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Tax Liabilities Within Groups of Companies: Case Study of Brazil

André Mendes Moreira and Marina Machado Marques

Abstract The objective of this paper is to identify the limitations for the selection of companies within the same corporate group to bear the unpaid taxes due by their co-companies at the Brazilian legal framework. Initially, we analyze the limitations to the selection of the taxpayer and the concept of corporate groups in Brazilian law. After, we demonstrate the specific restrictions to the transfer of tax obligations to third parties imposed by the National Tax Code and, in the end, we analyze a specific Brazilian legal provision that allocate joint and several liability due to mere belonging to a corporate group. Given this effort, we concluded that simply belonging to a corporate group is not a reason for transferring tax responsibility as per the National Tax Code and, therefore, this cannot be adopted by the Tax Authorities and by the Court System as justification for allocating tax responsibility onto a different company.

1 Introduction

The Brazilian experience of collecting unpaid taxes has sometimes proven to be inefficient and, therefore, compelled the administrative authorities to search for new mechanisms in order to ensure the tax collection. One of the main reasons for the lack of success in collecting due taxes not paid in time is the inability to pay of the legal entity, whose assets are often worth less than the amount of taxes evaded (especially considering the fines and interests charged). Henceforth, it has become common practice to make other companies liable for taxes unpaid by third parties simply because they belong to the same economic group—*de facto* or *de jure*.

A. Mendes Moreira (✉)
Federal University of Minas Gerais, Belo Horizonte, Brazil

University of São Paulo, São Paulo, Brazil
e-mail: andre@sachacalmon.com.br

M. Machado Marques (✉)
Federal University of Minas Gerais, Belo Horizonte, Brazil
e-mail: marina.marques@sachacalmon.com.br

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However, the Brazilian legal framework provides for numerous limitations to the expansion of tax obligations, hence making all group members liable should be carefully considered.

It is relevant to note that Brazil is a Civil Law country, where legislation is the primary legal source of regulations. Particularly in the tax field, the rule of law—or "principle of legality"—stands out as a conditio *sine qua non* for making the taxpayer liable. The Brazilian Constitution is extremely analytical and regulatory. The National Tax System comprises more than 20 articles, each having tens of items and paragraphs—making this sole part of the Brazilian Constitution as lengthy as the entire United States Constitution. The allocation of responsibility to companies of the same group certainly increases the effectiveness of tax collection. Nevertheless, how is it possible to conciliate such increase with the fact that the National Tax Code establishes various restrictions to the transfer of tax obligations to third parties?

The levying of taxes in Brazil is strictly limited by the legislation, which does not allow for any convenience or opportunistic approaches by the tax authorities. The National Tax Code brings regulations related to the definition of the taxpayer that forbid the transference of the tax burden to another legal entity simply because they are under the same control.

The objective of this paper is to identify the limitations for the selection of companies within the same corporate group to bear the unpaid taxes due by their co-companies. Consequently, we'll be able to verify if the method used nowadays by the Brazilian tax authorities is valid. This paper adopts the thesis that *the mere fact that a legal entity belongs to a corporate group is not a legitimate cause to make that entity liable for taxes of other entities, and, therefore, this cannot be used by the tax authorities or the Courts as the reason for that.*

2 The Rule of Law—"Principle of Legality"—As Constitutional Guarantee for Brazilian Taxpayers

In Chapter I of its Section VI—"On the Taxation and on the Budget"—the Brazilian Constitution sets forth many provisions related to the National Tax System, defining the events that can be subject to taxation; granting the power to levy taxes to each of the members of the federation; and setting limitations and conditions for the tax collection's activities. In granting the power to levy taxes, the Constitution outlines the details related to the exercise of such power, defining a series of guarantees to the taxpayers. Among these, the rule of law—"principle of legality"—stands out, which is worded as follows in the Brazilian Constitutional Law:

> Art. 150. Notwithstanding the other guarantees assured to the taxpayer, it is forbidden to the Federal, State, Federal District and Municipal governments to:
>
> I – impose or raise taxes without a legal statute providing for it;

In addition to the Constitution, the National Tax Code points out precisely the subjects that only the legal statute, which creates the tax, has power over:

> Art. 97. Only a legal statute can establish:
> I – the creation of taxes or their extinction;
> II – the increase in taxes, or their reduction (. . .);
> III – the definition of the taxable event of the principal tax obligation (. . .) and of the party liable for that tax;
> IV – the definition of the tax rate and its taxable amount (. . .);
> V – the imposition of penalties due the acts or omissions that breach the provisions of such statute, or due to other offences defined therein;
> VI – the conditions for exclusion, suspension and extinction of tax credits or dismissal or reduction of penalties.

Hence, in Brazil, the tax statute cannot be generic. The essential elements of the tax shall be entirely set forth in the parliamentary act: taxable event, taxable amount, taxpayers and liable third parties. The requirement imposed on the lawmaker to define precisely and in detail the taxable events leads to the idea of pre-defined concepts in Tax Law, thus keeping the Government or Court System officers from interfering with the original tax legislation. Therefore, it is clear from the provisions of the Constitution, interpreted in conjunction with the National Tax Code, that it is not possible for the taxpayer to be selected by the Court System or by the Government. Such task is an exclusive power of the Legislative Bodies, which shall do it in accordance with the general regulations defined in the National Tax Code.

3 Limitations to the Selection of the Taxpayer in Brazilian Legislation

The Brazilian Constitution, by granting the powers and limiting the events that are taxable, defines the party that must bear the tax burden as a consequence of the constitutional structure of each type of tax. When dealing with taxes, the burden must be put on the party who has demonstrated economic ability to bear it at the time the taxable event took place.

Thus, from the enforcement of the provisions set forth in the Constitution, the legal-tax relation is created and from that stems the obligation to pay the due taxes. At this moment, it is necessary to identify the party liable for the obligation, that is, the one who will be responsible for making the payment. When considering the liable party, the immediate thought is to allocate the responsibility for paying on the party who carried out the taxable event, for that party was who originated the tax obligation. This thought leads us to a very relevant consideration: the identification of the taxpayer within the legal-tax relation requires that party to be somehow related to the taxable event. To levy taxes on the party who carried out the taxable event is the safest way to ensure the taxation will be imposed where the wealth generation indeed occurred, therefore putting the burden on the individual who showed the ability to pay for the governmental expenses.

Article 121 of the National Tax Code indicates two types of parties on which the taxes can be levied, the “taxpayer” and the “responsible”:

> Art. 121. The taxpayer bearing the tax obligation is the party required to pay taxes or monetary penalty.
>
> Sole paragraph. The party responsible for bearing the tax obligation is:
>
> I – taxpayer, if it has a personal and direct relation with the situation that created the taxable event;
>
> II – responsible, if, not being a taxpayer, its obligation is expressly provided for in a statute.

According to the Brazilian Tax Code, taxpayer is the one that has a personal and direct relation with the taxable event. Responsible is the one who does not meet the taxpayer criteria, but is obliged to pay as a consequence of a specific legal provision. By mentioning *personal relation*, the National Tax Code determines that the taxpayer must take part personally in the factual event that triggers the tax obligation.

The taxpayer may or may not be expressly described in the statute that created the tax. Usually, the sole analysis of the taxable event is enough to enable the identification of the taxpayer. Note, for instance, that the tax on services intuitively leads to the provider of those services. On the other hand, item II of the same article 121 allows for the legislation to select another entity, which is different from the direct taxpayer, to comply with the obligation. That is why the responsible—despite not having carried out the taxable event, and not having made or earned an economic benefit—might, in many cases, be the tax-liable party.

The selection of a responsible to replace the taxpayer must be expressly established by a legal provision, in order to ensure the legal certainty and to forbid discretionary taxation. This is what one can extract from item I, article 150 of the Brazilian Constitution and from item III, article 97 of the National Tax Code, which follow below again:

> Art. 150. Notwithstanding the other guarantees assured to the taxpayer, it is prohibited to the Federal, State, Federal District and Municipal governments to:
>
> I – impose or raise taxes without a statute providing for it;

> Art. 97. Only the legislation can set forth:
>
> [...]
>
> III – the definition of the taxable event of the principal tax obligation (...) and of the party liable for that tax;

Nevertheless, not even the lawmaker is entirely free to determine who the tax responsible will be. Article 128 of the National Tax Code requires a link between the third party liable for the tax—responsible—and the taxable event that created such obligation:

> Art. 128. Notwithstanding the provisions of this chapter, the legislation may expressly allocate the responsibility for the tax onto a third party, connected to the taxable event of the corresponding obligation, thus exempting the taxpayer from that responsibility or putting on the latter a secondary liability to fully or partially meet the said obligation.

The connection required by Article 128 must therefore be analyzed. If the taxpayer is the one with personal and direct relation with the taxable event, one can infer the existence of connections that are not personal or direct. That is why if there were a direct connection with the third party, the taxable event would have

been generated jointly and consequently, there would be a relationship between the taxpayers. Thus, for the purpose of allocating tax responsibility, it suffices to have an indirect connection with the taxable event or with the party that carried it out, which allows the party liable for the tax—through withholding or reimbursement—to get a refund for the tax paid and the restoration of its assets.

Therefore, the transfer of liability cannot be broad and unrestricted, at the risk of illegally overburdening the third parties who are held responsible for paying taxes that were unpaid by the "original" taxpayer. If the party liable for the tax is not related to the taxable event, or if the reimbursement of the expenditures by that party is not ensured, the governmental entity will be earning an amount that is undue, thus exceeding its jurisdiction. Moreover, the tax-liable party would have its wealth illegally subtracted, harming its property right.

In this sense, the link to the taxable event required by the provisions of Article 128 of the National Tax Code must allow for the responsible the right to seek economic compensation from the taxpayer. It is necessary for the responsible to have control over the event, in order to avoid receiving the burden based on the existence of a legal link and not a moral or economic one, so that it is possible to demand monetary compensation from the party who undertook the taxable event—the "original" taxpayer.

One can conclude that the allocation of tax responsibility on third parties requires a relationship in accordance with the legal regulations and which is somehow associated with the taxable event. Simultaneously, the existence of the tax liability cannot keep the responsible from recouping the burden it has borne in place of the taxpayer.

4 The Concept of Corporate Groups in Brazilian Law

In spite of the technical excellence of its provisions, the existence of corporate groups was not addressed by the National Tax Code, especially because, at the time it was enacted—1966—that concept was not present. The absence of a clear regulation over the matter results in the use of various pieces of legislation to allocate the responsibility onto all the companies within a corporate group, once the Government seeks efficacy in tax collection at all costs.

The definition of corporate group may be found in numerous fields of Brazilian law, such as corporate, labor, consumer and business law, and it changes according to the legislation applicable to the situation at hand. As to the allocation of responsibility to the members of a corporate group, the matter is also handled differently according to each field of law. In antitrust law, there is express legal provision for the joint liability of the group members with respect to obligations incurred and acts taken individually by its members. On the other hand, in corporate law, there is no general provision for the joint liability, except if the corporate veil is lifted.

Since corporate groups are a reality in a globalized world, a brief presentation of the definitions of such concept consolidated in the main fields of Brazilian Law and

their implications to allocation of tax responsibility is necessary, along with an analysis of how Brazilian Courts have dealt with the matter. In corporate law, the joining of enterprises based on control relations through capital participation takes form as corporate groups *de jure*, which are regulated by Statute N. 6.404/76, Corporations Act (LSA, in Portuguese). Regulated in Chapter XXI of LSA, the corporate groups *de jure*—practically inexistent in the Brazilian business reality[1]—are formally set up by means of the execution of an agreement, called *corporate group convention*, while the corporate groups *de facto*, addressed in Chapter XX of the said statute, are present when one or more companies, individually or jointly, can decide the fate of the companies situated beneath them in the chain of command—control or affiliation relation—with no formal agreement.

Corporate groups are essentially formed by one or more companies, each one with its own legal personality and among which there is a link through board of directors, control, management or coordination for the conducting business. This way, some characteristics of corporate groups are the distinction among the legal personality of their members and the unity of board of directors, allowing, simultaneously, for the reduction in risk and for the growth of the business. For the very fact that their individual legal personalities are kept, the companies within corporate groups normally seek to accomplish their individual business purpose. Nonetheless, given there is an economic and strategic interest that overarches, at least in theory, the individual interests of the various companies involved—the corporate group interest—the need for a unified direction emerges, in order to coordinate the participants in the carrying out of their business activities. Thus, the unified strategy consists of delegating powers to one entity or company within the group to centralize the decision making process for the members of the corporate group. This is a broad concept, which involves many forms of coordination of the corporate group.

Therefore, corporate group may be defined as a group of companies that, though with individual legal personalities, is subject to a unified strategy, which aims at accomplishing the interests that overarch each of the legal entities considered individually. It seeks, in summary, to coordinate the group's activities in order to reach an optimal result for all its members. In corporate groups *de facto*, the unified decision-making lies on the hands of the controlling company. In corporate groups *de jure*, the decision-making process is established in the corporate group convention.

As mentioned above, in corporate law, there is no provision for the transfer to the whole group of obligations that are from a single group member. The same is true for tax law, in which regulations the term "corporate group" is not even quoted. Labor legislation, on the other hand, refers to the term in article 2nd, paragraph 2 of Decree-Law N. 5.452/43, requiring companies to be under common management, control or administration:

[1]The various fields of Brazilian law commonly expressly define joint and several liability for the obligations of the companies within a corporate group. Moreover, there numerous bureaucratic formalities to create corporate groups of right.

> Art. 2° - It is considered an employer the company, individual or collective, which, taking on the risks of the business activities, employ, remunerate and guides the personal rendering of service.
>
> [. . .]
>
> § 2° - Whenever one or more companies, though each with an individual legal personality, are under the management, control or administration of another, thus forming a corporate group of entities in the primary, secondary of any other sector of the economy, the main company and each of the controlled ones shall have joint and several liability with respect to labor issues.

It can be noted that the main Brazilian Labor Code expands the concept used by corporate law (Yamashita and Yamashita 2015), especially because in labor law the employer's liability is strict (not dependent on guilt, therefore, regardless of whether there was direct intervention or fault). However, the Brazilian Superior Labor Court has already issued rulings as to restrict the application of the concept of economic groups to allocate responsibility (Brazil, TST 2008). Hence, the provision that handles the labor liability, which is a result of labor relations, doesn't come even close to the relations generated by tax law, making it impossible to use that provision in this latter field of law. Furthermore, since the principle of the rule of law in taxation—legality—requires express legal provision when dealing with the transfer of tax liability, it can be argued that the use of legal provisions from other fields of law is not legitimate and as such they are not valid tax law provisions. Thus, considering there is no specific concept in tax law and that there is also not a set of concrete rules that allow for the precise definition of when a set of companies configures a corporate group, it is necessary to assess the main criteria used in tax case law in order to characterize a corporate group.

The proof of the existence of a corporate group is complex and requires extensive evidence, so that both of the following must be proven: the elements, based on which the tax authority concluded a corporate group exists; and the aspects that show the effective characterization of one of the hypothesis of tax responsibility allocation as set forth in the National Tax Code. From case precedents a series of factual circumstances were selected to allow for the characterization of corporate groups in real situations. In the Special Appeal N. 1.144.884/SC (Brazil, STJ 2010a), the following were considered enough to ascertain the existence of a corporate group: (i) sharing of facilities, employees and vehicles; (ii) conducting of transactions among the companies without consideration, such as loans without interest and free assignment of assets; (iii) existence of a power of attorney in favor of the managing partner of one of the companies, granting him management powers over the other companies; (iv) shared use of branches of the individual companies in the same address; (v) the fact that one company's revenue was almost entirely from rent of property and vehicles to companies considered to be in the same group; (vi) factual finding that the three companies involved were run by the same person during some of the periods assessed by the tax authority.

In the administrative realm, on the other hand, it is commonly required for the tax authority to show the evidence gathered, among which are: (i) existence of companies under a single command, where the main one controls the others (Brazil, CARF

2014a); (ii) companies run by the partners as if they were a single company, sharing the corresponding economic results (Brazil, CARF 2016a); and (iii) two or more companies with the same business purpose and under a single control (Brazil, CARF 2014b). Other circumstantial evidence usually used are: (i) sharing of address, telephone (Brazil, CARF 2014a) and facilities (Brazil, CARF 2014b); (ii) similar ownership structure (Brazil, CARF 2014a); (iii) identity of the accounting department (Brazil, CARF 2014c) and exchange of employees for provision of services (Brazil, CARF 2013); as well as (iv) loans among the companies (Brazil, CARF 2014b).

Now that the understanding of corporate group in the Brazilian law has been presented in general terms, the main objective of this paper will be addressed next, that is, determining in which situations there could be allocation of tax responsibility to companies within the same corporate group.

5 The Concept of Joint Liability Set Forth in Article 124 of the National Tax Code and Its Use for Allocating Tax Responsibility onto Companies Within the Same Corporate Group

There are various decisions from administrative and legal courts that confirmed the joint liability for tax purposes among companies within the same corporate group, based on the provisions of Article 124 of the National Tax Code. This piece of legislation lists, generically, situations where joint liability can be enforced on different companies for tax purposes:

> Art. 124. The following are jointly liable:
> I – the parties that have a common interest in the situation that constitutes the taxable event of the principal obligation;
> II – the parties expressly defined by law.

The instrument, which enables enforcing the tax obligation on many entities, is a measure welcome by the tax authorities for it eases the task of tax collection, given that the possibility of imposing the tax liability on various debtors, each one with different assets, increases the chances of success in the collection of taxes. The joint liability provided for in item I takes place from a fact, which is when two parties—legal entities or natural persons—carry out the taxable event together. Actually, it wouldn't even be necessary for a statute to establish the joint liability in this case, once it is based on the fact that both—or all—companies or individuals will personally and directly carry out the taxable event. Therefore, this is a typical case of one taxable event with more than one taxpayer. On the other hand, item II addresses the legal joint liability, which, under no circumstance, allows for the transfer of tax responsibility without the link to the taxable event (Brazil, STF 2010), since the principle of legality—rule of law—renders illegitimate the

establishment of joint liability that breaches the limits set in the National Tax Code aforementioned.

It is important to highlight that joint liability due to the existence of more than one taxpayer—e.g., more than one person carrying out the taxable event—and tax responsibility due to legal provision are distinct institutes. While the former regulates the relationship among parties liable for the payment, the latter identifies, in a general sense, who shall bear the tax burden. That is: the liability of the codebtors may be joint and several or secondary (Brazil, STJ 2008a).[2] In the same way, the Administrative Counsel for Tax Appeals (CARF, in Portuguese) has already issued an opinion through Appellate Decision N. 13021302-000490 on 22.Jan.2011 (Brazil, CARF 2011), stating that: "the joint liability set forth in art. 124 of the National Tax Code is not equivalent to the responsibility hypothesis and it requires the correct legal grounds for the transfer of tax responsibility, which must be presented by the tax authority".

Considering that, once the joint liability is identified, the Tax Authority may select, at its own discretion, which party to impose taxes on, a more in-depth analysis of the instruments is imperative in order to find out if the use of such prerogative to allocate tax responsibility to companies within the same corporate group is legitimate.

5.1 On the Joint Liability as a Consequence of the Common Interest in the Taxable Event, as Set Forth in Article 124, Item I of National Tax Code

Item I of article 124 of the National Tax Code is a piece of legislation normally referred to when dealing with allocation of tax responsibility on companies within a corporate group and it has gotten more importance due to the numerous cases that reach the Judiciary, notably the Superior Court of Justice (STJ, in Portuguese). The statute determines that once the common interest is identified, the joint and several liability among the parties involved is an immediate consequence. Nevertheless, how does one define "parties with common interest in the situation that constitutes the taxable event of the principal obligation", given the lawmaker did not present a definition?

Infinite are the definitions created by the legal doctrine, case precedents and tax authorities, some of which tend to overly expand the original purpose of the legal provision and include entities that should never be treated as tax-liable party for the tax obligation. It is not any given interest that suffices to trigger the joint liability,

[2]This is the understanding of the Superior Court of Justice, according to which: "The provisions of art. 124, item II, stating that the 'entities defined by law' are jointly and severally liable, do not authorize the lawmaker to create new cases of tax responsibility without abiding to the requirements of art. 128 of the National Tax Code."

because the legal provision is clear in stating that the common interest must be originated from the situation that constitutes the taxable event. The common interest is only present when the parties involved are in the same position in the situation that constitutes the juridical tax act, in other words, when these parties have shared rights and duties, which come from the same legal purpose. For instance, in the case of coownership of a property, when the parties involved jointly execute the taxable event that triggers the property tax—urban building and land tax (IPTU, in Portuguese)—and, as a consequence, are taxpayers jointly and severally liable for the payment of the tax.

This notion is, however, difficult to be transferred to other taxes, such as social contribution on revenues (COFINS, in Portuguese) and corporate income tax, given their material aspects—revenue, income and profit, respectively—do not allow, obviously, for the joint acts of different legal entities, which are independent from a legal perspective. Because of that, the application of item I, article 124 of the National Tax Code to some taxes is controversial. In any case, parties that have opposing interests in a given juridical act may not simultaneously have common interests with respect to the same juridical situation. Therefore, buyer and seller do not have common interests in the sale and purchase of a good, but rather opposing interests and thus the determination of joint liability is not legitimate, with respect to the tax on goods due when the merchandise is shipped (Schoueri 2013).

Even if the default is beneficial to the parties—resulting in a price reduction for the buyer, for instance—it is not a case of common interest for the purposes of allocating tax responsibility. That is because social, moral or economic interests cannot enable the allocation of joint liability. Thus, the concept of common interest must be obtained from the National Tax Code, which repeals the economic interpretation as hermeneutic method. In this sense, the mere fact that the parties belong to the same corporate group does not imply any common interest beyond that of eventual economic ones, and this does not award the allocation of tax responsibility to such companies, as ruled by the Superior Court of Justice (Brazil, STJ 2008b). Moreover, even if the existence of a simple economic interest was considered to be enough, it is pivotal to mention that not always the companies part of the corporate group have, in fact, common interests, as they are usually subject to independent professional management, which have their own—and not always coinciding—challenges and targets (de Oliveira et al. 2015).

In this context, it is important to interpret the nature of the joint liability mentioned in item I, article 124 of the National Tax Code, as being liability between taxpayers, for they have personal and direct relationship with the taxable event, and consequently, common interest in the situation. In spite of this, tax authorities usually apply such legal provision as a means to justify the allocation of responsibility to companies within the same corporate group, without verifying if the companies supposedly involved have in fact carried out the taxable event jointly. Such allocation is based exclusively on the existence of an alleged common economic interest.

Nevertheless, the prevailing legal precedents consider that there is only common legal interest in the event that triggered the taxation when the taxable act was carried

out jointly by the companies acting together. And this is not due to the fact that they belong to the same corporate group, but rather for being together in the same position from a tax law perspective. In this sense, the special appeal N. 859.616/RS[3] consolidated the understanding that common interest is not the same as economic interest, with the former requiring the companies to act together in the situation the constitutes the taxable event. The same understanding is found in many other precedents from the Superior Court of Justice (Brazil, STJ 2011; Brazil, STJ 2010b; Brazil, STJ 2016) and from CARF (Brazil, CARF 2016b; Brazil, CARF 2014d; Brazil, CARF 2014e), in which there are rulings that even require the tax authority to provide evidence of the joint acting of the parties. Therefore, it can be stated that, in accordance with the prevailing Brazilian case precedents, economic interest does not mean common interest, but rather legal interest, so that the mere participation in a corporate group is not enough evidence to allocate tax liability to companies that did not carry out the same taxable event (Brazil, STJ 2015). Hence, the participation in a corporate group does not automatically mean there is common interest, which would result in the application of item I, article 124 of the National Tax Code.

This, however, is not to say there will never be "common interest" within corporate groups, but rather that it must be effectively proven by the tax authorities in their claims that use this regulation as basis for issuing tax-deficiency notices. For instance, take the case of an employee that works for two companies within the same corporate group, but who has only signed one employment agreement. In this case, the taxable event that triggers social security contribution is carried out together and, consequently, both companies shall be jointly liable. Finally, it is important to also highlight that illegal acts or intermingling of asset are not grounds for applying the legal provision, given the fraudulent behavior of members of a corporate group is subject to regulations that aim at avoiding tax evasion, which are not the subject of this work, except if the purpose of the offense was to conceal a fact that reveals effective common legal interest.

5.2 Joint Liability According to Article 124, Item II of National Tax Code

As explained above, item II of article 124 of the National Tax Code determines that are jointly liable the parties expressly defined by law. This wording, at first glance, leads to the belief there is broad and unrestricted powers to such designation.

[3]The case involves the inclusion of Banco Alfa S/A as a tax-liable party in a tax execution proceeding, in which the claim was for the payment of service tax (ISSQN, in Portuguese) due by Alfa Arrendamento Mercantil S/A. The former was considered liable through an interlocutory order issued by a trial court and based on the fact that the companies belonged to the same corporate group. The ruling was that Banco Alfa S/A should not be liable to the taxes in that execution proceeding. STJ, Recurso Especial n° 859.616/RS, Primeira Turma, Relator Ministro Luiz Fux, ruled on 18.Sep.2007.

Nevertheless, it is imperative to abide by the limits established by the Constitution and the National Tax Code—designed to confer unity and coherence to the Brazilian tax system—for allocating tax responsibility. For this reason, the aforementioned item II may not be interpreted as a "blank check" to the lawmaker to act discretionarily. On the contrary, the lawmaker can only allocate liability onto the party that has a relationship with the event that triggered the tax obligation.

However, the tax authorities interpret the above mentioned regulation in isolation, as they mistakenly consider the only limit to allocating joint liability is the necessity for express legal provision and this implies requirements that are clearly contrary to the National Tax System.

One of these requirements is the allocation of tax responsibility to companies of the same corporate group simply because they have such relationship, but with no link whatsoever between these companies and the generation of the tax obligation, based on the provision set forth in article 30, item IX of Statute N. 8212/91, which will be studied below.

6 On the Liability on Corporate Groups with Respect to Payroll Taxes Defined in Article 30, Item IX of Statute N. 8212/91

The most straightforward case of tax responsibility allocation as a consequence of belonging to the same corporate group is in Statute N. 8212/91. Such statute expressly allocated joint and several liability to companies within any type of corporate group, with respect to paying payroll taxes provided for therein. Given the importance of the social security system—for which payroll taxes are enacted—the lawmaker tried to protect as well as to ensure the effectiveness of the collection by means of defining tax responsibility rules, among which is item IX, article 30, transcribed below:

> Art. 30. The collection and payment of payroll taxes or other sums due to Social Security are subject to the following rules:
>
> [. . .]
>
> IX – companies within any type of corporate group are all jointly liable for the obligations created by this Statute;

Note that the only criterion taken in consideration by this legal provision to allocate joint liability is the mere belonging to a corporate group, without any criterion that requires the link between the companies and the taxable event. According to this regulation, companies within a corporate group are automatically responsible for the payroll taxes due by the others. As to the concept of corporate group, Normative Instruction—Brazilian Federal Revenue (RFB, in Portuguese) N. 971/09 incorporated the definition from article 494 of the Brazilian Labor Code, stating that:

> Art. 494. A corporate group exists when 2 (two) or more companies are under the management, control or administration of one of them, forming an industrial, commercial or other group in any business sector.

As mentioned above, the allocation of responsibility for the tax obligation onto a third party must strictly abide by the principle of legality in taxation. Thus, it is crucial for the regulation to elect a party that is linked to the taxable event in order for it not to require an express legal provision to transfer tax responsibility or in order to be reimbursed for the amounts paid. Article 124, item II of the National Tax Code, which allows for the transfer or extension of liability by law, does not, thus, allow for the allocation of responsibility without a link to the taxable event, so that the joint liability mentioned in the statute must be interpreted within the limits of the National Tax Code.

Consequently, it must be deemed illegal to allocate the responsibility for paying payroll taxes onto companies of the same corporate group only because they belong to the corporate group. It is argued that, besides belonging to a corporate group, in order for a company to be made responsible for tax obligations of other taxpayers, it is necessary that the former is connected to the taxable event. In other words, the tax authorities may only transfer responsibility to a company that has concrete decision-making power over the events associated with the creation of the tax obligation of the other company, hence participating in the unified decision-making process. Therefore, the tax authorities must justify and provide evidence of the existence of these requirements when the tax-deficiency notice is issued.

It is believed that this method links the companies that make up the decision-making subgroup to the taxable event, thus making it possible both to prevent the burdening and to get reimbursed for the amounts paid, in case it is found liable in the future. This way, the requirement established in Article 128 of the National Tax Code will be complied with. It is worth noting that the other companies of the group, which are not part of the decision-making subgroup, are not associated with the situation that constitutes the taxable event, as per the requirements defined by the National Tax Code for allocating tax responsibility. To have shares in another company, to control or coordinate corporate groups does not characterize events that trigger a tax obligation, rather it normally just shows simply a possible economic interest. Thus, the mere existence of decision-making power, without any connection to the taxable event, is not a legitimate ground for the transfer of responsibility.

Regardless of that, the legal and administrative case precedents have ruled differently by applying the provision indiscriminately without verifying the existence of any relationship with the taxable event, as states the following CARF decision (Brazil, CARF 2014b):

> It is observed that the joint and several liability for social payroll taxes is legal, meeting the requirements set forth in item II, art, 124 of the National Tax Code. The regulation is clear when it establishes that, once the existence of a corporate group is proven, be it in a legal sense or in fact, the joint and several liability among the corporate group members is automatic with respect to Social Security obligations.

Unless proven otherwise, this understanding is incorrect both with respect to the use of article 30, item IX of Statute 8212/91—for the fact that the companies involved belong to a corporate group—and because it presumes common interest based on this fact, thus mistaking legal interest for economic interest. There are many other similar appellate decisions (Brazil, CARF 2016c). Nevertheless, still within CARF, it is worth highlighting appellate decision N. 2301-004.795 (Brazil, CARF 2016d). In this case, simulations and fraudulent practices were proven to exist with the purpose of evading payroll taxes. When assessing item IX of article 30 of Statute 8212/91, it was stated at the time that:

> Such provision clearly creates mechanisms to ensure tax collection, expanding the liability for such to companies that have certain proximity with the taxpayer and with the realization of the taxable event. Its wording is broad and, at least literally, is capable of encompassing tax responsibility both in a case of simple default and in a situation involving fraudulent behavior, intention or simulations by the parties involved – which can be controversial. However, there is no doubt that the drafting of the regulation and its application to the case at hand is not restricted to the literal interpretation, rather it must result from the use of other hermeneutic approaches (systematic, teleological, historic, etc.)
>
> Despite the fact that the expansion of art. 30, item IX of Statute 8212/91 may be disputed, we believe it presents an undisputed nucleus, with a minimal regulatory content, which may not be dismissed and must be sought by every interpreter and it corresponds to the role of the regulation to fight tax evasion.
>
> In other words, whenever it is proven that two or more companies have acted fraudulently, intentionally or through simulation and have carried out an act or deal that constitutes a taxable event of a principal tax obligation, with the purpose of inappropriately avoiding, reducing or deferring the payment of taxes, the mechanism of joint and several liability may be used by the tax authorities.

Note that the sentence mentions the need for the taxable event to be carried out by the companies, upon which the tax responsibility will be imposed. This represents significant progress, given the judges normally tend to apply the provision automatically, with the existence of a corporate group being the only criteria they verify.

In the Superior Court of Justice, the Special Appeal N. 1.144.884/SC, ruled on 07. Dec.2010 and mentioned above, demonstrates the following understanding "in light of art. 124, item II, of National Tax Code and of art. 30, item IX, of Statute N. 8212/ 91, it suffices to verify if, based on the facts and evidences in the record, there are enough elements to characterize the existence of '*companies that belong to any sort of corporate group*', in order to, in case there are, conclude there is joint and several liability". This case involved a situation, in which, based on the evidence presented, the companies involved were a single entity, without any separation in fact. It can be extracted from the grounds for the appellate decision that it aimed at proving the existence of a corporate group among the companies involved and not the existence of a connection to the taxable event, which would be in accordance with the provision contained in article 128 of the National Tax Code.

However, in the cases where the companies that make up a corporate group only appear to be independent—that is, independence is simply formal, and in reality there is only one company—it would be possible to allege the existence of common

interest, which would then trigger the use of item II, article 124 of the National Tax Code, once there is no intention—which would fall under article 116, sole paragraph of the National Tax Code,[4] since all companies involved would be connected to the taxable event.

What is seen in the case precedents is the absence of impediments to the automatic use of article 30, item IX of Statute 8212/91, even though there are no rulings of the Federal Supreme Court about the constitutionality of the provision. Nevertheless, based on all that was presented herein, it is considered illegitimate to allocate the responsibility for collecting payroll taxes onto companies, simply and exclusively because they belong to the same corporate group (*de jure* or *de facto*).

7 Conclusion

The formation of corporate groups is a legitimate business strategy according to the Brazilian legal framework and it is based on this strategy that companies come together for shared economic or business interests, but keep the corresponding legal personalities. The National Tax Code did not address the formation of corporate groups, neither did it handle the issue of allocating responsibility for paying taxes onto the different members of corporate groups. In an attempt to adapt that code to the current reality and aiming at making the tax collection more effective, the tax authorities have used the provisions of article 124—and regulations, whose validity foundations are based on this article—for allocating joint and several tax liability to companies belonging to the same corporate group. It happens that the expression "common interest", mentioned in the first item of the said article, is not present simply because there is common *economic* interest, thus it requires the joint execution of the taxable event in order to legitimize the allocation of responsibility. On the other hand, the joint liability mentioned in the second item is limited by article 128 of the same Code, requiring a connection to the taxable event.

In this sense, it is argued that only when a company has concrete decision-making power over the acts related to the taxable event of another company within the same corporate group it is possible to allocate responsibility on the former for obligations originally belonging to the latter, in accordance with article 124, item II of the National Tax Code. In this case, both the connection to the taxable event and the possibility of the tax burden being borne by the constitutionally defined taxpayer are present.

On the other hand, the allocation of responsibility based on article 124, item I of the National Tax Code is only legitimate if there is joint action that triggers taxes.

[4] Art. 116. Sole paragraph. The administrative authority may disregard juridical acts or deals carried out with the objective of omitting the occurrence of the taxable event or the nature of the elements that constitute the tax obligation, in accordance with procedures to be established in an ordinary statute.

Furthermore, it can be cited situations involving transfer of tax responsibility for illegal acts or intermingling of assets, where the legal personality of the parties involved should not have been disregarded and transfer of liability because the companies belonged to a corporate group should also not have taken place, but rather consideration should have been given to the legal situations that have tax evasion as the goal—article 116, sole paragraph of National Tax Code.

Initially, it is arbitrary and not in accordance with the general rules set forth in the National Tax Code to automatically use article 30, item IX of Statute 8212/91, if it is not proven that the allegedly liable company effectively had a connection to the taxable event. However, unfortunately, this is not what has been seen in reality, with the ever more frequent indiscriminate use of the provisions of article 124 of the National Tax Code—and of regulations that are based on it, such as article 30, item IX of Statute 8212/91—in order to ensure the timely payment of the tax obligation. Finally, it is important to emphasize that simply belonging to a corporate group is not a reason for transferring tax responsibility as per the National Tax Code and, therefore, this cannot be adopted by the tax authorities and by the Court System as justification for allocating tax responsibility onto a different company.

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