

# National Tax System: A Jurisprudential Discussion

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**Keywords** — *Municipalities, Taxation, Law.*

**Abstract**— *The municipalities, in search of a tax collection headquarters in order to bring more resources to their coffers so that they can carry out their public policies in a satisfactory manner, have been issuing, through secondary normative acts, via Decrees, significant changes in the tax calculation bases that are within its competence. The objective of the study was to respond to a jurisprudential discussion already consolidated by the Superior Courts regarding compliance with art. 150, I of the Federal Constitution of 1988, combined with art. 33 and art. 97, § 2 of the National Tax Code. The methodology of the study was a literature review, the method adopted was the use of qualitative analysis techniques of the text, which occurs with the confrontation of information and analysis of speeches and contents about the tax system of its importance. The results showed that in the Constitution, especially with regard to the principle of legality, as a limitation of the State's power to tax, as this fact is an individual right of the taxpayer, not subject to suppression, protected by an immutable clause, as provided in article 60, § 4 of CF/88. It is concluded that Authorization for monetary restatement purposes is limited to the official indices provided for in the fiscal list or in the value plan contained in a Law approved by the Legislative or equivalent to the law, such as the use of a Provisional Measure.*

## I. INTRODUCTION

The tax system plays a central role in a modern economy as it affects in multiple ways the pattern of economic growth and national competitiveness, as well as the social and regional distribution of income, and can act both as a support element and as an obstacle to development (ORAIR, 2018).

According to Carvalho (2021), tax policy in Brazil is treated from the point of view of revenue collection for the maintenance of public accounts and investments.

According to Machado (2017) understanding the reasons and history of taxation is important to measure the tolerable limits that each society admits to bear by way of tax exaction.

Therefore, this article is based on investigating the national tax calculation bases, whose bases are changed by

municipal decrees, starting from the interest instigated by the theme, the following research problem was formulated: How to carry out the tax calculation base following the commandments foreseen in the Constitution, therefore, in a Law acting in the national territory?

In view of this, the study aims to respond to a jurisprudential discussion already consolidated by the Superior Courts regarding compliance with art. 150, I of the Federal Constitution of 1988, combined with art. 33 and art. 97, § 2 of the National Tax Code, that is, the situation inherent to the limitation of the power to tax as an individual guarantee of the taxpayer, in this case, we will specifically verify the tax calculation base in general, since it must follow the commandments provided for by law (in the strict sense), with a formal process carried out by the legislature in its typical role of power and other cases through the use of the Provisional Measure.

## II. THEORETICAL FRAMEWORK

### 2.1 Tax Calculation Basis

The basis of calculation is numerical magnitude, provided for by law in the strict sense from the Legislative or normative equivalent to the Law, such as the Provisional Measure, which serves to measure the respective taxable event (tax hypothesis through the occurrence of legal facts), allowing the quantification of the tax liability and the definition of the tax type consistent in the legal order, identified through taxes, fees, contributions for improvements and general contributions.

The basis of calculation is a state or way of being proper to the hypothesis or an attribute of it. Therefore, it is she who gives the exact dimension of the tax hypothesis, establishing the necessary correlation between the fact described in the rule as an assumption and the tax provision. Thus, the calculation base, as well as the taxable event, are the identifying elements of the anticipated tax types. So much so that, in taxes, the calculation bases are magnitudes that measure the wealth of taxpayers in search of their contributory capacity, while in taxes, these serve to measure the degree of state activity, the cost to be charged, which will be absorbed by the taxable person of the main obligation, either as a taxpayer (directly) or responsible according to the indication of the Law (indirectly).

In the understanding of Professor Hugo de Brito Machado on the subject: “the calculation base is very important, because it allows us to identify the tribute that is being taken care of. If the law creates a tax on income, but indicates income or wealth as its calculation base, this is actually creating a tax on income or wealth, and not on income. (...) The calculation base is, therefore, an essential element in the identification of the tax, on which the rate is applied to have the corresponding tax value as a result” (MACHADO, P. 154).

In this context, the opinions of Paulo de Barros Carvalho and Aires Barreto are added. The first explains the following: “its existence is a constitutionally obligatory requirement” (CARVALHO, Course of tax law. P. 329).

The second comments that the calculation basis: “it is in the material aspect of the incidence hypothesis that, due to its attributes, we find the susceptibility of appreciation and dimensioning, with a view to stipulating the object of the benefit. The measurable attributes of the material aspect of the incidence hypothesis are designated as the basis for calculation” (BARRETO, 1998. P. 50).

### 2.2 Tax Calculation Basis on Real Estate and Urban Territorial Property

Article prescribes. 33 of the National Tax Code (CTN):

Art. 33. The basis for calculating the tax is the market value of the property.

Single paragraph. In determining the calculation basis, the value of movable assets held, permanently or temporarily, in the property, for the purpose of its use, exploration, beautification or convenience is not considered (BRASIL, 1966).

Municipal legislation in general is limited to reproducing art. 33 of the National Tax Code, prescribing that the basis for calculating the tax is the market value of the property, completely omitting the objective way to find this market value, without the adoption of real quantification procedures (BRASIL, 1966 ).

In the doctrinal sense, “the market value means that price that would be reached in a purchase and sale operation, in cash, under normal real estate market conditions, admitting a difference of up to 10% more or less” (HARADA, 2010, p. 438).

It turns out that the calculation base is one of the quantitative aspects of the taxable event, that is, the material aspect of the tax, therefore it must be submitted to the principle of legality in the strict sense, as explained above (art. 97, IV, of the CTN).

Therefore, it is not enough for the law to declare, as the market value of the property, the basis for calculating the Tax on Property and Urban Territorial Property (IPTU), without explaining how this value is obtained. Often, for the purposes of promoting the launch of the Urban Territorial Property Tax, municipalities adopt, through (formal) law, objective procedures capable of mentioning the unit values of the square meter of land and the square meter of existing buildings in the area. area, as well as the characteristics of the places where they are located, whether industrial, commercial and residential, as well as the types and standards of construction.

### 2.3 Marjoration of the IPTU Calculation Base

According to the jurisprudence of the Superior Court of Justice, the increase in the calculation base depends on the drafting of the law. The understanding is consolidated in Precedent 160, approved in 1996: “It is prohibited for the municipality to update the IPTU, by decree, in a percentage higher than the official index of monetary correction.” This is also the position of the Federal Supreme Court.(BRASIL, 1966).

Following this thesis, the Second Panel denied an appeal by the municipality of Bom Sucesso in Minas Gerais, which increased the calculation basis of the Tax on Property and Urban Territorial Property (IPTU), by means of a decree. According to the rapporteur, Minister Humberto Martins, even if the Municipal Tax Code provides criteria for correcting the market values of properties, the municipality is not authorized to increase values without the participation of the local Legislative Power (AResp 66,849).

In the same sense, the Minister of the same Superior Court, Mr. Ilmar Galvão – (Rapporteur): Provided the following understanding regarding art. 97 of the CTN:

Art. 97. Only the law can establish:

II - the increase of taxes...

1st The modification of its calculation basis, which makes it more onerous, is equivalent to the increase in the tax.

§ 2 The updating of the monetary value of the respective calculation basis does not constitute an increase in the tax (BRASIL, 1966).

It follows from the excerpts transcribed, obviously, the possibility for the Municipalities, for the purpose of launching the IPTU, to consider, annually, the value of the property updated in accordance with the official indexes of monetary correction.

Preventing abuses on the part of Municipal Administrations, the provisions in question were interpreted by the STF in the sense that, except for the hypothesis exposed above, only by means of a law, enacted in compliance with the principle of precedence, may the Public Power change the calculation basis of the tax on bases higher than those revealed by the official indexes of monetary correction, through the publication of the

so-called “Plans of Values”, ordinarily, as is known, dictated to be any attention to the mentioned indexes (RE 234.605, Reporting Min. Ilmar Galvão, judgment on 8.8.2000, First Panel, DJ of 1.12.2000).

In Extraordinary Appeal No. 648,245, which brings another similar case regarding the increase in the calculation base of the Tax on Property and Urban Territorial Property (IPTU), the Rapporteur of the highest court in the country (STF), Minister Gilmar Mendes expressed the following:

The constitutional principle of the legal reserve, provided for in item I of art. 150 of the Federal Constitution, it is clear when prohibiting the requirement and the increase of tribute without law that establishes it. This is a fundamental prescription of the tax system, which is linked to the very idea of democracy, applied to taxes (“no taxation without representation”).

Aside from the exceptions expressly provided for in the constitutional text, the definition of the criteria that make up the tax rule – and, among them, the calculation basis – is a matter restricted to the legislator's action. The Executive Branch cannot meddle in this area, either to define or modify any of the elements of the tax relationship (RE 648245/MG, rel. Justice Gilmar Mendes, 8.1.2013).

According Poubel (2018) compliance with the constitutional principle of the legal reserve (in its strict sense), as stated in art. 150, I of the Federal Constitution; “the increase in the market value of real estate for the purpose of charging the Tax on Urban Property and Territorial Property (IPTU) does not exempt the enactment of a formal law”, a requirement that can only be waived “when the update does not exceed the annual inflation indices of monetary correction”. Aside from exceptions expressly provided for in the constitutional text, the

definition of the criteria that make up the tax rule, including the calculation base, is a matter restricted to the legislator's action, and the Executive cannot "define or modify any of the elements of the tax relationship".

Thus, municipalities cannot, by Decree (substantive law), "change or increase the calculation basis of the Tax on Property and Urban Territorial Property (IPTU), but only annually update the market value of properties, based on official indices of monetary correction", given that its updating does not constitute a tax increase (art. 97, § 2, of the CTN).

The Rapporteur in question brought to the case, the understanding already consolidated in RE 234.605 (Rel. Min Ilmar Galvão). In addition, in the judgment there was mention of several other jurisprudence signed by the Federal Supreme Court (STF), such as: AI 534.150, Rapporteur Min. Joaquim Barbosa; RE 114,078; rel. Min. Moreira Alves; AI 346.226 - AgR, Rel. Min. Ellen Gracie; AI 176.870 - AgR; rel. Min. Marcus Aurelius, among others.

Thus, the orientation based on the Superior Courts is firm in the sense that the amount charged as tax on property and urban territorial property (IPTU) can be updated annually, regardless of the enactment of the law in the strict sense, that arising from the legislative power, provided that the percentage employed does not exceed the accumulated inflation in the previous twelve months and meets the official indexes of monetary correction presented by the monetary and fiscal policy (POUBEL, 2018).

### III. METHODOLOGY

This study is a literature review in order to analyze compliance with art. 150, I of the Federal Constitution of 1988, combined with art. 33 and art. 97, § 2 of the National Tax Code, in order to explore legal ways for the payment of taxes to occur in a less onerous way.

Bibliographic research, or secondary sources, covers all bibliography already made public in relation to the subject of study, from separate publications, bulletins, newspapers, magazines, books, research, monographs, theses,

cartographic material, etc., to oral means of communication: radio, magnetic tape and audiovisual recordings: films and television. Its purpose is to put the researcher in direct contact with everything that has been written, said or filmed on a given subject, including conferences followed by debates that have been transcribed in some way, whether published or recorded. (LAKATOS. 2003, p.183).

The method adopted was the use of qualitative analysis techniques of the text, which occurs with the confrontation of information and analysis of discourses and contents about the tax system of its importance, with presentation of the results during the development of the research, with the transcription of the most relevant excerpts from scientific articles and the other methods used.

The research is documentary, based on publications of articles, books, magazines, newspapers and electronic networks of the concepts, carried out in the academic databases Scielo and academic Google, as well as jurisprudential and doctrinal positions, to obtain concrete results and respond to the problem of trial study.

To choose the most relevant references for the development of this review, the materials with the proposed theme were selected based on the degree of importance and the presence of keywords. With this, a careful reading of the materials was carried out, allowing to capture the information that responds to the objective of the study.

After selection and critical analysis, the studies will be arranged in a synoptic table containing title, author, year of publication, design and main results for the definition and composition of the analytical categories that answered the guiding question of the research.

### IV. RESULTS

After reading the full text and excluding studies that did not fit the inclusion criteria, 5 articles were selected for analysis, as shown in Table 1.

Table 1: Summary of Results

Title	Author/Year	Goals	Results
The principle of tax legality and its exceptions	Alexandre Scaloppe/2014	Analyze the Principle of Tax Legality and its exceptions.	The limits of the power to tax must be observed under penalty of unconstitutionality, the principle of legality aims to protect the taxpayer who cannot be forced to do or not do something except by virtue of the law, it prevents abuses by the authorities and a possible discretion in the collection of taxes.
Principle of tax legality in its procedural applicability to federal taxes	Lucas Giribone Cardoso/2020	Check how the principle of tax legality works in its procedural applicability to federal taxes.	The importance of its study, because even though this subject is of great knowledge by jurists, it has a great vastness, which is always accompanied by the evolution and changes of the Law.
Tax custom and the normativity of repeated administration practices: a systemic reading of tax law	Rafael Köche/2015	Establish interpretative parameters, concerned with safeguarding the rights of those who made their decisions based on criteria considered “legitimate” and, at the same time, strengthening the Tax Administration, based on democratic foundations.	There are not exactly exceptions to the Principle of legality in tax law, in fact, as the doctrine mentions, the Federal Constitution only allows the Federal Executive Power to change the rates (and not the calculation bases) of some taxes with the purpose of extrafiscal regulation
Tax Transaction and Extrafiscality: an approach in the light of proportionality control	Ubaldo Cesar Balthaza/2020	Reflect on the tax transaction programs developed in Brazil, in the light of proportionality control	Proportionality can be used as a legitimate criterion for controlling public policies that induce behavior on the part of taxpayers, notably, based on compliance with the criteria of suitability, necessity and proportionality in the strict sense.
Principle of tax legality and the IPTU calculation base	Walter Moreira Junior/2015	Check if there is a possibility of increasing the IPTU calculation base by infralegal act, necessary to evaluate the implications of this principle and if there are exceptions to its application in the tax scope.	There is the possibility of increasing the IPTU calculation base by infralegal act, necessary to evaluate the implications of this principle and if there are exceptions to its application in the tax scope.

Source: Author – 2023.



The research analysis of the different thoughts of authors in relation to the theme will be carried out in a discursive way in order to answer the problem of the study of how to carry out the tax calculation base following the commandments provided for in the Constitution, therefore, in Acting Law in the territory national?

To this end, it is known that the municipalities, in search of collection headquarters in order to bring more resources to their coffers in order to be able to carry out their public policies in a satisfactory manner, have been issuing, through secondary normative acts, via Decrees, significant changes on the bases of tax calculations that are within its competence.

In these terms, in the light of several jurisprudence, it can be seen that this situation is a flagrant conflict with the precepts set forth in our Constitution, especially with regard to the principle of legality, as a limitation of the State's power to tax, as such fact is an individual right of the taxpayer, not subject to suppression, protected by an immutable clause, as provided for in article 60, paragraph 4 of CF/88.

In a study carried out, it was found that it is important to understand the limitations to the power to tax, that is, the tax principles must become easy to understand. As previously stated, the principles are fundamental to our legal system, therefore understanding a principle and its exceptions well is essential to apply the law correctly without causing injustice to the taxpayer (SCALOPPE, 2014).

Regarding tax transaction programs, research shows that they should be analyzed not only from the tax point of view, but mainly in the light of their extra-fiscal objectives, in order to allow the Public Administration to safeguard equality, through policies public behavior inducers of taxpayers. Under these lenses, it is essential to use criteria that allow, both the tax authorities and taxpayers, legitimate control of these institutional measures, especially in order to be able to assess adequacy to need and proportionality in the strict sense, in order to honor and value a more effective dialogue between the participants of the democratic rule of law (BALTHAZAR et al., 2020).

Regarding Tax Legality, evidence showed that the principle of tax legality determines that only by law can taxes be instituted or increased and that the exceptions to their application are exhaustive, it can be concluded that the increase in the calculation base and tax rates IPTU must obligatorily be effected by law in the strict sense (JUNIOR, 2015)

Therefore, the national tax applicability is always governed by the principle of legality, which influences the deadlines for tax collection, tax execution, the institution of

new taxes and even the limits of its calculation base, which generates great impacts on the economic world. Brazilian, thus generating great attention not only to legal scholars, but also to other areas of knowledge, being valid the study later in a multidisciplinary way, thus understanding its practical relevance (CARDOSO, 2020)

A synthesis carried out on tax custom showed that taxation makes up the cost. If, after years of legitimate widespread communication between the Tax Authorities and the taxpayer, a normative expectation is established in such a way that it is possible to say that it is a legal rule, the Treasury Administration decides to change the legal criteria on which they were based (Tax Administration and taxpayers) and charging the last five years of taxes would jeopardize the very existence of many taxpayers (KOCHE, 2015).

## V. CONCLUSION

The Federal Supreme Court (STF) states in its jurisprudence that the determination of the basis for calculating the IPTU, that is, the market value of the property, can only be effected by formal law (law in the strict sense). However, the monetary correction of these amounts can be carried out through an infralegal normative act issued by the Mayor (according to information no. 270 - STF).

The National Tax Code in its art. 97, § 2º supports this provision: “§ 2º It does not constitute an increase in tax, for the purposes of the provisions of item II of this article, the updating of the monetary value of the respective calculation base”. Thus, the authorization for monetary restatement purposes is limited to the official indices provided for in the fiscal list or in the value plan contained in a Law approved by the Legislative or equivalent to the law, such as the use of a Provisional Measure.

In this sense, it is also the understanding espoused in the Superior Court of Justice through the aforementioned Precedent 160, of 1996. In compliance with the legal reserve, aspects related to the increase in taxes, these can only be proposed by means of Law in the strict sense or act equivalent to the Law, such as the Provisional Measure.

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