "define satisfactorily all elements capable of giving rise to a valid tax obligation" despite the fact that both of them left the definition of certain concepts (like "core activity" or "degree of mild, medium and severe risk") to further regulation (by the Executive branch).

The Court also held that Legislative instructions to the Executive branch are not a "limitless power" ("*delegação pura*", that is, a kind of *carte blanche* to create new law). The same rationale supports the conclusion that regulations do not create new law, but give a previous law a detail-oriented nature.

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[8] The Brazilian Supreme Court. See: http://en.wikipedia.org/wiki/Supreme_Federal_Court.

[9] The Brazilian highest appelate court for non-constitutional questions of federal law. For additional information, see: http://en.wikipedia.org/wiki/Supreme_Federal_Court.

[10] The cited article provides an exception to the general prohibition of tax rate modifications through non-legislative acts, which is not a particularly relevant feature to our current analysis, though the rationale adopted by the Court – reaffirming the supremacy of the legislator principle and the legal nature of ordinances in general – is obviously very important to the present case.

Likewise, one could claim that art. 30 para. 4 establishes a right that is capable of producing immediate legal effects despite the fact that art. 30 para. 5 left the definition of "high oscillation" to further regulation.

5. Legal principles and the duty to respect the right to modify the regime regardless of an Executive branch regulation

In a rather striking difference from US or UK contemporary legal practice and legal theory debate, the hegemonic conception of Law in Brazil is not any Hartian or post-Hartian version of legal positivism, but legal interpretation and practice tends to resemble a Dworkinian approach.

This is not only a subject for academic circles; it leads to many concrete implications, including the general consideration of the legal system as an interpretive practice in which principles take a very important role. In the interpretation of legal norms, the search for identifying legal principles normatively above rules became standard procedure as a central aspect of the rule of law itself.[11]

In light of these theoretical conjectures, which are indeed dominant in Brazilian legal scholarship and case law, could the right to modify the regime in article 30, para.4 be interpreted or read as a means to implement broader normatively hierarchically superior legal principles? The answer is affirmative, but some preliminary remarks must be made to clarify what such right is about.

Accrual basis and *cash basis*[12] are the two classic methods of tracking income and expenses in accounting: in the former, the company registers income items when they are earned and records deductions when expenses are incurred; in the latter, revenue is recorded when cash is received, and expenses when they are paid.[13]

On the accrual basis regime, the exchange variation is registered on each period, irrespective of the settlement of the transaction. Thus, "passive" or negative exchange variation (expenses) will reduce the company's profit (therefore it can reduce the amount of CIT owned), while an "active" or positive exchange variation (income) will lead to an increase of profit and therefore can also lead to an increase of CIT (therefore it can lead to an increase of the amount of CIT owned).

[11] See, *v.g.*, Alves, Henrique Napoleão; Bustamante, Thomas. "A interpretação literal no Direito Tributário brasileiro: uma proposta de interpretação para o artigo 111 do CTN." In: Ávila, Humberto. *Fundamentos de Direito Tributário*. Madrid; Barcelona; Buenos Aires, São Paulo: Marcial Pons, 2012; Dworkin, Ronald. *Law's Empire*. Cambridge, MA: Belknap, 2000 [1986]; Àvila, Humberto. Argumentação jurídica e a imunidade do livro eletrônico. *Revista Diálogo Jurídico*, v. I, n. 5, agosto, 2001, p.1-33.

[12] Also known in the US as "Cash receipts and disbursements method" and in the European Union VAT's terminology as "cash accounting".

[13] Douglas J. McQuaig; Patricia A. Bille; Tracie L. Nobles; Judy McQuaig Courshon. *College Accounting, Chapters 1-12*. 11h ed. Cengage Learning, 2012, p. 185.

On the cash basis regime though, the exchange variation gains (income) or losses (expenses) will be known and registered only in the end or settlement of the transaction. In a scenario of high oscillation of exchange rates, cash basis can be the most prudent and conservative alternative for the company, especially because it will avoid the company to be subject to taxation on a momentary variation in the middle of a transaction that in the end may not remain in the same figures.

When the legislator enacts a right to modify the regime from cash basis to accrual basis in view of high oscillation, it is giving companies the opportunity to protect their accounting in variable times in general and their cash flow in particular.

Therefore, given that goal of predictability, the right contained in article 30 para.4 is more closely related to the constitutional principle of legal certainty.

In this sense, the Brazilian Supreme Court (STF) ruled on many different occasions in the sense of affirming legal certainty as both a cornerstone of Brazilian Law and a norm associated to predictability of the law and of social relations.[14] Among such cases, in *RE 566.621* several STF Justices even referred to legal certainty as a *superior legal principle* in Tax Law.

Among distinguished Brazilian scholars, professor Misabel Derzi claims that legal certainty is a requirement of the rule-of-law and is directly related to the reliability and the predictability of the law as a whole[15]. Professors Luis Schoueri and Alberto Xavier sustain that predictability of the law is a means to allow taxpayers to take decisions more accurately in light of all the costs involved *and to predict their tax rights and duties*.[16] Finally, Justice and lecturer Leandro Paulsen claims that legal certainty involves, among others, the stability or constancy of juridical situations.[17]

The possibility of regime change set forth by MP 2.158-35/2010 relates primarily with legal certainty. In this sense, Professors Sacha Calmon and Misabel Derzi gave testimony to the possibility of regime change as a way to protect companies from exchange market instabilities:

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[14] See, *v.g.*, MS 26.604, MS 24.448, ADI 605-MC, RE 566.621, RE 486.825, MS 25.116 *et caterva*.

[15] Derzi, Misabel de Abreu Machado. *Modificações da jurisprudência no Direito Tributário*. São Paulo: Noeses, 2009, p.593. In almost identical terms, Ávila sees legal certainty as a principle binding all State branches and determining reliability, predictability and calculability of the law as a major social and juridical goal to be attained. See Ávila, Humberto. *Segurança jurídica: Entre permanência, mudança e realização no Direito Tributário*. São Paulo: Malheiros, 2011, pp. 112, 120.

[16] Xavier, Alberto. *Tipicidade da tributação, simulação e norma antielisiva*. São Paulo: Dialética, 2001, p. 19; Schoueri, Luís Eduardo. *Direito Tributário*. 2nd ed. São Paulo: Saraiva, 2012.

[17] Paulsen, Leandro. *Curso de Direito Tributário Completo*. 4th ed. Porto Alegre: Livraria do Advogado, 2012.

> "*MP 2.158-35/2001 was enacted precisely for remedying situations of crisis and high exchange market instability, thus changing the standard regime from accrual basis to cash basis. Facing crises with irreversible regime choice at the beginning of each fiscal year would be unfeasible …*".[18]
>
> "*To defend that the option for one regime or another must be made in the first calculation, before the oscillations MP 2.158-35/2001 intend to protect taxpayers from, is to go against the spirit and end of the norms at hand, making them senseless.*"[19]

The *travaux préparatoires* of MP n. 2.158-31/2001 also reinforce the relation between the norm and legal certainty:

> "*… the accrual basis regime … not always reflect the definite result …, since the tax rate may oscillate depending on various economic factors. … In fact, in a changing rate system as the current one, exchange variation results can only be known upon the closing of the transaction that gave rise to them.*"

Other legal principles of constitutional nature may also be related to the possibility to modify the tax regime in view of a high oscillation of exchange rates. The *ability to pay* principle, for instance. In Brazilian Constitution, article 145, para.1 states that "*[w]henever possible, taxes shall have an individual character and shall be graded according to the economic capacity of the taxpayer*". In times of high oscillation, a company in the accrual basis regime may bear an immediate tax burden that can be higher than the final tax burden calculated in the end of the transaction, thus breaching the *ability to pay* principle in the first moment.

Furthermore, in the same scenario a temporary high burden may also impact very negatively the taxpayer's cash flow, which in turn can impose harsh conditions on the continuance of the enterprise's activities themselves and make it harder for the taxpayer to compete in the market. In this situation, there could be also a breach of other constitutional norms, *infra*:

> "*Article 170. The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles: […]*
> *II - private property;*
> *III - the social function of property;*
> *IV - free competition; […]*
> *Sole paragraph - Free exercise of any economic activity is ensured to everyone, regardless of authorization from government agencies, except in the cases set forth by law*."

[18] Coêlho, Sacha Calmon Navarro; Derzi, Misabel Abreu Machado. Dos regimes fiscais de reconhecimento das variações monetárias cambiais nas bases de cálculo do IRPJ e da CSLL. O momento de exercício do direito. *Revista Dialética de Direito Tributário*, n. 171, p.125.

[19] Coêlho, Sacha Calmon Navarro; Derzi, Misabel Abreu Machado. Dos regimes fiscais de reconhecimento das variações monetárias cambiais nas bases de cálculo do IRPJ e da CSLL. O momento de exercício do direito. *Revista Dialética de Direito Tributário*, n. 171, p.127.

The immediate impact of a higher tax burden due to high oscillations can also be dramatic enough to cause an additional breach of the following norm:

> "*Article 150. Without prejudice to any other guarantees ensured to the taxpayers, the Union, the states, the Federal District and the municipalities are forbidden to: […] IV - use a tribute for the purpose of confiscation;*"

Therefore, para.5 of art. 30 cannot provide a reason against the exercise of the right to modify the regime when facing a "high oscillation" without provoking a breach of the Constitution itself.

6. Further interpretation of the *trias politica* principle and the role of State's inertia

It is *prima facie* possible to claim that art. 30 para.5 must be respected also on constitutional grounds, since the Legislative branch was the one originally conditioning the right to the existence of an ordinance, and therefore disregarding this rule in favor of the taxpayer could also be seen as a breach of the constitutional *trias politica* principle.

In this case, there would be a conflict between rules (art. 30 para.4 vs. art. 30 para.5) and principles (legal certainty etc. vs. *trias politica* or separation of powers and the supremacy of the legislator principles).

It is our contention that this would not be a correct assessment of the situation, because (i) the *trias politica* principle prohibits the Executive branch to create norms, as mentioned in "2.2" *supra*; and (ii) the principle of the supremacy of the legislator is being breached by the very Executive omission to issue the ordinance (for the Executive is in fact not complying with legislative instructions to do so).

In favor of such view, it is worth mentioning that STF has condemned State's inertia (in all branches and organs/arms, including, of course, the Executive branch), as in cases MS 24.448, MS 25.116, MS 26.053 (concerning pension law); HC 102.206, HC 74.276 (regarding criminal law); ARE 639.337-AgR, RE 464.143-AgR, RE 594.018-AgR (cases related to social rights); MS 24.167 (Tax Law dispute in which the State is held accountable for taking too long to examine an administrative appeal); etc.

In STF case law, there are certain definitions of State omission particularly worth considering.

In a case involving Labor Law, for instance, Justice Celso de Mello stated the following (case ADI 1.442):

> "*… the State can also disrespect the Constitution through inertia …, undermining the effectiveness of the Constitutional declaration of rights and also preventing the very applicability of postulates and principles of the Constitution with the absence of furtherance measures*."

In other two pension law cases (MI 1.967 and MI 3.322), STF dealt with the following constitutional norm:

> "*Article 40. Paragraph 4 - The retirement pension shall be revised, in the same proportion and on the same date, whenever the remuneration of the servants in activity is changed, and any benefits or advantages subsequently granted to the servants in activity shall also be extended to the retired servants, including those resulting from the transformation or reclassification of the office or function from which they retired, as the law provides.*"

In both cases, retired servants were not able to exercise the right to equal treatment guaranteed in art. 40 para.4 due to a Legislative omission to enact a regulatory law defining the conditions under which this right would be exercised.

STF ruled that the State could not pledge its omission in its favor so as to deny the retired servants the right to equal treatment.

In our view, the same is applicable to the present case: the Executive branch, which is the same branch responsible for CIT, cannot oppose taxpayers' right to modify their regime by claiming its omission to enact an ordinance to define what a high oscillation is.

This is a specific application of a generally accepted maxim of equity: no one profits by his own wrong.[20]

7. The concept of "high oscillation"

Based upon the aforesaid, there are sound arguments for defending the existence of a right to modify the tax regime regardless of an ordinance defining what a "high oscillation" is.

However, one must yet define what a "high oscillation" is (in the absence of Executive branch regulations on the matter), otherwise it is not possible to delimit the facts which must arise for a taxpayer to claim such right.

No settled concepts of "high oscillation" were found in legal scholarship though. Also, there is not an indisputable concept of "high oscillation" that can be traced in judicial decisions.

[20] It is a basic principle of Brazilian Law, and elsewhere recognized in similar terms. In the classic US case *Riggs v. Palmer* (1889) 115 N.Y. 506, for example, a man who had killed his grandfather to receive his inheritance more quickly (and for fear that his grandfather could change his will) lost all right to the inheritance. See: Dworkin, Ronald. "The Model of Rules I". In: *Taking Rights Seriously*. Cambridge, MA: Harvard University Press, 1977.

In many Civil Law cases among 2nd instance tribunals, *v.g.*, exchange rate variations were not considered as a sufficient reason to trigger protective rights or even the revision of the contract. The rationale behind these precedents is that variations are part of the risk inherent to transactions and contracts in a capitalist economy[21], i.e., facts that are not able to trigger the rule of *rebus sic standibus*.

STJ also held the same rationale: in cases REsp 699.860 and REsp 614048, the Court affirmed that exchange variations are expected phenomena in the business environment and the exchange market is, by definition, inconstant.

The same STJ, however, ruled in favor of contract revision in case REsp 299501 on the grounds that the exchange market crisis of January 1999 resulted in an "*excessive burden that prevents the debtor from solving its contractual obligations*". There are also Civil Law cases among 2nd instance tribunals in which exchange variations were regarded as sufficient to trigger contract modifications and the like.[22]

Considering the peculiarities of Tax Law (especially when compared to Civil Law, for instance[23]) and the grounds of the right to modify the regime, a "high oscillation" should be interpreted as a variation capable of provoking significant impacts on the taxpayer's burden in the short-term. This concept is coherent with STJ's ruling in REsp 299501, and also with the normative expectations arisen of the *legal certainty* principle and *the ability to pay* principle.

8. Concluding remarks

Based upon the foregoing and subject to the additional qualifications set forth below, we are of the opinion that:

8.1. While art. 30, para. 4, of MP 2.158-35/01 states clearly that companies are entitled to chance their regime when facing a "high oscillation of the exchange rate", the following paragraph provides that the Executive Branch must define what a "high oscillation" is. In this scenario, many taxpayers are doubtful about whether they are entitled to exercise such right even in the absence of the cited Executive Branch.

[21] See: TRF1, Legal suit n. 0019636-67.1999.4.01.3800, 28 May 2013; TJSC, Legal suit n. 2012.074872-9, 02 Sept. 2013; TRF1, Legal suit n. 2000.34.00.037273-8, 11 Nov. 2009

[22] See: TJPR, AI 145692-2, 9 Nov. 1999; TJSC, AC 2006.037727-7, 29 Oct. 2008; TJMG, Legal suit n. 1.0024.05.769680-9/003, 08 Oct. 2008; TJMG, Legal suit n. 1.0027.01.013693-8/001, 14 Nov. 2007; etc.

[23] After all, in Brazilian Law, a regular taxpayer has more rights and guarantees than a regular private contractor does. In Civil Law, private parties are presumably equal; this is not so in Tax Law and the relation between taxpayers and the State.

8.2. Considering the *trias politica* principle, the Executive branch is defined as the one responsible for executing and enforcing the law *par excellence* (not creating it). In such contexts, Executive ordinances can only make a pre-existing law clearer or more detail-oriented. Therefore, the right to modify the regime when facing a “high oscillation of the exchange rate” exists regardless of the enactment of an Executive ordinance.

8.3. According to classical scholarship on the legal efficacy of norms, article 30, §§ 4 and 5 of MP 2.158-35/01 must be regarded as an example of a norm with (a possible) restrained legal efficacy, which means that there is a right to modify the tax regime, and that this right can be delimited or constrained by further regulation.

8.4. Relevant case law by STF and STJ reinforces the supremacy of the legislator and the non-creative nature of Executive branch ordinances and the possibility of the exercise of comparable rights regardless of further regulation.

8.5. The right contained in article 30 para.4 is more closely related to the constitutional principle of legal certainty, as well as the *ability to pay* principle and the norms in articles 170 and 150 IV of the Constitution, since it gives companies the opportunity to protect their accounting in variable times in general and their cash flow in particular and the chance to avoid being subject to artificially high tax burdens in the short-term.

8.6. Additionally, the Executive branch cannot oppose taxpayers’ right to modify their regime by claiming its omission to enact an ordinance to define what a high oscillation is, for it is a generally accepted maxim of equity that no one profits by his own wrong.

8.7. In the absence of Executive regulation, a “high oscillation” must be regarded as the one capable of provoking significant impacts on the taxpayer’s burden in the short-term – this scenario imposes an “excessive burden” that may prevent taxpayers from solving their obligations.