THE STUDY OF THE PRIOR DEPOSIT AS A CONDITION FOR ADMISSIBILITY OF AN APPEAL IN THE TAX ADMINISTRATIVE PROCESS

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SUMMARY

The prior deposit as a condition of admissibility for appeals in administrative tax proceedings has given rise to much discussion since it was introduced into the Brazilian legal system by Provisional Measure No. 1.621-30/97, which later gave rise to Law No. 10.522/2002. This scientific article discusses the jurisprudential and doctrinal positions before and after the decision of the Federal Supreme Court, which declared the measure unconstitutional. The currents in favor and against the requirement and the constitutional foundations of the tax administrative process are examined.

Keywords: Tax Administrative Process, Appeal, Prior Appeal Deposit, Federal Supreme Court.

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INTRODUCTION

Provisional Measure No. 1621-30, of December 11, 1997, which later became Law No. 10,522, of July 19, 2002, made it compulsory to deposit thirty percent of the disputed amounts before appealing a decision in administrative tax litigation.

Although much opposed by the doctrine and taxpayers, initial case law was soon established in the sense that the legal requirement of a prior appeal deposit or the listing of assets, in the same proportion, was considered a condition of admissibility for appeals filed in administrative tax proceedings.

However, the case law, which had been consolidated since 1997, was modified by the Plenary of the Federal Supreme Court by nine votes to one in a session held on March 28, 2007, which decreed the unconstitutionality of paragraph 2 of article 33 of Decree No. 70.235, of 1972, as amended by article 32 of Law No. 10.522, of July 19, 2002, the legal basis for the requirement of a prior deposit for administrative appeals.

The problem dealt with in this scientific article involves an analysis of the jurisprudential and doctrinal discussions before and after the decision of the Federal Supreme Court, which decreed the unconstitutionality of the requirement for a prior appeal deposit.

Thus, this article aims to analyze the rules that incorporated the mandatory prior appeal deposit in the context of administrative litigation against the Federal Supreme Court's decision declaring it unconstitutional, seeking to identify the main arguments for and against this thesis.

This article has adopted the empirical inductive method through documentary analysis, studying books, articles, and websites, using case studies, and examining administrative and judicial case law. It is, therefore, a scientific review article.

The article is divided into four chapters. The first chapter discusses general aspects of the Tax Administrative Process and its constitutional principles, including the principle of isonomy, the principle of the right to petition, the principle of due process of law, the principle of adversarial proceedings, broad defense, and the principle of the double degree of jurisdiction.

The second chapter introduces the mandatory prior appeal deposit for appeals in tax administrative litigation. It shows the justifications put forward by the Public Administration for its introduction.

The third chapter discusses the doctrinal and jurisprudential debate on the constitutionality of the requirement for a prior deposit in administrative litigation. It will study the points defended by the current majority in favor of applying the measures, which were predominant at the time of their introduction, as well as those that support the current majority position, focusing on the judgment of the Federal Supreme Court, which declared the obligation unconstitutional.

The fourth chapter deals with the Supreme Court's current understanding of the advance deposit.

At the end of this study, it is hoped that the objectives will be achieved and that the research problem will be answered satisfactorily, contributing to the author's academic training.

1 - THE TAX ADMINISTRATIVE PROCESS

To make the tax administrative process constitutionally indispensable, article 5, LV, of the 1988 Constitution states:

> Art. 5 (...)
> (...)
> LV - litigants, in judicial or administrative proceedings, and the accused in general are guaranteed the adversarial process and a broad defense, with the means and resources inherent to it.

In this way, the constituent legislator gives the taxpayer the undeniable right and fundamental guarantee to go through the tax administrative sphere to ensure the exercise of their full defense through due legal process, without any obstacles, in an unrestricted and unconditional manner.

The tax administrative process arises from disagreements arising from the relationship between the tax authorities and the taxpayer. On the one hand, there are the tax authorities, who want to collect a certain amount considered to be due as a result of non-compliance with a main and/or ancillary obligation, and, on the other hand, the taxpayer, who defends the impossibility of demanding it because he considers it to be undue.

Because conflicts between the tax authorities and taxpayers must be resolved, there must be a tax administrative process in addition to the judicial process. This process guarantees the essential attributes of a broad defense, an adversarial proceeding, and the inherent means and resources.

It should be pointed out that the tax administrative process would also derive from the systematic application of item LIV of the article above, which states that "*no one shall be deprived of* their *liberty or property without due process of law,*" as well as item 'a' of item XXXIV of *the* article mentioned above, which states that "*everyone is guaranteed, regardless of* the *payment of fees (...) the right to petition the Public Authorities in defense of rights or against illegality or abuse of power*".

Article 146(III)(b) of the 1988 Constitution[1] states that a complementary law must establish general tax legislation rules, especially tax obligations, tax credits, and their respective assessment.

The guarantee of the tax administrative process, within the scope of complementary legislation, is found in various provisions contained in the National Tax Code (CTN), ratified by Law no. 5.172 of October 25, 1966, received by the new constitutional order with the *status of* complementary law, especially in articles 145, 151, item III and 201.

That said, both the 1988 Constitutional Text and the National Tax Code (CTN), in full compatibility with the 1988 Federal Constitution, guarantee the taxpayer the tax administrative process as a valid instrument for adjusting tax relations, duly guided by the broad defense and the adversarial process, prohibiting any limitations on resources or the means necessary to make it possible to exercise the defense in an unrestricted and unconditional manner.

1.1 THE CONSTITUTIONAL PRINCIPLES OF THE TAX ADMINISTRATIVE PROCESS

Constitutional tax principles, "in addition to guiding the state's activity in its taxing function, also act as a brake on it, imposing limits on taxpayers, to give social life the necessary limits," as Cais points out.[2]

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[1] "Art. 146. It is up to the complementary law: (...) III - to establish general rules on tax legislation, especially on: (...) b) tax obligation, launch, credit, prescription and decay."

[2] CAIS, Cleide Previtalli. **The tax process**. 5. ed. São Paulo: Revista dos Tribunais, 2006, p.40.

The tax administrative process will be invalid for violating the taxpayer's constitutional guarantees if any of its principles are not respected. The Federal Supreme Court (STF) is the competent court to deal with questions of constitutional justice.

1.1.1 THE PRINCIPLE OF EQUALITY

The principle of isonomy in tax law states that taxes cannot be levied and collected unequally between taxpayers on an equal legal footing. It derives from the constitutional principle of legal equality in Art. 5, caput and item I, which states that "all are equal before the law." The principle of isonomy is also found in the Magna Carta, in Article 150, II, which states:

> Art. 150: Without prejudice to other guarantees assured to the taxpayer, the Union, the States, the Federal District, and the Municipalities are prohibited from: (...) II - instituting unequal treatment between taxpayers who are in an equivalent situation, prohibiting any distinction on the grounds of professional occupation or function exercised by them, regardless of the legal denomination of income, titles, or rights;

Along with other tax principles, it is part of a prohibition on state arbitrariness and thus guarantees the individual taxpayer. It is considered a permanent clause of the Constitution and cannot be abolished even using a constitutional amendment.

As mentioned above, the principles of equality and tax isonomy are expressed in art. 150, II of the National Tax Code. In the words of Sabbag[3]:

> "This is a specific postulate that prohibits unequal tax treatment of taxpayers in a situation of equivalence or equipotence. While Art. 5 sets out the theme of equality in a generic way, art. 150, II, CF, explores it in a specific way, converging it to the area of taxation."

On the application of the Principle of Isonomy in the tax sphere, Machado[4] points out that:

> "In tax matters, more than any other, the idea of equality in proportionality is important. It would be truly absurd to want everyone to pay the same tax. Thus, in taxation, the principle of isonomy sometimes seems confused with the principle of ability to pay."

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[3] SABBAG, Eduardo. **Manual of tax law**. 3. ed. São Paulo: Saraiva, 2011, p. 136.

[4] MACHADO, Hugo de Brito. **Tax law course**. 30. ed. São Paulo: Malheiros, 2009, p. 277.

Thus, when it comes to tax matters, it must be borne in mind that demanding an economic benefit from the citizen means that the economic situation in which taxpayers find themselves must be carefully investigated when establishing new tax rules.

1.1.2 THE PRINCIPLE OF THE RIGHT TO PETITION

The principle of the right to petition in administrative tax proceedings is laid down in Article 5, XXXIV of the Federal Constitution. The guarantee of the right to petition must be understood as the right to obtain from the Public Authorities a manifestation of what is requested of them and provides that everyone is guaranteed, regardless of the payment of fees, the right to petition the public authorities in defense of rights or against illegality or abuse of power.

It refers to "the right guaranteed to Brazilians or foreigners, which is used to defend individual rights against possible abuses and general and collective interests."[5] The legitimate interest must be demonstrated if the request is for a certificate to defend rights or clarify situations of personal interest.

As Coelho summarizes[6]:

> "(...) the complaint addressed to the competent authority to review or, if necessary, correct a certain measure; the complaint addressed to the superior authority, with the same objective, the file addressed to the authority about the conduct of a subordinate, as well as any request or complaint regarding the exercise or assessment of Public Power".

Again, as a consequence of the use of the principle of the right to petition, article 48 of the Administrative Procedure Law (Law No. 9.784, of January 29, 1999) stands out, which stipulates that the Administration must issue decisions in administrative proceedings, including requests or complaints in matters within its competence.

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[5] COELHO, Inocêncio Mártires. Effective judicial protection. In: MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires; BRANCO, Paulo Gustavo Gonet. **Course in constitutional law**. 4. ed. São Paulo: Saraiva, 2009, p. 540.
[6] COELHO, op. cit., p. 540.

1.1.3 THE PRINCIPLE OF DUE PROCESS OF LAW

The Principle of Due Process of Law only appeared expressly in Brazil in the Federal Constitution 1988, despite being implicit in previous Constitutions. It is set out in Article 5, section LIV of our Magna Carta, which reads:

> Art.5: "All are equal before the law, without distinction of any kind, and Brazilians and foreigners residing in the country are guaranteed the inviolability of the right to life, liberty, equality, security, and property, under the following terms:
> LIV - no one shall be deprived of their liberty or property without due process of law."

Due process of law is a guarantee of freedom, a fundamental human right enshrined in the Universal Declaration of Human Rights, which states:

> Art. 8: "Everyone has the right to an effective remedy from the competent national courts for acts violating the fundamental rights recognized by the constitution or law."

In the Convention of San José de Costa Rica, due process of law is guaranteed in Article 8, which states:

> Art. 8º - "Judicial guarantees
>
> (1) Everyone shall have the right to be heard, with due guarantees and within a reasonable time, by a competent, independent, and impartial judge or tribunal, previously established by law, in the investigation of any criminal charge against him or her, or the determination of his or her civil, labor, fiscal or other rights and obligations.

Many scholars, including Nelson Nery Júnior, consider the due process of law as the fundamental principle of civil procedure, forming the basis on which all the others are based. Xavier[7] shares this view, stating that "the right of defense and the adversarial process are manifestations of the principle of due process of law." That said, Marins[8] claims that "the right to due process corresponds to a logical structure of guarantees, its principles, in the Brazilian constitutional regime."

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[7] XAVIER, Alberto. **Principles of the Brazilian administrative and judicial process**. Rio de Janeiro: Forense, 2005, p.3.
[8] MARINS, James. **Brazilian tax procedural law (administrative and judicial)**. 5. ed. São Paulo: Dialética, 2010, p.149.

Generally speaking, the principle of due process of law can be understood as the effective possibility for the party to have access to justice, make claims, and defend themselves in the broadest possible way.

1.1.4 PRINCIPLE OF ADVERSARIAL PROCEEDINGS AND AMPLE DEFENSE

The principle of an adversarial proceeding and a broad defense is enshrined in the 1988 Constitution of the Federative Republic of Brazil, in article 5º, LV, and is also identified by the Latin expression auditor et al. tera pars, which means "let the other party also be heard."

This is a result of the principle of due process of law, according to which the act carried out by an authority must follow all the stages provided for by law to be considered valid, effective, and complete.[9] , and is characterized by the possibility of a response and the use of all means allowed by law.

The Constitution of the Federative Republic of Brazil guarantees this not only in judicial proceedings but also in administrative proceedings. This is because the administrative process is an institute proper and fundamental to the democratic state of law, and its applicability must always proceed with respect for the precepts inserted in the Constitution of the Republic, which prescribe the means and principles with which all its stages must correspond. The adversarial procedure in administrative proceedings aims to allow the full participation of citizens, administrators, civil servants, or taxpayers to avoid possible abuses, thus guaranteeing the full presentation of the facts and evidence pertinent to the process.

As mentioned above, in the procedural sphere, the principle under study is manifested in the possibility for litigants to request the production of evidence and to participate in its taking, as well as to comment on its outcome, whether in judicial, extrajudicial, administrative, employment, associative or commercial proceedings or procedures, guaranteed to any party affected by a decision of a higher body.

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[9] Albuquerque, André. **Due Process of Law: Anglo-Saxon Influences on the Brazilian Legal System**. Direitonet. Page visited on April 23, 2014.

Although they have an interdependent semantic relationship, scholars usually individualize the definitions of each term, referring to the adversarial process as "the constitutional guarantee that assures the accused of a broad defense, allowing them to fully exercise their right to defense, according to J. Canuto Mendes de Almeida.[10] , who teaches:

> "The truth reached by public justice cannot and should not be valid in court without the defendant having the **opportunity to defend himself**. The trial must be preceded by unequivocal acts of communication to the defendant: that he is accused of the precise terms of this accusation and its grounds in fact (evidence) and in law. It is also necessary for this communication to be made in time for the defendant to be able to object: this includes the time limit for knowing the exact evidential and legal grounds of the accusation and for objecting to the accusation and its grounds of fact (evidence) and law."

The broad defense, in turn, is the possibility that the accused has, already enjoying the right to an adversarial proceeding, made use of all the possibilities to fully exercise his right to defense, enabling him to bring the elements he deems necessary to clarify the truth.

According to Vicente Grego Filho[11], the broad defense is based on five fundamentals: "a) having clear knowledge of the accusation; b) being able to present allegations against the accusation; c) being able to follow the evidence produced and provide counter-evidence; d) having a technical defense by a lawyer, whose function is essential to the Administration of Justice (art. 133 [CF/88]) and being able to appeal against an unfavorable decision".

In summary, it can be concluded that while the adversarial process is the opportunity guaranteed to the accused to defend himself against what is attributed to him, the broad defense is, properly speaking, the enjoyment of this guarantee through the tools allowed by law.

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[10] ALMEIDA, J. Canuto Mendes. **Fundamental principles of criminal procedure.** São Paulo: RT, 1973. p.86-7.

[11] GRECO FILHO, Vicente. **Op. Cit.** Apud: PAGLIUCA, José Carlos Gobbis. **Op. Cit.** In: MARQUES DA SILVA, Marco Antônio (coordinator). **Thematic treatise on criminal procedure.** São Paulo: Juarez de Oliveira, 2002. p.247.

One without the other would lose its meaning because while the adversarial process is a requirement for a broad defense, the former would make no sense if the latter were not offered the prerogatives necessary for the best provision of the judicial service.

1.1.5 PRINCIPLE OF DUAL JURISDICTION

Article 5, XXXV of the Federal Constitution states:

> **Art. 5** (...)
>
> **XXXV** - the law will not exclude any injury or threat to rights from the Judiciary;

According to Coelho[12] Precautionary or anticipatory measures would also be defended since judicial protection would not only be limited to actual injury but also to any potential injury or threat to the right:

> "It should be noted that effective judicial protection is not only asserted in the face of actual injury, but also any potential injury or threat to the right. Thus, effective judicial protection also includes precautionary or anticipatory measures to protect the right."

Ribeiro[13] summarizes the scope of the Principle of Double Jurisdiction:

> "The Federal Constitution guarantees much more than the mere formulation of a request to the Judiciary: it guarantees effective access to a fair legal order. In this sense, the principle of instability of judicial control should be understood."

To conceptualize the principle of the double degree of jurisdiction, it is necessary to conceptualize the principle of appealability since these concepts are correlated. Appealability means the possibility for the party to challenge any judicial act that harms their interests or rights. To better guarantee this right, another body, distinct from the one that issued the decision, must examine it.

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[12] COELHO, Inocêncio Mártires. Effective judicial protection. In: MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires; BRANCO, Paulo Gustavo Gonet. **Course in constitutional law**. 4. ed. São Paulo: Saraiva, 2009, p.540.

[13] RIBEIRO. Leonardo Ferres da Silva. Effective judicial provision: a constitutional guarantee. In: FUX, Luiz; NERY JUNIOR, Nelson; WAMBIER, Teresa Arruda Alvim (Coordinators). **Process and constitution - Studies in honor of Professor José Carlos Barbosa Moreira**. São Paulo: Revista dos Tribunais, 2006, p. 163.

"Thus, to complete the principle of appealability, there is also the principle of duality of instances or double degree of jurisdiction" (TEODORO JR., 1990, p. 29). Characterizing the principle of the double degree of jurisdiction as a constitutional guarantee is not peaceful, as the principle only appeared expressly in the text of the Imperial Constitution. The controversy is whether it is an implicit constitutional principle or does not exist in the current national constitutional system.

Coelho[14] "at the risk of jeopardizing legal certainty and res judicata, the right to a continued and permanent challenge in the judicial sphere is not recognized." He also stresses that the Federal Supreme Court understands that the rule is that the right to a double degree of jurisdiction is not recognized, except in cases where this is expressly guaranteed:

> "Thus, the Federal Supreme Court has emphasized the non-configuration of a right to a double degree of jurisdiction, except in those cases in which the Constitution expressly assures or guarantees this right, as in the cases in which it grants the possibility of an ordinary appeal or appeal to an immediately higher instance (arts. 102, II; 104, II; 108, II)."

Carrazza[15] points out that the changes incorporated by Constitutional Amendment No. 45 of December 8, 2004, expanded the list of fundamental rights, guaranteeing those who litigate, both in the administrative and judicial spheres, "reasonable duration of the process" and "means that guarantee the celerity of its processing" (CF, art. 5, LXXVIII).

As such, there is a tendency to make public activities more effective by seeking to increase efficiency, largely reflected in the search for greater speed in case processing.

2 THE PUBLIC ADMINISTRATION'S ARGUMENTS IN FAVOR OF ADVANCE DEPOSIT

The understanding of the need for a mandatory appeal deposit in administrative proceedings began to predominate after the 1988 Constitution was enacted.

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[14] COELHO, Inocêncio Mártires. Effective judicial protection. In: MENDES, Gilmar Ferreira; COELHO, Inocêncio Mártires; BRANCO, Paulo Gustavo Gonet. **Course in constitutional law**. 4. ed. São Paulo: Saraiva, 2009, p.540.

[15] CARRAZZA, Roque Antonio. **Curso de direito constitucional brasileiro**. 26. ed. São Paulo: Malheiros, 2010, p.474.

The aim was to provide better procedural effectiveness and minimize default, whether in the enforcement or administrative collection phase.

A percentage of 30% of the disputed amounts was established for appeals in the administrative sphere, based on Provisional Measure No. 1.621-30/97, which would later become Law No. 10.522 of July 19, 2002. The changes made to §2 of Article 33 of Decree 70.235 of 1972 were as follows:

> "Art. 33: A voluntary appeal may be lodged against the decision, in whole or in part, with suspensive effect, within thirty days of receiving the decision.
> [...]
> § Paragraph 2: In any case, the voluntary appeal will only be accepted if the appellant provides proof of the deposit of an amount corresponding to at least thirty percent of the tax demand defined in the decision."

At first, the measure's effectiveness was satisfied only with the introduction of the prior deposit to appeal in the administrative sphere; however, as time went by, it was observed that it was necessary to insert, as an alternative, the possibility of providing guarantees or listing assets.[16] Thus, after several reissues of the provisional measure, the alternative above was inserted in its 66th reissue. On the subject, Marins teaches "the possibility of, as an alternative to the 30% deposit, providing guarantees or listing assets and rights of a value equal to or greater than the tax requirement defined in the decision.[17] "

With this change, the paragraph above, §2 of Article 33 of Decree 70.235 of 1972, was amended as follows:

> "Art. 33: A voluntary appeal may be lodged against the decision, in whole or in part, with suspensive effect, within thirty days of receiving the decision.
> [...]
> § Paragraph 2. In any case, the voluntary appeal will only be accepted if the appellant lists assets and rights equivalent in value to 30% (thirty percent) of the tax demand defined in the decision, limiting the listing, without prejudice to the appeal being accepted, to the total of permanent assets if a legal entity or assets if an individual. (Included by Law No. 10.522, of 2002)"

[17] XAVIER, Alberto. **Principles of the Brazilian administrative and judicial process**. Rio de Janeiro: Forense, 2005, p.185.
[18] MARINS, James. **Brazilian tax procedural law (administrative and judicial)**. 5th ed. São Paulo: Dialética, 2010, p.266.

According to Xavier, the guarantee of recourse in the administrative sphere softened progressively with the publication of this amendment to the article, providing for the alternative of other measures.[18] , who teaches:

> "It can thus be seen that the guarantee of the administrative appeal has undergone a process of progressive softening: in a first phase, the *deposit of thirty percent of the tax demand was required*; in a second phase, the deposit of thirty percent of the tax demand *or* the provision of *guarantees or pledges of assets of* a *value equal to or greater than the* tax *demand* defined in the decision (limited to permanent assets, if a legal entity, or to assets, if an individual) began to be required as an *alternative;* in a final phase, the deposit requirement disappears and only the listing of assets and rights is required, no longer for the total tax demand, but for thirty percent of it (maintaining the limits relating to permanent assets and property)."

Furthermore, with the introduction of the prior deposit in the legal system, the continuation of the voluntary appeal in the sphere of administrative litigation was conditioned to the citizen's provision; such condition originated with the opinion of the Attorney General of the National Treasury PGFN/CAT No. 2.078/97, of December 11, 1997, published in the Official Gazette of December 12, 1997, which essentially highlighted the purpose of prohibiting the presentation of delaying appeals, speeding up the entry of values and avoiding the entry into the judiciary, after being defeated in the administrative instance.

On the subject of Cais[19] teaches:

> "[...] based on the argument of the need to prohibit the presentation of protracted appeals, to speed up the entry of amounts and to avoid that, after being defeated in the administrative instance, the taxpayer seeks the judiciary, thus extending the receipt of the credit by the National Treasury by many years."

Furthermore, Xavier[20] reports:

> "In short, the measure rules out delaying maneuvers in favor of bringing funds into the public coffers. All in line with the realization of the social justice advocated in the Federal Constitution, given the public interest destinations of the amounts to be collected."

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[18] XAVIER, Alberto. **Principles of the Brazilian administrative and judicial process**. Rio de Janeiro: Forense, 2005, p.185.
[19] CAIS, Cleide Previtalli. **The tax process**. 5. ed. São Paulo: Revista dos Tribunais, 2006, p. 291.
[20] XAVIER, Alberto. **Principles of the Brazilian administrative and judicial process**. Rio de Janeiro: Forense, 2005, p.183.

Parente addressed these proposed changes to the bill.[21] , Minister of Finance, in the explanatory memorandum to the President of the Republic:

> "The purpose of the proposed changes is to introduce, for the admissibility of voluntary appeals, the obligation to deposit part of the demand contained in the tax administrative process, judged well-founded at first instance, and the consequent destination of the deposited amount, according to the outcome of the litigation."
> "These measures not only discourage the filing of appeals with merely procrastinatory motives, but at the same time ensure the entry of part of the appeals that are the subject of the dispute if recognized as due to the Union by the judging authority, or their restitution to the appellant in the event of success on his part."

Therefore, the Administration wanted greater effectiveness and procedural speed, as well as a reduction in non-compliance in the administrative collection and enforcement phases, as is also highlighted in the explanatory memorandum, claiming that the proposals are part of "measures to improve the instruments that are intended to make the exercise of tax administration and judicial provision more effective, while at the same time allowing for a rapid and equitable resolution of tax disputes," in line with the "Administration's effort to make the collection of tax credits regularly constituted by ex-officio assessment more effective." [22]

3 THE HISTORY OF THE DISCUSSION ON PRIOR DEPOSIT IN DOCTRINE AND CASE LAW.

The prior deposit was introduced in 1997, supported by several precedents in the Federal Supreme Court case law dealing with issues related to labor and social security law; such a matter has moved the Judiciary in recent years. Some legal scholars and taxpayers attacked the prior deposit when it was introduced. Still, at its introduction, the prevailing case law was that the deposit above was mandatory, as was listing assets to the same extent to appeal in administrative litigation.

The issue took a turn for the worse on March 28, 2007, when the Federal Supreme Court declared that §2 of article 33 of Decree 70.235 of 1972, as amended by article 32 of Law 10.522 of July 19, 2002, was unconstitutional.

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[21] PARENTE, Pedro Pullen. Explanatory Memorandum No. 714, of December 11, 1997, of the Ministry of Finance, p.1 and 2.
[22] PARENTE, op. cit., p.2.

This session voted by 9 votes to 1, declaring, as stated, the unconstitutionality of the requirement for a prior deposit as an admissibility requirement for appeals in administrative litigation. In the plenary session, Justices Marco Aurélio de Mello, who was the rapporteur, Joaquim Barbosa, Ricardo Lewandoviski, Eros Grau, Carlos Britto, Cezar Peluso, Cármen Lúcia, Celso de Mello and Gilmar Mendes voted in favor of rejecting the extraordinary appeal filed by the Federal Government, while Justice Ellen Gracie (President) was on leave.

On the one hand, it was argued that the mandatory prior deposit for appeals consisted of a procedural aspect of the tax administrative process to discourage the use of appeals as delaying acts, and on the other, that the Principle of the double degree of jurisdiction was not expressly guaranteed in the Federal Constitution, making its application in the context of administrative litigation unfeasible. On the other hand, it was claimed that the obligation to deposit a deposit before filing an appeal offended several Constitutional Principles, such as the principle of due process of law, the adversarial process, a broad defense, the right to petition, as well as the principle of the double degree of jurisdiction, which was rejected by the opposing side.

3.1 THE CURRENT IN Favor OF THE ADVANCE DEPOSIT.

This trend argued that due process of law in the administrative sphere did not enjoy access to appeal but only to certain guarantees, as Leila de Souza Teixeira reports[23] :

> "Due process of law in the administrative sphere does not necessarily mean the existence of a subjective right to appeal, but rather the observance of certain guarantees that ensure the taxpayer's right to challenge and defend themselves against tax demands that they consider illegitimate."

The Federal Supreme Court's plenary ruled that the condition of access to a higher administrative instance did not offend Article 5, LV, of the Federal Constitution in the judgments of ADI No. 1.049-MC, with Minister Carlos Velloso as rapporteur, and DJ of August 25, 1995, ***RE 210.246, with*** Minister Nelson Jobim as rapporteur.

[23] TEIXEIRA, Leila de Souza. **The mandatory appeal deposit, the Principle of Broad Defense and Unfair Competition**. Available at: <http http://www.padilla.adv.br/teses/deposito.htm#_ftn1>. Accessed on: May 8, 2014.

Nelson Jobim, DJ of 17.03.2000, ***ADI 1.922-MC***, rapporteur Minister José Carlos Moreira Alves, DJ of 24.11.2000 and in the judgment of ***ADI nº 836-6-GO, with*** Minister Francisco Rezek as rapporteur, DJ of 11.02.1993.

In addition, here are some positions that agreed with the view that the appeal deposit was mandatory in the judgments above:

Justice Francisco Rezek, in the decision of Direct Action of Unconstitutionality No. ***836-6*** in the Federal District[24] :

> "I don't think requiring a deposit undermines the prerogative guaranteed by the Constitution. Even when the deposit required within a certain procedural path is not strictly intended to guarantee execution. It may not have that purpose, but it should not be understood, by the mere fact of its existence, as an obstacle to the normal flow of appeals."

Justice José Carlos Moreira Alves, in his decision on the Precautionary Measure in ***ADI 1922 MC in*** the Federal District[25] :

> "This Court, by both its panels, has held that the requirement of a prior deposit of the amount of the fine for an administrative appeal to be admitted does not offend the provisions of article 5 (XXXV), (LIV) and (LV) of the Constitution, since the latter does not guarantee a double degree of administrative jurisdiction [...]. On the other hand, this deposit is a requirement for the admissibility of an administrative appeal and not the payment of a fee for the exercise of the right of petition, which is why the provisions of article 5, XXXIV, "a" of the Constitution do not apply to it. It should also be noted that the allegations that this deposit is a payment for an uncontested claim are irrelevant, as it is a deposit and not a payment, which means that it will be refunded if the appeal is upheld. This deposit has nothing to do with the claim that the Taxpayers' Council is the natural judge of the appeal, which, by its law, can cease to exist, nor, of course, with participatory and direct democracy. Finally, if a percentage of the debt represents the deposit, there is no way to claim that there is a breach of equality between wealthy and non-wealthy debtors."

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[24] BRAZIL. Federal Supreme Court. Precautionary Measure in Direct Action of Unconstitutionality - ADI 1922 MC/DF, ADI 836 MC, Rapporteur: Min. FRANCISCO REZEK, Full Court, judged on 11/02/1993, DJ 23-04-2004 PP-00006 EMENT VOL-02148-01 PP-00181. Available at: <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28adi+836%29&base=baseAcordaos>. Accessed on: May 2, 2014.

[25] BRAZIL. Federal Supreme Court. Medida Cautelar em Ação Direta de Inconstitucionalidade - ADI 1922 MC/DF, Relator: Min. MOREIRA ALVES, Tribunal Pleno, judged on 06/10/1999, DJ 24-11-2000 PP-00089 EMENT VOL-02013-01 PP-00032. Available at: <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28adi+mc+1922%29&pagina=2&baseAcordaos >. Accessed on: May 2, 2014.

Justice Octavio Gallotti, in his decision on Extraordinary Appeal No. ***210.246-6*** in Goiás[26] :

> "[...] I also understand that there is no constitutional right to a double degree of jurisdiction, either in administrative or judicial proceedings, and, for this reason, the law, when creating an appeal that it might not introduce, can subject it to the deposit requirement, leaving the full defense assured as to the first instance decision."

Minister Sepúlveda Pertence, rapporteur, in the decision on the precautionary measure in ***ADI 1049-2*** in the Federal District[27] :

> "A deposit is required for an administrative appeal once the local authority's decision has been made. Now, as due process of law does not even require the existence of an administrative appeal, I don't see how conditioning its exercise on the deposit could affect the guarantee of due process of law."

In a session held on March 28, 2007, in the Plenary of the Federal Supreme Court, in the judgment of Extraordinary Appeal 388.359-3, where the vote was 9 to 1, it declared the unconstitutionality of paragraph 2 of article 33 of Decree 70.235, of 1972, with the wording given by article 32 of Law 10.522, of July 19, 2002, as already mentioned in this article, the only vote in favor at the time of the constitutionality of the prior deposit requirement for appeals in the context of administrative litigation was delivered by ***Justice Sepúlveda Pertence,*** who defended the constitutionality of the legal deposit requirement for administrative appeals, referring to the vote he had delivered in ADI 1.922-MC, Federal District[28] which has also been dealt with in this article, where he prescribed:

> "Making administrative appeals conditional on deposits would be unconstitutional if administrative appeals were a guarantee of the Constitution or if filing them, or rather exhausting the administrative instance created by law, were a condition for access to the jurisdiction of the Judiciary.

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[26] BRAZIL. Federal Supreme Court. Recurso Extraordinário 210246 - GO, Relator(a): Min. ILMAR GALVÃO, Relator(a) p/ Acórdão: Min. NELSON JOBIM, TRIBUNAL PLENO, judged on 12/11/1997, DJ 17-03-2000 PP-00028 EMENT VOL-01983-03 PP-00625 RTJ VOL-00172-03 PP-00982. Available at: <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28re+210246%29&pagina=2&base = baseAcordaos>. Accessed on: May 2, 2014.

[27] BRAZIL. Federal Supreme Court. Medida Cautelar em Ação Direta de Inconstitucionalidade - ADI 1049 MC/DF, Relator: Min. CARLOS VELLOSO, Tribunal Pleno, judged on 18/05/1995, DJ 25-08-1995 PP-26021 EMENT VOL-01797-02 PP-00196) Available at: <http://www.stf.jus.br/portal/jurisprudencia/ listarJurisprudencia.asp?s1=%28adi+1049%29&pagina=2& baseAcordaos >. Accessed on: May 2, 2014.

[28] BRAZIL. Federal Supreme Court. Precautionary Measure in Direct Action of Unconstitutionality - ADI 1922 MC / DF - Federal District. Full Court. Applicant: Federal Council of the Brazilian Bar Association. Defendant: National Confederation of Industry - CNI. Rapporteur: Justice Moreira Alves. Brasília, October 6, 1999. Available at <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28adi+mc+ 1922%29&pa>. Accessed on: May 2, 2014.

> In my opinion, the Constitution does not guarantee administrative appeals. It will establish, depending on the matter, administrative procedures to make administrative decisions final, which are always subject to judicial control. Jurisdictional control, however, never relies on the exhaustion of the administrative instance.
>
> For this reason, the National Tax Code, which gives the tax administrative appeal a suspensive effect on the enforceability of the tax debt, clearly refers to the regulation of this appeal and its very existence in the tax administrative procedure law. For this reason, I don't think the claim of unconstitutionality is plausible.
>
> As Justice Celso de Mello has just said, I also reserve the right to examine cases in which the deposit is abusive and unreasonable because then the very principle of substantive due process prevents a law from granting an administrative appeal, even though it may not grant it, and in practice subtracting from its enforceability by establishing a disproportionate burden. This is not the case, nor is it even alleged."

Justice Sepúlveda Pertence argued that if the taxpayer disagreed with the prior deposit requirement, he could file a lawsuit at any time to claim his rights. According to the Justice, the mandatory deposit would act as an efficient instrument to prevent merely procrastinatory appeals and would not constitute a disproportionate burden on the taxpayer. Justice Sepúlveda Pertence strengthened the argument that the 1988 Federal Constitution did not expressly refer to the double degree of administrative jurisdiction and, therefore, taxpayers should not enjoy such a guarantee.

At the time when the mandatory prior deposit was in force, it was argued that proportionality would be respected because the deposit required represented a percentage of the debt in question and, therefore, did not violate the Principle of Isonomy since taxpayers with higher tax claims would have to make a larger prior deposit to have access to the administrative appeal procedure. It was also argued that the Principle of Petition was not violated because it was not a fee but an admissibility requirement. In short, the majority thesis at the time of the mandatory prior deposit for appeals was that the effective realization of the control of the legality of the assessment by the Administration, even in one instance, guaranteed the taxpayer the constitutional mandates set out in Article 5, LV of our Federal Constitution.

3.2 THE CURRENT AGAINST THE ADVANCE DEPOSIT

The arguments of this current against the mandatory prior deposit in the context of administrative appeals, in the judgment of Extraordinary Appeal 388.359-3 on March 28, 2007, already dealt with in this article, basically defend allegations referring to violations of constitutionally guaranteed rights, such as the Principle of Isonomy, the Principle of Due Process of Law, the Principle of the Double Degree of Jurisdiction in the administrative sphere, the Principle of the Right to Petition and the Principle of Full Defense and Adversarial Proceedings.

The judgment of Extraordinary Appeal 388.359-3/PE[29] understudy, which declared that the mandatory prior deposit was unconstitutional, signified a turning point in jurisprudence, as reported by the illustrious Professor Eduardo Sabbag[30] :

> "It has been argued for a long time, in the context of hundreds of lawsuits before the Judiciary, in full effervescence against the appeal deposit, that the conditional requirement violates art. 5, LV of the Federal Constitution, which guarantees a broad defense and an adversarial proceeding to litigants in administrative or judicial proceedings. This constitutional provision well glorifies the double analysis of the process, in which a collegiate and superior body will make the second free of charge, suspending the production of the effects of the first decision, which preceded it, in the administrative-tax orbit."

3.2.1 INFRINGEMENT OF THE PRINCIPLES OF DUE PROCESS OF LAW, THE DOUBLE DEGREE OF JURISDICTION, AND THE RIGHT TO A FAIR HEARING AND DEFENSE

Article **5**, LV of the Federal Constitution states:

> **Art. 5** All are equal before the law, without distinction of any kind, and Brazilians and foreigners residing in the country are guaranteed the inviolability of the right to life, liberty, equality, security, and property under the following terms:
> **LV** - litigants, in judicial or administrative proceedings, and the accused in general are guaranteed the right to an adversarial proceeding and a full defense, with the means and resources inherent to it.

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[29] BRAZIL. Federal Supreme Court. Extraordinary Appeal 388359/PE - Pernambuco, Rapporteur (a): Min. Marco Aurélio, Tribunal Pleno, judged on 28/03/2007, DJe-042 DIVULG 21-06-2007 PUBLIC 22-06-2007 DJ 22-06-2007 PP-00017 EMENT VOL-02281-05 PP-00814 RDDT n. 143, 2007, p. 238 RDDT n. 144, 2007, p. 154-169 LEXSTF v. 29, n. 344, 2007, p. 184-218 Available at: <http://www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28re+388359%29&pagina=2&base=baseAcordaos>. Accessed on: May 2, 2014.

[30] SABAGG, Eduardo. **Manual of tax law**. 3. ed. São Paulo: Saraiva, 2011, p. 847.

Based on the abovementioned article, most scholars believe that the law on prior deposit for appeals overstepped its competence.

On this subject, the illustrious Professor Eduardo Sabbag[31] teaches:

> "It should also be added, as a criticism of the obstructive measure in question, that the double degree of jurisdiction - relativizable, yes, since it is up to the infra-constitutional legislator to regulate its access - is an inescapable instrument of social pacification. The monocratic decision is not immune to errors and inaccuracies, and its re-examination aims precisely to reassure the court, either by ratifying the understanding of the trial session *a quo or by altering its essence* due to the innovative vision of the collegiate body *ad quem.*" collegiate body *ad quem*."

Sacha Calmon Navarro Coêlho[32] states that:

> "The imposition of a material obstacle to the taxpayer's right to question the tax credit in the administrative instances provided for in the legislation appears to be a clear restriction on the guarantees of due process of law and broad defense, petrified in the body of the federal constitution."

Justice Celso de Mello spoke out in favor of revising the previous case law, in which he defended the obligation to deposit a deposit before filing an appeal. In his opinion, he outlined the following arguments in favor of ending this obligation in the context of appeals:

> "[...] the requirement of a guarantee based on a deposit as a condition for admissibility of an appeal at the administrative level ends up affecting and compromising, within the scope of this procedure, the exercise of the right of defense."
> "[...] the interested party has the right, even in administrative proceedings, as a direct result of the constitutional guarantee of the right to a fair hearing.
> Due process of law (regardless, therefore, of whether or not there is a normative provision in the statutes that govern the actions of the organs of the State), the unavailable prerogative of the adversarial process and full defense, with the means and resources inherent to it (including the right to evidence), as prescribed by the Constitution of the Republic, in its art. 5, subsections LIV and LV."
> "It can be seen, therefore, that effective respect for the constitutional guarantee of due process of law, even in the case of an administrative procedure (such as the one instituted in this case, which has no tax basis), strictly conditions the exercise of the powers vested in the Public Administration, Otherwise, the legal legitimacy of acts and resolutions emanating from the State will be seriously undermined, especially when such deliberations, as is the case here, may jeopardize the legal sphere of the private individual (or taxpayer)."

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[31] SABAGG, Eduardo. **Manual of tax law**. 3. ed. São Paulo: Saraiva, 2011, p. 848.
[32] COÊLHO, Sacha Calmon Navarro. **Course in Brazilian tax law**. 11. ed. Rio de Janeiro: Forense, 2010, p. 704.

In his vote, Justice Cezar Peluso alleges violations of the principles of due process of law, the principle of the right to petition, and the principle of the adversarial process and ample defense:

> "[...] the duty to review the acts of the public administration corresponds to the need to expand the taxpayer's means of access to hierarchical appeals."
> "[...] it makes no sense to make disproportionate demands that end up making it impossible to use the remedy itself."
> "Although one can adhere to the thesis that the Constitution of the Republic does not contemplate, at least in a straightforward manner, the double administrative degree, nor does it seem to do so, at least under generic discipline, about the jurisdiction itself, its concrete provision in the lower legislation must be accommodated to the constitutional principles, in whose light it would not be too much to affiliate the obligation in the *amplitude* that the Constitution of the Republic confers and assures, also in the administrative process, to the defense of the litigant "with the means and resources inherent to it" (art. 5, subsection LV). Suppose the Constitution does not oblige the establishment of appeals in the administrative sphere. In that case, there is already clear damage to the principle of due process of *law* and the right to petition when, by establishing them, the law makes the use of appeals subject to the satisfaction of a requirement contrary to other constitutional precepts."

Similarly, in the vote given by Justice Joaquim Barbosa, it is outlined that "[...] from the need to provide an adequate administrative procedure, the imperative arises to enshrine the possibility of appealing in the course of the procedure itself". The Justice above argues that "making the administrative procedure impossible or unfeasible, by indirect means, constitutes an offense against the principle of legality," claiming that this would lead to an offense against fundamental principles protected by the Federal Constitution.

The double degree of jurisdiction can be defined as the assessment and possible reform of a decision handed down in the first degree by a higher court to guarantee the litigating parties the certainty of the effective realization of the substantive right. For those who dispute the 30% deposit, the double degree of jurisdiction would be an inherent condition of both judicial and administrative proceedings. One cannot disagree with the fact that Article 5 (LV)º of the Federal Constitution establishes the double degree of jurisdiction for both "judicial or administrative" proceedings insofar as it mentions "the appeals inherent to them." However, one of the characteristics of fundamental rights is their relativity.

Fundamental rights are not absolute; they can suffer limitations due to the competition of other rights: "In these cases, which are the majority, one must speak of fundamental rights that are not absolute, but relative, in the sense that their protection finds, at a certain point, an insurmountable limit in the protection of an equally fundamental but competing right" (BOBBIO, 2004, p. 61) if the double degree of jurisdiction principle is characterized as a constitutional guarantee, based on art. 5, inc. LV, of the Federal Constitution, has the characteristic of relativity. This is because we see no reason for the principle to be elevated to absolute rights, considered, in Bobbio's magisterium, as exceptions[33] -. For this reason, some limitations on appeals are accepted when other constitutional principles clash with the principle of appealability and the double degree of jurisdiction.

Thus, in the judgment of Extraordinary Appeal 388.359-3/PE, which declared the mandatory prior deposit to be unconstitutional, the understanding was established, already defended by the doctrine, that the requirement of a previous appeal deposit in the sphere of administrative litigation violated the principles of due process of law, adversarial proceedings and full defense, double degree of jurisdiction, etc.

3.2.2 OFFENSE AGAINST THE PRINCIPLE OF THE RIGHT OF PETITION

Regarding the offense to the principle of the right to petition, James Marins[34] argues that:

> "[...] The right to appeal in administrative proceedings is a general principle of law and, above all, a fundamental right. This right enjoys dual constitutional protection and is manifested through the principles of adversarial proceedings and the right to petition regardless of the fee payment."

[33] The author mentions as absolute rights the right not to be tortured and the right not to be enslaved. It can be seen that these rights are closely linked to the principle of human dignity, we share the author's understanding, they can never give in when confronted with other rights.
[34] MARINS, James. **Brazilian tax procedural law (administrative and judicial)**. 5. ed. São Paulo: Dialética, 2010, p.2

On the subject, Justice Ricardo Lewandowski claims that:

> "[...] the right of petition is very old, dating back perhaps to the Magna Carta of 1215, being the first instrument of defense that the citizen has to guarantee rights, remove illegalities or abuse of power, even before going to court; it is the weapon of the common man, who defends himself with such instruments even before constituting a lawyer because it is only through him that the citizen can plead in court, before bearing the costs and running the risk of eventual succumbing."

Justice Cesar Peluzzo argued that: "[...] the effectiveness of the constitutional rule that provides for the right of petition is demeaned by the requirement of a prior appeal deposit". Reporting Justice Marco Aurélio de Mello pointed out: "This is something that can make even the right of defense unfeasible, compelling the interested party to engage in an incongruous practice, that is, to deposit, even partially, what they consider to be undue." Lastly, it is worth quoting Justice Carlos Britto's opinion, in which he gave this issue a broad interpretation: "there is a right to petition in all administrative instances, thus gaining the connotation of an appeal petition, if necessary."

In this way, the majority view was that the obligation to make a prior deposit offended the principle of the right to petition, as it would have limited the scope of this right.

3.2.3 OFFENSE AGAINST THE PRINCIPLE OF ISONOMY

About the offense to the Principle of Isonomy, the Illustrious Professor Eduardo Sabbag[35] teaches that:

> "It is a fact that the requirement of an appeal deposit, in addition to hindering the taxpayer's right to challenge, violates isonomy since only the wealthiest litigant will be entitled to a rehearing of the decision against which the appeal is lodged."

Justice Ricardo Lewandoviski argued that: "there is a clear affront to the principle of isonomy, in my opinion, above all because it places citizens in a situation of inequality before the Administration given their material resources."

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[35] SABAGG, Eduardo. **Manual of tax law**. 3. ed. São Paulo: Saraiva, 2011, p. 848.

In his opinion, Justice Cezar Peluso argued that the principle of equality was being violated because of discrimination based on the financial condition of the person concerned:

> "The requirement of a prior deposit for admissibility of administrative appeals is, in my opinion, a clear offense against the importance of isonomy. No one denies that the admissibility of appeals, whatever their nature, can, if not must, be subject to certain requirements. But neither is it denied that, among these, there cannot be any that imply or involve discrimination based on the financial condition of the interested party. If a given financial condition were to be assumed as an ingredient of a legal requirement for the admissibility of appeals, as is the case here, two interested parties who are in the same general situation, equal in everything except the degree of availability of money to pay the prior deposit, would face different legal-normative treatment, due solely to their different economic capacity."

As such, the majority view, both in jurisprudence and doctrine, was that the requirement of an economic payment to file an appeal in the administrative sphere also violated the principle of isonomy, given that citizens in the same general situation would be unequal before the Tax Administration due to their economic situation.

4 CURRENT UNDERSTANDING OF THE SUPREME FEDERAL COURT

As shown in this article, the Federal Supreme Court has dealt with the issue under study several times, and it is worth mentioning some of the precedents addressed, such as ADI 1.049-MC, RE 210.246, ADI 1.922-MC, ADI 836-6 GO and ADI 1.976-MC.

In the cases mentioned above, the position was that the requirement of a prior deposit to appeal in administrative proceedings was constitutional, but the Supreme Court's position has been revised.

On March 28, 2007, in the judgment of Extraordinary Appeal 388.359-3 of Pernambuco, it was declared by 9 votes to 1 that the mandatory prior appeal deposit in administrative litigation was unconstitutional.

In 2009, the Federal Supreme Court changed its position on the validity of rules that require a prior deposit for appeals to be heard in administrative proceedings.

On November 27, 2009, the Federal Supreme Court published Binding Precedent No. 21/09, ratifying the understanding that "It is unconstitutional to require a deposit or prior listing of money or assets for an administrative appeal to be admissible."

The following *is a* summary of the decision that gave rise to the STF's Binding Precedent No. 21:

> **Decision**
>
> The Court unanimously accepted and approved the proposal to issue Binding Precedent No. 21 in the following terms: "It is unconstitutional to require the prior deposit or listing of money or assets for an administrative appeal to be admissible." The President, Justice Gilmar Mendes, voted. Dr. Haroldo Ferraz da Nóbrega spoke for the Federal Public Prosecutor's Office. Justice Joaquim Barbosa was absent on leave, and Justice Ricardo Lewandowski was absent on justification. Plenary, 29.10.2009 (PSV 21 / DF - Distrito Federal, Proposal for a Binding Precedent, Rapporteur: Minister (a) President, Judgment: 29/10/2009, Judging Body: Full Court).

As already stated in this article, it is worth emphasizing that current case law states that demands of this kind offend the principles of due process of law and ample defense, which are fully applicable to administrative proceedings by the express provision of Article 5 (LV) of the 1988 Constitution.

It is important to clarify that Binding Precedent No. 21 originated in the judgment RE 388.359, which Justice Ellen Gracie and Justice Cezar Peluso suggested. This article has already mentioned it many times.

Reinforcing the idea that it is not appropriate to require a prior deposit to appeal in administrative proceedings, it is important to emphasize that the ordinary legislator could not condition the right to appeal on an illogical obstacle since it is a real contradiction to impose on the taxpayer to deposit a percentage of the credit still to be discussed to suspend its enforceability.

In this same vein, the following passage is transcribed from the vote of Justice Carlos Velloso in the judgment of ADI 1.511-MC:

> "[...] I would like to clarify that the 1988 Constitution enshrines due process of law in its substantive and procedural aspects in sections LIV and LV of Art. 5, respectively. (...) Due process of law, with substantive content - substantive due process - constitutes a limit on the Legislature in the sense that laws must be drawn up fairly, must be endowed with reasonableness and rationality, and must have, according to W. Holmes, a real and substantial link to be achieved. At the same time, due process of law, with a procedural character - procedural due process - guarantees people a fair judicial procedure, with the right to a defense."

The relationship above of reasonableness and rationality is not present in the condition of prior deposit of the amount required for the taxpayer to be able to use the remedies provided for in the tax procedure legislation since this expedient, which undermines the right stamped in art. 5, LV, of the Constitution, also violates the principle of isonomy, since it entails "discrimination based on the financial condition of the interested party," and may generate different legal treatment due to various economic capacity.

CONCLUSION

Based on the study of this article, it can be concluded that the Federal Supreme Court has already dealt with the issue under discussion several times: ADI 1.049-MC (Rel. min. Carlos Velloso, DJ of 25.08.1995), RE 210.246 (rel. for the judgment), ADI 1.922-MC, ADI 1.976-MC and ADI 836-6 GO, etc.

In the cases above, the position was that the requirement for a prior deposit was constitutional, which I have never agreed with, but the Supreme Court's position has been revised.

Finally, on March 28, 2007, in the judgment of Extraordinary Appeal 388.359-3 of Pernambuco, it was declared by 9 votes to 1 that the mandatory prior appeal deposit in administrative litigation was unconstitutional.

In 2009, the Federal Supreme Court changed its position on the validity of rules that require a prior deposit for appeals to be heard in administrative proceedings.

On November 27, 2009, the STF published Binding Precedent No. 21/09, ratifying the understanding that "It is unconstitutional to require a deposit or prior listing of money or assets for an administrative appeal to be admissible."

Based on everything discussed in this article, it is concluded that the requirement for a deposit to appeal against decisions handed down at first instance in the tax administrative process is unconstitutional.

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