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27 MARCH 2015

**THE COFINS [CONTRIBUTION FOR SOCIAL SECURITY FINANCING] AND THE CUSTOMS VALUE****1. INTRODUCTION**

We will comment the decision taken in the judgment of Extraordinary Appeal 559.937 RS, in the Supreme Federal Court, with Rapporteur Ellen Gracie. The assigned editor for the sentence, Dias Toffoli presented the vote upon further review in the session of March 20, 2013.

The definition of "customs value" was sub judice, which had been adopted a long time ago under the scope of the General Agreement on Tariffs and Trade (GATT) and received in Brazilian legislation as the calculation basis of the importation tax.

Since the Amendment 33, 2011, the expression was established in the Constitution as being the calculation base of the Contribution for Social Security Financing (Cofins) in importation.

In 2004, the Article 7 of Law 10.865 stipulated that the “customs value of the Cofins” would be the calculation basis of the importation tax increased by the values of the Contribution for the Social Integration Program (PIS), under Cofins and part of Value-Added Tax (ICMS), linked to the operation. It was a second tax definition for “customs value”.

The Court, however, decided that the constituent would have used “customs value” taking into account the calculation basis of the importation tax. Due to that assumption and, by unanimity, the concept of Law 10.865 was declared unconstitutional.

The Ministry of Finance evaluated the effect of the decision in R\$ 34 billion.

In October 2013, the Article 26 of the 2.000th posterior law (Law 12.865) gave a new wording to the then-unconstitutional Article 7 of Law 10.865, adjusting it to the Court’s decision.

## 2. CITED LEGISLATION AND STRETCHES OF THE VOTE UPON FURTHER REVIEW FROM THE EDITOR:

### Federal Constitution:

**Article 149.** The Federal Government is the sole responsible for instituting the social contributions, of intervention in the economic domain and interest of professional or economic categories, as instrument of its performance in the respective areas, subject to the provision in Articles 146, III, and 150, I and III, without prejudice to the provision in Article 195, §6, related to the contributions referred to in the provision.

(...)

§ 2 The social contribution and contribution for intervention in economic domain dealt with in the caput of this article:

(...)

II - may focus over importation of oil and its derivatives, natural gas and its derivatives and combustible alcohol;(Subsection included by Amendment 33, in 2001; it gained new wording in 2003, with Amendment 42, transcribed below)

II - will also focus over the importation of foreign products or services; (Effective wording, given by Amendment 42, 2003)

III - they may have aliquots: (Subsection included by Amendment 33, 2001)

a) ad valorem, taking as basis the invoicing, the gross income or the value of operation and, in case of importation, the customs value;

b) specific, taking as basis the adopted measure unit.

(...)

**Article 195.** The social security will be financed by the entire company, in a direct and indirect manner, under the terms of the law, through resources arising from the budgets of the Federal Government, States, Federal District and Municipalities, and the following social contributions:

(...)

IV - the importer of goods or services from abroad, or whom the law equates to it. (Included by Amendment 42, 2003)

(...)

§ 4 - The law may institute other sources intended to ensure the maintenance or expansion of social security, subject to the provisions in Article 154, I.

### Law 10.865, 2004:

**Article 7.** The calculation basis will be:

I - the customs value, thus understood, for the purposes of this Law, the value that serves or would serve as basis for the calculation of importation tax, increased by the value of Value-Added Tax focusing in the customs clearance and in the value of the own contributions.

## New wording, Law 12.865, 2013:

I - the customs value, in the hypothesis of subsection I of the caput of Article 3 hereof;

## National Tax Code, Law 5.172, 1966:

**Article 110.** The tax law cannot modify the definition, the content and the reach of institutes, concepts and forms of private law, used, expressly or implicitly, by the Federal Constitution, by the Constitutions of the States, or by the Organic Laws of the Federal District or Municipalities, to define or limit tax competences.

## Stretches selected from the vote upon further review from Dias Toffoli, editor for the sentence:

**T1** With regard to the question brought to the analysis of this Court, I note that it is with regard, exclusively, to the constitutionality or not of Article 7, subsection I, of Law No. 10.865/04, which provides to integrate the calculation of PIS/PASEP-Importation and COFINS-Importation contributions the customs value “increased by the value of Value-added Tax - ICMS focusing in the customs clearance and the value of their own contributions”.

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**T2** When analyzing the constitutional command, I cannot visualize to interpret the economic bases mentioned therein as mere starting points for the taxation, inasmuch as the Constitution, by granting the tax competences, makes it by delineating its limits. By providing that the social and intervention contributions may have “ad-valorem aliquots, taking as basis the invoicing, the gross income or the operation value and, in the case of importation, the customs value”, the Article 149, § 2, III, “a”, of the Federal Constitution used unequivocal technical terms, circumscribing to such bases the respective tax competence.

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**T3** Therefore, in the absence of express stipulation of the semantic content of the expression ‘customs value’ by the Constitutional Amendment No. 42/03, it is possible to conclude that the assumption sense, and absorbed by the Federal Constitution upon the utilization of the term to grant legislative tax competence to the Federal Government, refers to that already practiced in the legal-positive discourse pre-existing to its edition. In this line, the simple reading of the standards contained in Article 7 of Law No. 10.865/04, object of questioning, already allows to determine the calculation basis of social contributions over taxation of goods and services extrapolated the quantitative aspect of the focusing delimited in the Federal Constitution, by increasing to the customs value the value of focusing taxes, including the value of the own contributions.

## 3. INITIAL CONSIDERATIONS:

Preliminarily, some comments over the constitutional amendments and the vote upon further review from the editor:

**1** - The subsection III of §2 of Article 149, which contains the expression “customs value”, does not grant tax competence to the Federal Government, as it was established in vote (in T2); the competence is in the caput of the Article, where the exclusive competence was expressly attributed to the Federal Government, to institute social contributions.

**2** - The normative content of the subsection III, upon the Cofins-Importation, should be in Article 195, where the original constituent listed taxpayers and calculation bases of social contributions, among which the Contribution of Intervention in Economic Domain (Cide) is not included, evidently.

The reason to exist subsection III and of it to be in art. 149 (and not in the 195) it had the concern of the legislator with the opening of the importations of oil and derivatives (Law 9,478, of 1997), in relation which, until then, Petrobras' withheld exclusiveness.

For obvious reasons, the government considered inadequate to tax the importation of fuels only by ad valorem focusing.

There was then the decision of instituting the collection of Cofins and Cide-Combustíveis through a specific aliquot, as established in letter b, of which, in turn, the letter a was only a counterpoint without useful normative content.

As it was not possible to insert the subsection III in Article 195 due to Cide, and as the constituent decided to keep it with two letters, it ended allocated in Article 149.

This disfunction was fixed in 50% with the Amendment 42, which extended the Cofins-Importation to all products, by inserting the subsection IV in Article 195, where the customs Cofins taxpayer was identified. The other 50%, the definition of the calculation basis, remained in Article 149, misplaced.

**3-** In the first stretch of the vote (in T1), the editor, with equivalent terms, made the following affirmation: the Article 7 of Law 10.865 provides to integrate the basis of contributions the customs value increased by the Value-Added Tax and the values of the own contributions. An equal affirmation was also contained in the Rapporteur's vote.

Therefore, both of them created an ad hoc wording for the Article 7, by replacing the "value of the calculation basis of importation tax" (as it is established in law) by "customs value" (as they wanted to demonstrate).

By doing so, however, with or without intention, they used a circular argumentation, in which the conclusion to be demonstrated was used as premise. That is what the logic denominates *petitio principii*, which occurs when the conclusion is used to demonstrate a thesis starting from the assumption that it is valid.

There is no doubt that the calculation basis of the importation tax is the "customs value", but that does not imply that the reciprocal is true, in the sense of "customs value" meaning, necessarily and exclusively, calculation basis of the importation tax.

**4 -** Finally, it is important to note that the former GATT, current World Trade Organization (WTO), in the tax scope of international trade, disciplines exclusively "its" customs calculation basis, which is the base of importation tax. Therefore, there is nothing more natural, by standardizing the determination criteria of that base, which has appointed it by "customs value" Therein, it is the only one.

I.e., in the tax scope of GATT, "customs value" and "calculation base of importation tax" are interchangeable. But that is not how it works in our legal system: here we have several customs taxes, each of them using a certain concept of value in the definition of its customs calculation basis. Once these points were commented and excepted, we can now pass to the main subject hereof.

#### **4. THE GROUNDS OF THE COURT DECISION:**

From Dias Toffoli's vote it can be extracted the argument that served as basis to the Court Decision. It is about the conclusion preceded by assumption, almost a syllogism. We can express them as follows:

- The constituent did not stipulate the semantic content of the expression "customs value"; then
- it is possible to conclude that the assumption sense is the one already practiced in preexisting legislation.

In the premise, by telling us that the constituent did not stipulate in an express manner the semantic content of "customs value" (see T3), the editor also told us, implicitly, that the constituent had before himself/herself an expression with more than one semantic content. Otherwise, the assumption would be meaningless.

In the conclusion, the editor attributed to the constituent the use of "customs value" with an "assumption meaning" (see T3), which would be the one existing in tax law at the time in which the Amendment 33 was edited, in the year 2001.

The interpreter may, without a doubt, attributed an assumption meaning to any constitutional expression or concept - which, by itself, does not mean a thing, or means only this: an assumption, a conjecture, based on which one cannot declare a provision of law unconstitutional.

At most, one could conclude for a presumptive unconstitutionality. But that was not the case, the concept of "customs value" of the tax law from 2004 was declared absolutely unconstitutional.

We will analyze from now on the concept of "customs value" under the semantic and legal focuses, to determine if the provisions in Article 7 of Law 10.865 is constitutional or not.

#### 4.1 - The semantic content of "customs value"

The word "customs" is evidently derived from customhouse. "Customs Value", then, is a value related to an economic or financial fact occurred in a customs house. Such fact may be the value of a commercial operation, the base of a tax focusing or the value of a tax, for example. It is, without a doubt, the semantic content of the expression.

Therefore, it is undeniable that we are dealing with a generic expression and that, by using it, the constituent intended to specify to the tax legislator an open calculation base. Especially since that is the way the calculation bases of the social contributions are listed in the Constitution.

When the constituent cites, for example, the calculation basis income (or profit, etc.), it is using pre-existing concepts, already consecrated in legislation of private law.

Even so these concepts are armored to Article 195 of the Constitution, preventing the tax legislator from freely use them as calculation bases of social contributions. By which reason "customs value" would deserve a special treatment?

For sure, the tax law cannot ignore the provision in Article 110 of the National Tax Code (NTC) nor the semantic value of the constitutional concept. With regard to the latter, it could not, for example, appoint by "customs value" the product of a mercantile operation transacted outside the environment of customs house. It is its semantic restraint.

It is also evident that if the constituent wanted to demarcate a certain calculation basis it would have said, for example, the "customs value" that served as basis for the calculation of the importation tax, or for the Excise Tax (IPI) linked to the importation, or for any other preexisting customs tax to Cofins-Importation.

I.e., the constituent could specify a certain "customs value", explaining or stipulating a semantic content (as the editor recognized), if he wanted to. As he did not make it, he transferred to the tax law the incumbency to conform the calculation basis of Cofins, in the same manner as it had made with the calculation basis of Cofins in the internal market, in this case, in two contexts, firstly with regard to invoicing, and then for the term income.

By the way, in the referred letter a of subsection III it is also contained the expression "operation value", which became a new calculation basis for Cofins in the internal market. Before the Amendment 33, it could only be collected in a particular type of operation: the sale, which result or product is referred to as "income" or "revenue".

After the Amendment 33, Cofins may be collected in any operation in the internal market, as for example, in the transfer of products between establishments belonging to the same company.

It is important to bring attention to the fact that the "operation value" is also the appointment of the calculation basis of Excise Tax and Value-Added Tax.

How the Court assumption would apply to this case? One shall not forget that the calculation basis of Excise Tax and Value-Added Tax, even being similar and with the same denomination, are almost never equal (the equality between the bases is an exception that occurs in the direct sale operation from an industrial to a final consumer).

Therefore, the coexistence of different calculation bases with the same designation is perfectly constitutional and legal. That is what "operation value" shows us.

Thus, we can affirm that "operation value" and "customs value" are generic expressions, which denote genders that cover several species.

With the advent of the primitive wording of Article 7 of Law 10.865, "customs value" acquired a second legal definition, legally able to coexist with "customs value", previously established for the importation tax. In the same way that "operation value" is the denomination of three different calculation bases (IPI, ICMS and Cofins).

## 4.2 - The legal content of customs value

The questioned Article 7 of Law 10.865 told us that "The calculation basis of Cofins-Importation will be the customs value, thus understood, for the purposes of this Law, the value that..."

The Court, by declaring such provision unconstitutional, denied to an ordinary law the normative competence to modify a constitutional tax concept, in this case, the concept of "customs value", because it is already pre-established in another ordinary law.

From the decision of the Court, then, it is appropriate to inquire under which conditions a tax law can change concepts used in the Constitution.

The Article 110 of the CTN (transcribed in item 2) deals precisely with this subject. It prohibits the tax law to change the definition or the reach of private law concepts that had been used by the Constitution to define tax competence. This means that the tax legislator does not have all the degrees of freedom to change the constitutional concepts. From a legal point of view, therefore, the Article 110 is the restrictive beacon of the tax law in this matter.

But the reading of Article 110 reveals that the constitutional concept shall meet two conditions to be armored to legislative changes: 1) be a private law concept; and 2) have been used in the Constitution to define tax competence.

The CTN, therefore, instituted two conditions that shall be met by the own concept and not by the modifying law. It is very important to highlight this point, despite its obviousness, taking into account that the own STF was mistaken by using Article 110 (when it judged the concept of invoicing).

Only to illustrate the effectiveness of the Article in a case where it "armors" a tax concept, we can cite the term "property" a notorious institute of private law and that was used three times in the Constitution to define tax competences, one for each sphere of Power- Rural Land Tax (ITR), Vehicle Tax (IPVA) and Property Tax (IPTU). A tax law could not, therefore, change the sense or the reach of "property" existing in private law.

In the case under analysis, it is in question the concept of "customs value", and we must then inquire:

- 1) Is it a private law concept?
- 2) Was it used in the constitution to define tax competence?



The answer to the first question is obvious: "customs value" is only a tax calculation basis, before and after the Law 10.865. It is, therefore, an exclusive concept of public law, it has nothing to do with private law.

This observation is sufficient to conclude that "customs value" is not reached by the prohibition in the CTN. It may, therefore, be changed by any tax law. (The second question was already answered, also negatively, in the initial considerations.)

## 5. FINAL CONSIDERATIONS:

It was shown that the concept of "customs value" introduced in Article 7, of Law 10.865, of 2004, was according to the semantic content and in line with the legal standard that guides the matter, the Article 110 of the National Tax Code.

The STF, in turn, did not proceed to a semantic or legal analysis of the expression. By the way, it did not even analyze the grammatical nature of "customs value" because, apparently, it read the expression as "Customs Value", an own substantive, a private designation of the importation tax basis.

It is important to recognize, obviously, that before the edition of Law 10.865, the "customs value" in the Constitution meant, for any reader, the calculation basis of importation tax. This is unquestionable. After the Law, however, there was no space to debate points of view or opinions. The subject was no longer opinionated, it became legal.

And the Law that was edited on the subject only told us that that "customs value" in the Constitution would be equal to the importation tax base increased by the values of Cofins, PIS and part of Value-Added Tax.

It is important to refer, despite the obviousness: the Law 10.865 did not change the calculation basis of importation tax. The customs value of the tax continues the same, even because it is established in an agreement of which Brazil is a signatory.

Finally, it is a subject that is already decided, unappealable, and even a new law was edited, accepting the Court's decision.