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Civil actions for the collection of delinquent taxes and the tax authorities' duty to reimburse taxpayers for surety bond or bank guarantee expenses when they lose the lawsuit

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***Keywords*— Civil action for the collection of delinquent taxes. Expenses of litigation. Surety bond. Bank guarantee. Reimbursement.**

***Abstract*—** *This article aims to analyze whether tax authorities should be ordered to reimburse taxpayers for the expenses related to obtaining and maintaining surety bonds or bank guarantees when they lose civil actions for the collection of delinquent taxes. To that end, we looked into court precedents to identify not only the statutory provisions that apply to the subject matter, but mainly how such provisions have been interpreted and enforced by the courts, as well as the legal arguments used by taxpayers and tax authorities alike. The pivotal question in this discussion, as the result of our research showed, is whether or not obtaining such guarantees is optional, and this article seeks to analyze it through a systematic interpretation of positive law, as well as elements of philosophy of law. The conclusion of such analysis is that, although these types of guarantees are optional, tax authorities that lose a civil action for the collection of delinquent taxes must reimburse taxpayers for the expenses related to such guarantees.*[1]

[1] A version of this article was published by *Revista da Faculdade de Direito da UERJ*, v. 13, n. 41 (2022).

I. INTRODUCTION

In the Brazilian legal system, and according to the principles guiding the recovery of costs and causality, the losing party in a lawsuit is ordered to reimburse the winning party for the litigation expenses incurred by the latter over the course of the proceedings. However, court practices show that it is uncommon for taxpayers to claim recovery of costs related to maintaining bank guarantees and surety bonds when they win civil actions of the collection of delinquent taxes. This article aims to find out if there are legal reasons for this behavior.

Taxpayers are mandated by law to provide a guarantee in tax-collection actions as a requirement to file a motion to stay execution. The most common type of guarantee offered by major taxpayers is surety bonds or bank guarantees, under Article 9 of the Tax Enforcement Act. Although such guarantees entail costs, in most cases, they are the most viable option. Depending on the amount in dispute, a cash deposit would be unfeasible, either because it would harm the taxpayer's ability to conduct their activities as usual, or simply because of insufficient funds. Additionally, a levy on the debtor's assets is usually accepted as a guarantee by tax authorities and courts as a last resort (i.e., after the failed attempt to attach financial assets).

However, the costs of maintaining these guarantees can be rather high, considering that they vary according to the

amount guaranteed, but also their term, which in general must coincide with duration of the tax-collection lawsuit. And, as pointed out by the *Justiça em Números 2020* report[2], tax-collection actions are the lawsuits that take the longest to be decided by the courts.

Therefore, if the taxpayer's motion to stay execution is granted and the case is dismissed, would it be appropriate for the court to order the tax authority—which filed an unwarranted tax-collection lawsuit—to reimburse the taxpayer for the guarantee costs incurred? Such is the question that this article intends to answer.

To achieve this goal, we will first analyze how Brazilian court precedents deal with the subject. We will also identify the existing regulations in Brazilian positive law on the subject, and, more importantly, how these regulations are interpreted and enforced.

After identifying the rules and their application by the courts, the article will analyze, through a systematic interpretation of positive law and specialized literature, the grounds of the judgments, as well as the arguments presented by taxpayers and tax authorities.

We expect that this analysis will lead to a conclusion on whether or not there are legal reasons capable of justifying why taxpayers seldom claim the reimbursement, by tax authorities, of costs of obtaining and maintaining guarantees in tax-collection lawsuits.

1. Overview of statutory regulations and court precedents.

Without renouncing scientific rigor, which is necessary in academic analyses of any aspects of Law, and with a view to providing a broader, more pragmatic analysis on the subject, we believe it would be convenient to give our readers an overview of the Brazilian legislation and also court precedents on this matter so as to examine how positive rules are applied in concrete cases.[3]

We limited our research to the Superior Court of Justice, the five Brazilian Federal Courts of Appeals, and the Appellate Courts of São Paulo and Rio de Janeiro. This allowed us to cover the highest-ranking court for non-constitutional matters, the entire Federal Justice system, and the state courts that have dealt with the most tax-collection lawsuits in the country.[4]

This research was carried out from May through June 2020, and six judgments passed by the aforementioned courts were found. They were delivered in tax-collection lawsuits or motions to stay execution in which the taxpayer asked the court to order the tax authority to reimburse the expenses incurred in obtaining and maintaining a surety bond or a bank guarantee. Two of these judgments were delivered by the Federal Court of Appeals of the 2nd Region, two by the Federal Court of Appeals of the 4th Region, one by the Appellate Court of the State of São Paulo, and one by the Appellate Court of the State of Rio de Janeiro.

We also found a Superior Court of Justice judgment in which the possibility of including bank guarantee expenses in the recoverable costs is discussed. However, such judgment is not of great value to this article, as it was not passed in a tax-collection lawsuit or a motion to stay execution, but rather in an action for the annulment of a tax liability, and the appeal was not heard due to procedural defect and, as a result, the merits were not discussed by the court. [5]

Out of the six judgments that deal with the specific subject matter of this article, three granted the claim for the inclusion of guarantee expenses in the litigation costs recoverable by the wining party. Two of these judgments were delivered by the Federal Court of Appeals of the 4th Region, and the third one by the Appellate Court of the State of São Paulo. Among the remaining three judgments, the two delivered by the Federal Court of Appeals of the 2nd Region concluded that such expenses do not constitute recoverable costs to be paid by the losing party, and the judgment delivered by the

[2] NATIONAL COUNCIL OF JUSTICE, *Justiça em números 2020*. Brasília: National Council of Justice, 2019. p. 157.
[3] ARAÚJO, Clarice von Oertzen de. *Incidência jurídica*: teoria e crítica. São Paulo: Noeses, 2011. p. 182.
[4] CONSELHO NACIONAL DE JUSTIÇA, *Justiça em números 2020*. Brasília: National Council of Justice, 2019. p. 157.

[5] "[...]. *INCLUSION OF BANK GUARANTEE COSTS IN THE CONCEPT OF LITIGATION EXPENSES. ARGUMENT UNCHALLENGED.* FEDERAL SUPREME COURT PRECEDENT 283. INTERLOCUTORY APPEAL TO THE SUPERIOR COURT OF JUSTICE (PUBLIC ENTITY). FAILURE TO CHALLENGE THE CONTENT OF THE DECISION THAT DISMISSED THE APPEAL. SUPERIOR COURT OF JUSTICE PRECEDENT 182. 1. The business establishment, by means of the appeal, claims: a) the award of attorney's fees in its favor as per Article 85, par. 1 and 2, of the Code of Civil Procedure; and b) the inclusion, in the costs to be recovered, of the amounts incurred in maintaining a bank guarantee. [...] 4. Such precedent is equally applicable to the claim that the tax authority should be ordered to pay the expenses incurred in maintaining the bank guarantee. In this regard, the appellate court noted that such argument was only raised in the motion for clarification, i.e., it was not discussed previously. Additionally, the appellate court asserted that the matter can be analyzed by the appropriate court (the trial court) in the phase of execution of the judgment. Such arguments remained unchallenged. (BRAZIL, Superior Court of Justice (2nd Panel). *Appeal to the Superior Court of Justice No. 1803004/SP*. Judge-rapporteur: Justice Herman Benjamin, March 21, 2019. Available at: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ITA&sequencial=1829955&num_registro=201900692498&data=20190618&formato=PDF. Accessed on June 6, 2020)

Appellate Court of the State of Rio de Janeiro determined that any obligation to reimburse the guarantee expenses is a matter of civil liability of the State, and therefore it should be the subject matter of a separate action filed for this specific purpose. We will now begin to analyze each of these judgments to understand the determining factors behind each decision.

We will start our analysis with the judgments that granted relief to the taxpayers and ordered the relevant tax authorities to reimburse the expenses incurred in maintaining guarantee in tax-collection lawsuits. To better understand the reasons that led the courts to arrive at such conclusion, the summary and main excerpts of each judgment are transcribed below:

> INTERLOCUTORY APPEAL. MOTION TO STAY EXECUTION. REIMBURSEMENT OF LITIGATION EXPENSES INCURRED IN OBTAINING A SURETY BOND. CODE OF CIVIL PROCEDURE, ARTICLES 82 AND 84. LAW 6830/80, ARTICLE 9, PAR. 2. 1. The collection guarantee is a prerequisite for the acceptance by the Court of a motion to stay execution (Article 16, par. 1, Law 6830/80), that is, a requirement for debtors to have the opportunity to be heard. 2. The surety bond is one of the means provided for in Law 6830/80, Article 9, item II, as per Law 13043/2014, to guarantee tax collection. Such provision does not establish an order of preference, and debtors are allowed to avail themselves of any of the legally accepted guarantees. 3. The list provided for in Article 84 of the Code of Civil Procedure is not exhaustive, and recoverable litigation expenses must be understood as any and all expenses incurred, including out-of-court expenses, so as to ensure that the lawsuit fulfils its social function, provided that they are indispensable to the proceedings.[6]
>
> TAX LAW. TAX-COLLECTION ACTION. EXTINCTION OF TAX LIABILITY IN MOTION TO STAY EXECUTION. ATTORNEY'S FEES. CALCULATION. IMPOSSIBILITY. LITIGATION EXPENSES. [...] 2. The guarantee is a prerequisite for the taxpayer to file a motion to stay execution. Therefore, the guarantee costs unequivocally constitute litigation costs that must be reimbursed by the tax authority should it lose the lawsuit. 3. Appeal granted. [7]
>
> INTERLOCUTORY APPEAL - Municipality of Itirapina - Objection against enforcement of judgment - Judgment against the tax authority - Claim to overturn the decision that denied the objection and ordered the losing party to reimburse the winning party for the expenses incurred in obtaining/maintaining a surety bond - Allegation of excessive and/or improper litigation costs – Inapplicability – Payment of all expenses incurred by debtor cannot be rejected – Systematic interpretation of Articles 82, par. 2; 84; 98, item VIII, and 776, of the Code of Civil

[6] BRAZIL. Federal Court of Appeals of 4th Region (1st Panel) *Interlocutory Appeal No. 5045251-74.2018.4.04.0000*. Judge-rapporteur: Federal Judge Alexandre Rossato da Silva Ávila, April 24, 2019. Available at https://bityli.com/orZIk. Accessed on June 6, 2020.

[7] BRAZIL. Federal Court of Appeals of 4th Region (1st Panel) *Civil Appeal From Final Judgment No. 5008453-63.2014.4.04.7111*. Judge-rapporteur: Federal Judge Alexandre Gonçalves Lippel, February 20, 2020. Available at https://bityli.com/DAoM2. Accessed on June 6, 2020.

Procedure, and Articles 16 and 39, main paragraph, of the Tax Enforcement Act – Decision sustained – APPEAL DENIED.

[...]

As widely known, in civil actions for the collection of delinquent taxes, the debtor must provide a guarantee to secure collection in order to file a motion to stay execution by choosing one of the options provided for in the Tax Enforcement Act (cash, surety bond or bank guarantee, assets for attachment, observing the order set forth in Article 11; alternatively, the debtor can indicate assets offered by third parties for attachment, provided that they are accepted by the tax authority). In the present case, despite such options, the tax collection was guaranteed by means of a surety bond, which was accepted by the court.

In this regard, it should be noted that the bank guarantee and surety bond produce the same effects as the attachment, when it comes to securing collection. Additionally, Article 15, item I, of Law 6830/80 gives such guarantees the same status of a cash deposit to replace attachment, and, therefore, they constitute sufficient guarantee of collection.

Obviously, these types of guarantees also constitute procedural acts inherent to the exercise of one's right to be heard. However, obtaining and maintaining them entail costs.

As per Article 82, par. 2, the judgment shall order the losing party to reimburse the prevailing party for the expenses it incurred. Although there is no express legal provision for the reimbursement of guarantee and surety expenses, the concept of "expenses" must not be restricted to just a few types. Rather, the meaning of the word must be interpreted comprehensively by virtue of the *mens legis* principle. Therefore, "all" expenses incurred by the winning party must be included in the recoverable costs, including those incurred in obtaining a bank guarantee/surety bond, especially when such party is subject to the encumbrances imposed by an improper lawsuit, as is the present case.

Thus, it is unreasonable that such expenses be borne by only one of the parties, under penalty of violating the principle of equality. On this subject, Article 7 of the Code of Civil Procedure ensures equal treatment to all parties in regard to their procedural rights and options, forms of defense, burdens, duties, and procedural sanctions, and is the judge's duty to ensure the due process of law.

It is worth noting, in this regard, that the tax authorities and the courts that deal with these types of collection lawsuits commonly reject other assets as collateral, preferring cash, surety bonds, or bank guarantees, which are equivalent to cash for the purposes of attachment. Such burden cannot be considered a benefit granted to taxpayers, nor does it constitute a discretion or choice/option that the taxpayer can choose to exercise. Rather, depending on the amount in dispute and the

> taxpayers' financial situation, they have no other alternative but to obtain one of such guarantees.
>
> The argument that the taxpayer could easily make a deposit in court or even offer of its many assets (vehicles, real estate etc.) is fragile. Therefore, the duty of the tax authority, when it loses a lawsuit, to pay for the expenses thereof is undeniable.
>
> [...]
>
> On the one hand, observing the principle of minimum burden, the debtor can protect his/her assets and, at the same time, allow the dispute to move on and ensure the payment of the debt in the least burdensome way (Code of Civil Procedure, Article 850). On the other hand, according to the principle of causality, whoever gives rise to the lawsuit or proceeding will be liable for the resulting expenses.
>
> [...][8]

The first judgment of the Federal Court of Appeals of the 4th Region, regarding Interlocutory Appeal No. 5045251-74.2018.4.04.0000, upheld the trial court judgment that had ordered the Union to reimburse the debtor for the surety bond expenses. The first of the determining factors behind this decision was the fact that the guarantee is a prerequisite for the motion to stay execution to be accepted by the court, as provided for in Article 16, par. 1, of Law No. 6830/80 (Tax Enforcement Act). For this reason, according to the appellate judgment, the provision of a guarantee constitutes a mandatory requirement for the debtor to have the opportunity to be heard. It is, therefore, an indispensable cost, inseparable from the lawsuit. The second determining factor behind the decision is the fact that Law No. 6830/80 does not establish an order of preference between the cash deposit, bank guarantee, surety bond, or levy on the debtor's or third parties' assets[9], which contradicts the arguments presented by the tax authority that obtaining a bank guarantee or surety bond is discretionary, and the taxpayer could have guaranteed the collection by means of a deposit or other assets. Finally, the third decisive reason is the fact that the list provided for in Article 84 of the Code of Civil Procedure is not exhaustive.

The second judgment of the Federal Court of Appeals of the 4th Region was delivered in an appeal filed against the judgment that dismissed Tax-collection Lawsuit No. 5008453-63.2014.4.04.7111 and ordered the Union to reimburse the taxpayer for the guarantee expenses. The determining factor in this judgment was the argument that the list provided for in Article 84 of the Code of Civil Procedure is not exhaustive. According to the judgment, the systematic interpretation of the said provision reveals that the expression "procedural expenses" has a much broader scope than the list of Article 84. As an example, the judgment mentions Articles 95 and 98 of the Code of Civil Procedure, which provide for expert fees and the expenses that must not be charged from those who enjoy *in forma pauperis* status. According to the judgment, expert fees are not listed in Article 84, but are nevertheless undoubtedly litigation expenses. Article 98, par. 1, provides a list of litigation costs that those who proceed *in forma pauperis* are exempted from, including not only expert and attorney's fees, but also other expenses that are not on the list of Article 84.

Finally, the third judgment was delivered by the Appellate Court of the State of São Paulo in Interlocutory Appeal No. 2002444-11.2019.8.26.0000, which was filed by the Municipality of Itirapina against a trial court decision that ordered the municipal government to reimburse the taxpayer for the surety bond expenses incurred in a tax-collection lawsuit that was dismissed as

[8] BRAZIL, Appellate Court of the State of São Paulo (18th Public Law Chamber). *Interlocutory Appeal No. 2002444-11.2019.8.26.0000*; Judge-rapporteur Henrique Harris Júnior, February 28, 2020. Available at https://bityli.com/RJyJe. Accessed on June 6, 2020.

[9] Article 9 - To guarantee the collection of the debt amount, interest, and late payment fine and charges indicated in the Certificate of Overdue Tax Liability, the debtor may:
I - make a cash deposit, to the Court's name, in an official credit establishment that ensures adjustment for inflation;
II - offer a bank guarantee or surety bond; (As per Law 13043 of 2014)
III - indicate assets for attachment, in compliance with the order provided for in Article 11; or
IV - indicate assets owned by third parties and accepted by the tax authority for attachment.
Paragraph 1 - The debtor may only indicate real property, owned by the debtor or a third party, for attachment with the express consent of the debtor's or third party's spouse, as applicable.
Paragraph 2 - Proof of deposit, bank guarantee, surety bond, or attachment of the assets owned by the debtor or the third party must be entered of record. (As per Law No. 13.043 of 2014)

the motion to stay execution was granted. In addition to the arguments presented by the other two judgments delivered by Federal Court of Appeals of the 2nd Region and presented above, the Appellate Court of the State of São Paulo based its decision on the content ***(i)*** of Article 776 of the Code of Civil Procedure, which prescribes that the plaintiff must reimburse the defendant for "the damages sustained by the latter, when the final and unappealable judgment declares that the obligation that gave rise to the dispute does not exist, wholly or in part," and ***(ii)*** of Article 16 of the Tax Enforcement Act, according to which "should the tax authority lose, it shall reimburse the prevailing party for the expenses it incurs."

Having presented the determining arguments of the judgments found in our research that are favorable to the taxpayers' claim for reimbursement, by the tax authority, for the costs they incurred in obtaining and maintaining guarantees, we will now analyze the determining factors behind the judgments that rejected such claim. We will begin our analysis by transcribing the summaries and main excerpts from the votes delivered in these judgments:

> TAX LAW. MANDATORY REVIEW. APPEALS FROM FINAL JUDGMENT. MOTION TO STAY EXECUTION. SURETY BOND. PRIVATE CONTRACT. BURDEN ARISING OUT OF A PRIVATE CONTRACT THAT SHOULD NOT BE INCLUDED IN THE RECOVERABLE EXPENSES. PRECEDENT OF THE FEDERAL COURT OF APPEALS OF THE 2ND REGION. INCREASE IN ATTORNEY'S FEES DUE. APPLICABILITY OF ARTICLE 85, PAR. 3 OF CODE OF CIVIL PROCEDURE. MANDATORY REVIEW AND APPEALS HEARD AND PARTIALLY GRANTED TO INCREASE ATTORNEY'S FEES IN FAVOR OF THE TAXPAYER AND TO EXCLUDE THE COST OF SURETY BOND FROM THE RECOVERABLE EXPENSES. [...]. 2. Obtaining a surety bond in tax-collection lawsuits is discretionary, as the taxpayer is free to choose to pay for such insurance and transfer the risk to the insurer. As it is a private contract, a choice, its inclusion under the recoverable costs is not admissible. 3. Along these lines: "With regard to the request to order the tax authority to pay the costs arising from the surety bond, it should be noted that the conduct of the tax authority is not capable of giving rise to indemnifiable damage, insofar as it acts under its authority/duty to charge and enforce the taxes provided for by law. Additionally, the guarantee in the form of a surety bond is not an obligation imposed on the taxpayer, as set forth in Article 9 of Law No. 6830/80. 10 - Appeal partially granted. (AC - Appeal from Final Judgment - Appeals - Civil and Labor Proceeding 0104624-03.2015.4.02.5006, LUIZ ANTONIO SOARES, Federal Court of Appeals of the 2nd Region - 4th SPECIALIZED PANEL.)" [...]. 5. Mandatory review and appeal heard and partially granted to increase attorney's fees in favor of ORICA BRASIL LTDA. and MACHADO MEYER, SENDACZ E OPICE ADVOGADOS, and to exclude the surety bond expenses from recoverable costs.
>
> [...]
>
> The inclusion of the surety bond expenses, which the

taxpayer obtained to guarantee the collection, in the litigation expenses is inappropriate. The surety bond is a contract entered into by the debtor and the insurer so that the latter, upon payment of the premium by the insured/debtor, undertakes the risk should the tax authority prevail in the lawsuit.

The risk inherent to insurance contracts is easily noticeable in the relationship between the insured and the insurer, since the obligation is directly linked to a future, uncertain event. Obtaining a surety bond in tax-collection lawsuits is discretionary, as the taxpayer is free to choose to pay for such insurance and transfer the risk to the insurer. As it is a private contract, a choice, its inclusion under the recoverable costs is not admissible, because if such an argument were accepted, the State would indirectly bear the costs of a private insurance, which would be unimaginable in a democratic State governed by the rule of law. Also, this would impose a condition to be met by the tax authorities in the conduction of their duties, that is, to file only "perfect" tax-collection lawsuits that do not leave any room for a motion to stay execution, which would be just as unimaginable.

[...][10]

TAX-COLLECTION ACTION. CANCELLATION OF TAX LIABILITY. DISMISSAL WITHOUT PREJUDICE. ATTORNEY'S FEES. APPLICABILITY. PRINCIPLE OF CAUSALITY. INCREASE. ARTICLE 20, PAR. 3 AND 4 OF THE CODE OF CIVIL PROCEDURE. RECOVERY OF SURETY BOND EXPENSES. IMPOSSIBILITY. [...] 9 - With regard to the request to order the tax authority to pay the costs arising from the surety bond, it should be noted that the conduct of the tax authority is not capable of giving rise to indemnifiable damage, insofar as it acts under its authority/duty to charge and enforce the taxes provided for by law. Additionally, the guarantee in the form of a surety bond is not an obligation imposed on the taxpayer, as set forth in Article 9 of Law No. 6830/80. 10-Appeal partially granted.[11]

CIVIL APPEAL FROM FINAL JUDGMENT. CIVIL PROCEDURAL LAW. TAX-COLLECTION ACTION. IMPROPER REGISTRATION AS AN OVERDUE TAX LIABILITY. CANCELLATION OF DEBT CLEARANCE CERTIFICATE. EXTINCTION. ATTORNEY'S FEES. INCREASE. NON-APPLICABILITY. CLAIM FOR RECOVERY OF GUARANTEE EXPENSES.

[10] BRAZIL. Federal Court of Appeals of 2nd Region (2nd Specialized Panel). *Appeal from final judgment No. 0000556-24.2010.4.02.5120*. Judge-rapporteur: Appellate Judge Eugênio Rosa de Araujo, June 27, 2019. Available at https://bityli.com/fQVPL. Accessed on June 6, 2020.

[11] BRAZIL. Federal Court of Appeals of 2nd Region (2nd Specialized Panel). *Appeal from final judgment No. 0104624-03.2015.4.02.5006*. Judge-rapporteur: Federal Appellate Judge Luiz Antonio Soares, September 13, 2019. Available at https://bityli.com/ZVqwB. Accessed on June 6, 2020.

> MATTER RELATED TO CIVIL LIABILITY. MATTER CANNOT BE RESOLVED IN THE PRESENT LAWSUIT. [...] 3. Claim to recover the costs incurred to secure collection. Matter of civil liability of the State; no decision shall be awarded in the present action. 4. Judgment sustained. APPEAL DENIED.
>
> [...]
>
> Moreover, it should be noted that the State is exempted from costs, and the bank guarantee expenses must be claimed in an appropriate lawsuit, as they are not included under Article 20 of the Code of Civil Procedure and the taxpayer could have provided a different type of guarantee.
>
> The guarantee offered to the court in the form a bank guarantee or surety bond creates the burden of compensating the financial institution or insurer, to be borne by the taxpayer, in an amount proportional to the amount in dispute and duration of the lawsuit.
>
> However, in the present case, once the tax liability is canceled due to improper registration as an overdue tax liability, there are, in theory, sufficient grounds to claim the right to recovery of costs.
>
> The Brazilian legal system ensures to the harmed party the right to recover all direct and immediate losses, including expenses incurred in surety bonds and bank guarantees during the lawsuit.
>
> Such cases are matters of civil liability of the State, as per Article 37, paragraph 6, of the Federal Constitution. According to precedents of the Federal Supreme Court and the Superior Court of Justice, such matters are characterized by: a) the damage itself (in this specific case, the guarantee expenses); b) the administrative action (the improper tax collection); and c) causality (the causal link between the improper collection and the disbursement).
>
> Thus, in the present judgment, no decision shall be awarded in this regard, and the taxpayer must, if applicable, claim her right in an appropriate action on the grounds described above.[12]

In the first judgment delivered by the Federal Court of Appeals of the 2nd Region in Appeal No. 0000556-24.2010.4.02.5120, there were two determining factors for overturning the decision that ordered the Union to reimburse the taxpayer for expenses incurred in obtaining and maintaining the surety bond. The first one is the argument that the surety bond is optional, i.e., in the words of the Court, the taxpayer "is free to choose to pay for such insurance and transfer the risk to the insurer." Consequently, by ordering the tax authority to reimburse the taxpayer for amounts paid to the insurer, "the State would indirectly bear the costs of a private insurance, which would be unimaginable in a democratic State governed by the rule of law." The second determining factor was the fact that ordering the tax authority to pay for the expenses in question would impose on the tax authority the condition to file only "'perfect' tax-collection lawsuits that do not leave any room for a motion to stay execution," which, according to the judgment, is not acceptable either.

In the second judgment delivered by the Federal Court of Appeals of the 2nd Region in Appeal No. 0104624-03.2015.4.02.5006, there were also two determining factors for rejecting the taxpayer's claim to reimbursement, by the Union, for expenses incurred in

[12] BRAZIL. Appellate Court of the State of Rio de Janeiro (21st Civil Chamber). *Appeal from final judgment No. 0154852-43.2001.8.19.0001*, Judge-rapporteur: Monica Sardas, November 24, 2015. Available at https://bityli.com/b1mxo. Accessed on June 17, 2020.

obtaining and maintaining the surety bond. The first one was the argument that the contract in question is discretionary, and not mandatory for the conduction of the lawsuit. The second decisive argument was that bringing a tax-collection lawsuit would not be an indemnifiable conduct, insofar as the tax authorities would be acting "under its authority/duty to charge and enforce the taxes provided for by law."

Finally, in the third judgment denying the claim against the tax authority was rendered in Appeal No. 0154852-43.2001.8.19.0001 by the Appellate Court of the State of Rio de Janeiro, which based its decision on the premise that the Code of Civil Procedure provides for an exhaustive list of costs recoverable by the prevailing party. Thus, considering that the guarantee expenses are not on this list, the Court rejected the request to order the tax authority to pay such expenses. The court also understood that the claim in question is a matter of civil liability of the State, which could be asserted by the taxpayer in an appropriate, separate action.

1.1. Partial conclusions.

The extensive analysis of legal provisions and court precedents indicates the main factors involved with assessing whether a tax authority that loses a tax-collection lawsuit must reimburse debtors for the costs of obtaining and maintaining guarantees.

The three rulings in favor of ordering the tax authority to reimburse the costs of such guarantees analyzed the same two issues: the list provided for in Article 84 of the Code of Civil Procedure and the taxpayer's discretion to obtain a surety bond or bank guarantee or other types of guarantees. These judgments concluded that the list set forth in Article 84 is not exhaustive and that obtaining a surety bond or bank guarantee is not optional, because, unlike civil executions, tax-collection lawsuits require a guarantee for the taxpayer to be able to file a motion to stay the execution. Thus, according to these judgments, obtaining a guarantee is a legal prerequisite.

On the other hand, the two judgments of the Federal Court of Appeals of the 2nd Region that denied the reimbursement analyzed the taxpayer's discretion to obtain a guarantee or bond, as well as axiological issues, such as whether it would be fair to pass on to a tax authority the costs of a private contract signed between the debtor and an insurance company or bank, and whether it would be fair to demand that tax authorities file only "perfect" tax-collection actions. The third judgment rejecting the reimbursement claim, delivered by the Appellate Court of the State of Rio de Janeiro, considered that the list provided in Article 20 of the 1973 Code of Civil Procedure[13] is exhaustive and, therefore, any duty of the State to reimburse taxpayers for guarantee costs is a matter of civil liability of the State, which should be discussed in a separate lawsuit.

The first point that should be highlighted is that, despite being the main topic of the few studies that we found[14] that discuss the specific subject matter of this article, the three rulings that granted the reimbursement claim expressly denied that list set forth in Article 84 of the Code of Civil Procedure is exhaustive, but this issue was not taken into account as a determining factor in the two rulings of the Federal Court of Appeals of the 2nd Region that denied the claim. The only judgment that considered that the list is exhaustive was the one delivered by the Appellate Court of the State of Rio de Janeiro, which understood, however, that the claim could be asserted in a separate lawsuit with the specific goal of determining the civil liability of the State arising out of a tax-collection action that turned out to be unwarranted.

The second point that deserves attention is that the judgments delivered by the Federal Court of Appeals of the 2nd Region, which rejected the claim for reimbursement of guarantee cost, were not based on a statutory legal argument, but on axiological concepts, as explained above.

Considering all six judgments found in our research, as well as the grounds that were deemed decisive by them, one can affirm that the main subject to be analyzed in this article does not involve the list set forth Article 84 of the Code of Civil Procedure (and whether it is exhaustive or not), or the axiological issues addressed in the judgments delivered by the Federal Court of Appeals of the 2nd Region (whether it would be fair to pass on to the State the costs of a private contract, and to mandate that tax authorities file perfect tax-collection lawsuits

[13] Equivalent to Article 84 of the 2015 Code of Civil Procedure.

[14] PIRES, Luiz Henrique da Costa. *Devolução de fiança no caso de procedência dos embargos à execução fiscal*. Available at https://www.conjur.com.br/2018-mar-14/luis-pires-devolucao-fianca-embargos-execucao-fiscal. Accessed on September 11, 2020;

PIERONI, Luiz Felipe de Toledo. *Da possibilidade do ressarcimento das despesas de carta de fiança bancária ou seguro garantia pela Fazenda Pública em embargos à execução fiscal*. Available at https://jus.com.br/artigos/79081/da-possibilidade-do-ressarcimento-das-despesas-de-carta-de-fianca-bancaria-ou-seguro-garantia-pela-fazenda-publica-em-embargos-a-execucao-fiscal Accessed on September 12, 2020.

PEIXOTO, Daniel Monteiro. *A Fazenda Pública deve ressarcir despesas com a contratação de garantia judicial?* Available at: https://www.machadomeyer.com.br/pt/inteligencia-juridica/publicacoes-ij/tributario-ij/a-fazenda-publica-deve-ressarcir-despesas-com-a-contratacao-de-garantia-judicial Accessed on September 12, 2020;

only). Rather, the main subject pertains to the taxpayers' discretion to obtain a surety bond or bank guarantee, as this is the principal issue on which the aforementioned judgments disagree.

Therefore, the next section will analyze the three aspects presented above—(i) the list provided for in Article 84 of the Code of Civil Procedure; (ii) the axiological issues related to passing on the costs of a private surety bond or bank guarantee to tax authorities when they lose tax-collection lawsuits; and, more importantly, (iii) the taxpayer's discretion or advantage in obtaining a guarantee. More focus will be placed on the latter, as this is the key point of the discussion, especially the question around the taxpayer's discretion.

II. ANALYZING STATUTORY REGULATIONS AND COURT PRECEDENTS.

2.1. Axiological issues: is it unfair to pass on the costs of a private insurance or guarantee contract to the tax authorities or to demand that they only file "perfect" tax-collection lawsuits? (Why do "judgments order the losing parties to reimburse the prevailing parties for the expenses incurred"?)

We will start our analysis with the axiological arguments used as determining factors in the judgments passed by the Federal Court of Appeals of the 2nd Region, which rejected the claim to order the tax authority to reimburse the expenses that the winning party had to incur to obtain and maintain a guarantee so as to be able to file a motion to stay execution. We chose this subject as a starting point because it will allow us to understand the reasons why the Brazilian legal system imposes on the judge the obligation to order the losing party to reimburse the prevailing party for the procedural expenses incurred by the latter in the course of the lawsuit.

One of the determining factors behind the courts' denial to order the tax authorities to reimburse the taxpayers for the expenses of obtaining and maintaining a surety bond in the judgments shown in the previous section was the assumption that the burden of a private contract between the taxpayer and the insurer would be passed on to the State. According to the judgments, this would be "unimaginable in a democratic State governed by the rule of law." Furthermore, the courts understand that such situation would imply that the State would be required to file only "perfect" tax-collection actions.

It appears to us, however, that passing on the costs that the winning party had to incur in the lawsuit to the losing party is exactly the logic of the cost recovery system adopted by Brazilian procedural law, which seeks precisely to reestablish the legal *status quo* of an individual that had to pursue judicial relief.

To understand the reasons for the existence of this duty, one must comprehend the notions of procedure and conflict. It is not an overstatement to say that the conflict is one of the key elements of Law studies. Carnelutti goes so far as to say that were if not for conflicts, there would be no need for a legal system.[15]

This notion of conflict as a key element of Law studies is also present in the work of Pugliesi, who defines Law "as a specific area of human knowledge/activity aimed at conflict resolution."[16] To explain the importance of conflicts in Law, Pugliesi uses a very enlightening allegory, in which he compares Law to medical sciences and says that conflictive States are like "pathogens, and the pragmatic approach is the treatment."[17] Paulo Cesar Conrado uses the same allegory and explains that the pragmatic approach to treat the pathology that arises in a legal relationship is the procedure: "whenever relationships (the substantive ones) do not develop according to their natural, spontaneous course, i.e., according to the prescriptions of substantive law, procedural law has to step in to regulate precisely how the State must intervene to resolve the dispute."[18]

These notions of conflict and procedure are also examined by Paulo de Barros Carvalho, who, however, steers his analysis from allegory to legal technique, building upon the concepts of primary and secondary legal rules. According to the author, primary rules are those that establish legal duties, whereas secondary rules establish coercive sanctions to compel fulfillment of such duties. Primary rules are therefore the ones that regulate substantive legal relationships, whereas secondary rules regulate procedural legal relationships and allow the State, through the Judiciary, to coerce debtors to meet the obligations provided for in the substantive regulations.[19]

Therefore, every lawsuit—with the exception of non-litigious proceedings—is the result of a conflict related to the fulfillment of an obligation that is invariably governed by a substantive rule. In a "healthy" State, legal relationships are to be resolved without the intervention of the State/Judiciary. Thus, the role of the Judiciary is

[15] CARNELUTTI, Francesco. Introduzzione allo studio del diritto processuale tributário. *Rivista di diritto processuale civile.* 2. Pádua: Cedam, 1932, p. 108.
[16] PUGLIESI, Márcio. *Teoria do direito*. 2nd ed. São Paulo: Saraiva, 2009. p. 186.
[17] Ibidem, p. 187.
[18] CONRADO, Paulo Cesar. *Introdução à teoria geral do processo civil.* 2nd ed. São Paulo: Max Limonad, 2003. p. 35.
[19] CARVALHO, Paulo de Barros. *Curso de direito tributário.* 23rd ed. São Paulo: Saraiva, 2011. pp. 586-589.

twofold: to recognize the existence of the conflict, and to compel compliance with the obligation, reestablishing normality.

The purpose of a lawsuit is, hence, to reestablish the regular state of affairs through the fulfillment of legal obligations. However, considering that a lawsuit, strictly speaking, entails costs for both parties, judicial relief alone is not enough to restore normality, although it does put an end to the conflict. After all, if either party needs to spend money in a lawsuit to compel the other party to fulfil its duty, at the end of the lawsuit the *status quo ante* will not be completely restored, although the obligation has been coercively met. In order to restore the *status quo* prior to the lawsuit, the party that gave rise to it by breaching the original obligation must reimburse the expenses incurred by the opposing party due to the lawsuit.

Such is the rationale behind the principle of recovery of costs, according to which any and all costs incurred by a party to obtain judicial recognition of a certain right (and these costs also constitute a violation of such right) must be recovered by the party. After all, judicial relief should not impose financial losses on those who obtained it, and it is not in the best interest of a fair State to resolve conflicts to the detriment of those who are entitled to judicial relief. [20] Thus, the party that gave rise to the conflict must reimburse the prevailing party for the expenses incurred in the lawsuit. Otherwise, the "innocent" party will not be restored to the exact same situation in which they were before the conflict was established, as their assets will have been reduced due to the costs they were forced to incur in the lawsuit.

It seems to us, therefore, that the reason why Brazilian positive law commands judges to order the losing party to reimburse the prevailing party for the expenses resulting from the lawsuit is directly linked to the need to restore *status quo ante.* This is not a punitive principle, but rather a mere recovery of the costs that the winning party had to pay in the course of the lawsuit.

As James Marins suggests, tax law is contentious by nature, insofar as tax relationships imply the subordination of an individual's private property to the State.[21] Whenever a tax authority understands that a taxpayer has not spontaneously complied with a tax obligation, it is entitled to file a tax-collection lawsuit to prompt the judiciary to exercise its jurisdiction and coerce the alleged debtor to comply with their legal duty to pay the supposedly due tax. However, if the Judiciary arrives at the conclusion that the legal relationship has not been breached—either because it never existed, or because it has already been extinguished by payment, peremption, statute of limitations etc.—the judge must order the tax authority to reimburse the taxpayer for the costs paid to exercise their right to be heard. Otherwise, notwithstanding their rightful claim to judicial relief, the winning party will be harmed as a result of the lawsuit.

In view of these considerations, the premise upon which the Federal Court of Appeals of the 2nd Region rendered its judgments, i.e., that tax authorities cannot be expected to file only "perfect" tax-collection lawsuits that leave no room for a motion to stay execution, does not seem valid to us. The cost recovery system adopted by the Brazilian legal system aims precisely to command the one who gave rise to the dispute to reimburse the other party for the expenses it incurred in the lawsuit. Therefore, one can conclude that the cost recovery system does require plaintiffs to file only "perfect" actions under penalty of having to reimburse the defendants for the costs they had to pay to exercise their right to be heard. Tax authorities are no different. If they file an "imperfect" tax-collection lawsuit, thereby causing the taxpayer to incur guarantee costs, they must, by virtue of the cost recovery system, reimburse the defendant for such costs, restoring the pre-conflict state of affairs.

It should also be noted that, according to Article 2, paragraph 3, of the Tax Enforcement Act, tax attorneys are not mandated to pursue legal action for the collection of any and all tax debts submitted to them by collection agencies. Rather, they are mandated by law to verify the legality of the collection, at the administrative level, before its registration as overdue tax liability, precisely to avoid filing improper—or imperfect—tax-collection lawsuits, to use the same term as the judgment on Appeal No. 0000556-24.2010.4.02.5120.

Equally unacceptable is the argument that, by ordering the tax authority to the reimburse the prevailing party for the expenses incurred in obtaining and maintaining a surety bond or bank guarantee, the State would bear the costs of a private insurance or bank contract, which would be "unimaginable in a democratic State governed by the rule of law." Article 84 of the Code of Civil Procedure lists, among the expressly recoverable expenses, the compensation of technical assistants. Technical assistants are hired by means of private contracts, just like bank guarantees or surety contracts. That does not exempt the losing party from reimbursing the winning party for such expenses. The legal rationale is

[20] CHIOVENDA, Giuseppe. *Instituições de Direito Processual Civil*. Portuguese translation by J. Guimarães Menegale. 2nd ed. São Paulo : Saraiva, 1965. v. 3. p. 325

[21] MARINS, James. *Direito processual tributário brasileiro*: administrativo e judicial. 9th ed. São Paulo: Revista dos Tribunais, 2016. p. 47.

the same as the one related to the so-called "perfect" tax-collection lawsuits. The cost recovery and causality principles adopted by the Brazilian legal system command that the losing party must reimburse the prevailing party for all expenses incurred in the exercise of the right to be heard, otherwise the *status quo ante* will not be restored, harming the rightful winning party.

2.2. The list of Article 84 of the Code of Civil Procedure and the alleged civil liability of the State

As explained in Section 1.3, one of the hottest topics in studies that look into the tax authorities' obligation to reimburse collection guarantee expenses involves the list of Article 84 of the Code of Civil Procedure and whether it is exhaustive or not. In addition to having been rejected by the judgments that granted relief to taxpayers, the argument in favor of considering the list exhaustive was accepted only by one out three judgments that decided against the tax authorities. Such judgment, however, understood that the issue constituted a civil liability on the part of the State.

Article 84 of the Code of Civil Procedure, which is part of a section called "Expenses, attorneys' fees and penalties," prescribes that "expenses include the cost of pleadings, compensation for travel expenses, the compensation of the retained expert, and the travel allowance of witnesses." At first glance, despite its poor wording, the provision really leaves room for doubt as to the most adequate interpretation of the rule. Do litigation expenses cover *only* the costs of the procedural acts, travel expenses, and the compensation of the technical assistant, as per the judgment of the Appellate Court of the State of Rio de Janeiro, or are such costs just a few examples of litigation expenses, as per the three judgments that ordered the tax authorities to reimburse the winning parties for guarantee expenses?

In our opinion, the correct conclusion is that the list in Article 84 is not exhaustive. In addition to other litigation expenses that are not listed in Article 84 but are included in Article 98 of the Code of Civil Procedure—which, in our view, is enough proof that litigation expenses include costs other than those listed in Article 84—there are a number of other costs that can be found throughout the Code of Civil Procedure that are not included in Article 84 either. An example is expert fees. Although they are not covered by Article 84, they are considered litigation expenses that must be reimbursed by the losing party at the end of the lawsuit, as expressly provided for in the main paragraph and paragraph 1 of Article 91 of the Code of Civil Procedure.

In our research of specialized literature, we did not find any jurist defending that list of Article 84 of the Code of Civil Procedure is exhaustive. As an example, when commenting on the said article, Luiz Dellore expressly asserts that "this is a partial list, particularly if you consider item (i), which is generic."[22] Along the same lines, Humberto Theodoro Júnior affirms that "expenses are all other expenses incurred by the party in the procedural acts, with the exception of legal fees, which are addressed in a specific provision in new Code (Article 85)".[23] Nelson Nery Junior and Rosa Maria de Andrade Nery also affirm that the list of Article 84 contains examples, "as litigation expenses must be understood as all expenses incurred so that the lawsuit can fulfill its *social function*."[24] Araken de Assis also states that they are all "the expenses necessary for the conduction and performance of procedural acts." This is categorically set forth by Article 82, main paragraph, which states that all expenses incurred "until there is full satisfaction of the right recognized in the instrument" are subject to reimbursement. Assis goes on to say that "refundable expenses can be extrajudicial in nature, but they must be indispensable for the performance of procedural acts."[25] In the same vein, Misael Montenegro Filho asserts that "the provision lists examples that include only a few litigation expenses. The losing party must be ordered to pay any and all suitable and legitimate expenses incurred as a result of the initiation and conduction of the lawsuit."[26]

We believe that by stating that Article 84 of the Code of Civil Procedure provides only some examples and, in particular, that all suitable, legitimate and indispensable expenses must be recovered by the prevailing party, jurists demonstrate alignment with the principles of causality and cost recovery, which are explained in Section 2.1 of this paper. As described in the said section, these principles aim to restore the winning party to the situation prior to the lawsuit. Such situation would not be restored if the law did not provide mechanisms for the winning party recover the cost incurred in the exercise of their rights to be heard.

In view of this conclusion, the solution given by the Appellate Court of the State of Rio de Janeiro, which

[22] GAJARDONI, Fernando da Fonseca. DELLORE, Luiz. ROQUE, Andre Vasconcelos. OLIVEIRA JÚNIOR, Zulmar Duarte de. *Teoria geral do processo*: parte geral: comentários ao CPC de 2015. 3rd ed. Rio de Janeiro: Forense, 2019. p. 297.

[23] THEODORO JÚNIOR, Humberto. Código de Processo Civil anotado. 22nd ed. Rio de Janeiro: Forense, 2019. p. 111

[24] NERY JUNIOR, Nelson. NERY, Rosa Maria de Andrade. *Código de processo civil comentado*, 3rd ed. São Paulo: Revista dos Tribunais, 2018, p. 1286)

[25] ASSIS, Araken. *Processo civil brasileiro* 1st ed. v. II, São Paulo: Revista dos Tribunais, 2015, p. 357

[26] MONTENEGRO FILHO, Misael. *Novo Código de Processo Civil comentado*. 3rd ed. São Paulo: Atlas, 2018. p. 81

affirms in its judgment that this is a case of civil liability of the State which should be discussed in a separate action, does not seem to be correct to us. As we will explain in the next section, obtaining a bank guarantee or surety bond is a legitimate act. It is suitable and directly linked to the defendant's opportunity to be heard, and, by virtue of the principles of cost recovery and causality, its costs must be recovered in the same tax-collection lawsuit or motion to stay execution, which in the Brazilian legal system constitutes a separate action. It appears to us that it would not make sense to demand that a new action be filed to pursue the reestablishment of the *status quo ante* of the taxpayer against whom an action was unfairly brought by the tax authority.

2.3. The taxpayers' discretion to choose the type of guarantee

With the exception of the Appellate Court of the State of Rio de Janeiro, which determined that the reimbursement, by tax authorities, of surety bond or bank guarantee expenses incurred by taxpayers in tax-collection lawsuits was an issue of State civil liability, all other courts discussed whether such costs were optional, and they arrived at opposite conclusions. In their judgment, some courts determined that obtaining those guarantees was the taxpayer's choice and, therefore, the costs cannot be passed on to a tax authority that loses the lawsuit. Other courts, on the other hand, decided that, since the guarantee is a prerequisite for filing a motion to stay execution, obtaining such guarantee is not optional, and the costs can be passed on to the tax authority that loses the lawsuit. It seems, however, that all such courts are mistaken. The taxpayers do have a choice, but the costs must be reimbursed by the tax authority.

According to Article 16, paragraph 1, of the Tax Enforcement Act, "no motion to stay execution shall be accepted without guarantee." The Code of Civil Procedure, in Article 914, provides that "The judgment debtor, independently of a levy of execution, deposit or security, may oppose the execution by filing a motion to stay." Article 919 states that "The judge may, at the request of the appellant, grant supersedeas effect to the motion if it is verified that the requirements for granting a provisional remedy have been fulfilled and provided that the execution has already been guaranteed by sufficient levy of execution, deposit or security." Thus, in civil execution proceedings in general, a collection guarantee is a requirement only for granting supersedeas effect to the motion, whereas in tax-collection proceedings the guarantee is a prerequisite for filing the motion in the first place[27].

This conclusion shatters any assumption that obtaining a guarantee is optional. Rather, it is a legal requirement for the judge to accept the motion to stay execution. The question raised by the judgments about the alleged discretion that taxpayers have in offering a collection guarantee, therefore, concerns the type of the guarantee, not the need for a guarantee itself.

The Tax Enforcement Act has several provisions on the ways in which tax collection can be guaranteed. In our view, the most important of them are Articles 9, 10 and 11.[28]

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[27] Confirming this understanding: "CIVIL PROCEDURE. TAX LAW. APPEAL REPRESENTING THE CONTROVERSY. ARTICLE 543-C OF THE CODE OF CIVIL PROCEDURE. APPLICABILITY OF ARTICLE 739-A, PARAGRAPH 1, OF THE CODE OF CIVIL PROCEDURE IN TAX-COLLECTION LAWSUITS. *NEED FOR A COLLECTION GUARANTEE* AND JUDGE'S INTERPRETATION OF THE RELEVANCE OF THE ARGUMENT (FUMUS BONI JURIS) AND THE OCCURRENCE OF SERIOUS DAMAGE OF DIFFICULT OR UNCERTAIN RECOVERY (PERICULUM IN MORA) FOR GRANTING SUPERSEDEAS EFFECT TO A MOTION TO STAY EXECUTION [...] 6. In accordance with the *lex specialis* principle, and considering the provisions of the Tax Enforcement Act and Article 736 of the Code of Civil Procedure (as per Law 11382/2006)—which Article provides that motions to stay execution are not contingent to a guarantee—this court understand that the said article does not apply to tax-collection lawsuits, as there is a specific provision, namely Article 16, paragraph 1, of Law 6830/80, that expressly requires a guarantee for filing a motion to stay execution. 9. Appeal to the Superior Court of Justice sustained. Judgment submitted to the rules of Article 543-C of the Code of Civil Procedure, and Resolution No. 2008 of the Superior Court of Justice." (BRAZIL, Superior Court of Justice (1st Section). Appeal to the Superior Court of Justice No. 1272827/PE, Judge-rapporteur: Justice Mauro Campbell Marques, May 22, 2013. Available at https://scon.stj.jus.br/SCON/GetInteiroTeorDoAcordao?num_registro=201101962316&dt_publicacao=02/08/2013. Accessed on September 26, 2020).

[28] "Article 9 - To guarantee the collection of the debt amount, interest, and late payment fine and charges indicated in the Certificate of Overdue Tax Liability, the debtor may: I - make a cash deposit, to the Court's name, in an official credit establishment that ensures adjustment for inflation; II - offer a bank guarantee or surety bond; (As per Law 13043 of 2014) III - indicate assets for attachment, in compliance with the order provided for in Article 11; or IV - indicate assets owned by third parties and accepted by the tax authority for attachment. Paragraph 1 - The debtor may only indicate real property, owned by the debtor or a third party, for attachment with the express consent of the debtor's or third party's spouse, as applicable. Paragraph 2 - Proof of deposit, bank guarantee, surety bond, or attachment of the assets owned by the debtor or the third party must be entered of record. (As per Law No. 13.043 of 2014) Paragraph 3 - A cash deposit, bank guarantee or surety bond offered as a collection guarantee shall produce the same effects as the attachment. (As per Law No. 13.043 of 2014) Paragraph 4

These provisions show that there is a subtle but important difference between guarantee and levy. Humberto Theodoro Júnior explains that "the cash deposit, bank guarantee and surety bond do not constitute a levy formally speaking."[29] About the differences between these instruments, Renato Lopes Becho explains that the collection guarantees must be offered by the debtor, while the levy is a constraint imposed on a debtor's asset by public agents.[30] Cassio Scarpinella Bueno delves deeper into the issue, stating that the levy can only be exercised after the end of the statutory term for the debtor to pay the debt or provide a guarantee.[31] Along the same lines, Paulo Cesar Conrado emphasizes that the levy is one type of guarantee, as is the deposit, bank guarantee, or surety bond.[32] In other words, guarantee and levy are different legal concepts. The guarantee must be offered by the debtor, whereas the levy is an act of forced expropriation carried out by the State officials, which, in tax collection lawsuits, can only be enforced after the end of statutory term of five days from the date the summons is served upon the debtor, and provided that the debtor fails to voluntarily make the payment, offer a guarantee, or file a motion to dismiss the tax-collection action.

By contrasting the two provisions, one can conclude that Article 9 of the Tax Enforcement Act addresses the types of guarantees that can be offered in court, whereas Article 11 sets forth the order that public authorities have to follow when attaching the taxpayer's asset. Article 9 does not establish an order of preference between the forms of guarantee. And the order expressly established by Article 11 concerns exclusively asset attachment, not the types of guarantees. Therefore, according to Article 11, tax authorities do not have discretion to levy or request the court to place a levy on assets according to their will or opinion but must always follow the order of preference established by law.[33]

By reading the two provisions, one can conclude that the taxpayer, after receiving service of process, may make a court deposit for the disputed amount, offer a bank guarantee or a surety bond, or submit a list of assets for attachment. If the taxpayer chooses the latter, the sequence provided for in Article 11 must be followed.

Therefore, if the taxpayer decides to offer a collection guarantee—as opposed to assets for attachment—there is no order of preference between a cash deposit, a bank guarantee, or a surety bond. It should be noted that if the taxpayer offers, for instance, a real-estate property for attachment, the tax authority may reject such asset on the grounds that the list provided for in Article 11 of the Tax Enforcement Act must be followed.[34] However, if the taxpayer offers a bank guarantee or a surety bond during the statutory term to do so, neither the tax authority nor the courts have legal authority to reject it[35] claiming that precedence must be given to the cash deposit over the bank guarantee and the surety bond.

Nevertheless, the fact that there is no order of preference between a cash deposit and a bank guarantee or a surety bond prior to the foreclosure phase of tax-collection lawsuits does not answer the question posed at the beginning of this section. Rather, it only confirms that, although taxpayers must provide a collection guarantee in order for their motion to stay execution to be received, they have discretion in choosing between the different types of guarantees. Additionally, one cannot ignore the fact that obtaining a bank guarantee or a surety bond

- Only the cash deposit, made in accordance with Article 32, shall exempt the debtor from inflation adjustment and interest for late payment. Paragraph 5 - The bank guarantee provided for in item II shall be offered in accordance with the pre-established conditions set by the National Monetary Council. Paragraph 6 - The debtor may pay an undisputed portion of the debt and offer a guarantee for the outstanding balance.
[...]
Article 11 - The final or pre-judgment attachment of assets shall obey the following order: I - cash; II - government bonds and negotiable instruments listed on the stock exchange; III - precious stones and metals; IV - real estate; V - ships and aircraft; VI - automobiles; VII - furniture or live animals; and VIII - rights and stock. Paragraph 1 - Exceptionally, commercial, industrial, or agricultural establishments, as well as plantations or buildings under construction may be attached. Paragraph 2 - The attachment of cash shall be converted into the cash deposit referred to in item I of Article 9. Paragraph 3 - The Judge shall order the collection of the attached asset for deposit in court, private deposit, or deposit in an account indicated by the relevant tax authority, upon request of the said tax authority, at any stage of the lawsuit."

[29] THEODORO JÚNIOR, Humberto. *Lei de execução fiscal*. 13th ed. São Paulo: Saraiva, 2016, p. 173.

[30] BECHO, Renato Lopes. *Execução fiscal*: análise crítica. São Paulo: Noeses, 2018. p. 35

[31] BUENO, Cassio Scarpinella. *Curso sistematizado de direito processual civil*: tutela jurisdicional executiva. 2nd ed. São Paulo: Saraiva, 2009, p. 247.

[32] CONRADO, Paulo Cesar. *Execução fiscal*. São Paulo: Noeses, 2013, p. 174

[33] BECHO, Renato Lopes. *Execução fiscal*: análise crítica. São Paulo: Noeses, 2018. p. 37.

[34] In this case, it is up to the judge to analyze the case and weigh the principle of maximum efficiency in the collection against the principle of minimum sacrifice on the part of the taxpayer, in order to accept the asset, or to reject it, as per the tax authority's claim, and order the attachment of other assets that are higher on the list.

[35] Naturally, such other asserts must fulfil the parameters required by the tax authority, for example, the parameters provided for in PGFN Ordinance No. 664/2009 (bank guarantee) and PGFN Ordinance No. 164/2014 (surety bond), at the federal level

entails costs that would not exist if the taxpayer decided to make a deposit in court for the disputed amount. Would it be possible, therefore, to affirm that taxpayers do not necessarily need to obtain a surety bond or bank guarantee and, consequently, such costs are superfluous or inessential and it would be unfair to pass them on to tax authorities that lose tax-collection lawsuits? Although counterintuitive, in our opinion the answer is no. And the reason is not provided by positive law, but by philosophy of law and, more specifically, the theory of values.

According to Renato Becho, axiology (or theory of values) influences the structure of the legal system and the very creation of tax regulations, offering instruments to interpret the content of normative texts.[36]Also according to Becho, "philosophical axiology pervades the field of law having principles as its vehicle."[37] Indeed, by analyzing the 1988 Federal Constitution, one can verify that it enshrined principles such as the protection of the social value of labor and free enterprise (Article 1, item IV), private property (Article 170, item II), and free competition (Article 170, items II and IV). Therefore, labor, free enterprise, private property, and free competition are values so dear to the Brazilian society that they had to be protected not only in positive law, but at the constitutional level.

Additionally, according to Renato Becho, protecting taxpayers' ability to choose is the main purpose of tax law. Therefore, tax law serves to limit the reach of the State, protecting taxpayers against the State's taxation power. In Becho's words, "the State cannot impose taxes at its free will, as its taxation freedom must coexist with the taxpayers' freedom to exist."[38]

Tax law's purpose to protect taxpayers against the power of the State does not apply to substantive tax law only. It also applies to adjective tax law, including the secondary regulations mentioned in section 2.1 of this paper, which establish coercive sanctions to compel fulfilment with obligations by means of jurisdictional coercion. After all, no amount of constitutional tax principles would suffice to protect taxpayers from the State's taxation power if such rules and principles were to apply only to substantive tax law, leaving uncovered the moment when the State's power and tax law materialize in the form of tax-collection lawsuits and expropriation proceedings.

Thus, considering that the protection of labor, free enterprise, private property, and free competition are enshrined in the 1988 Federal Constitution as fundamental values of the Brazilian society, and considering that the main purpose of tax law is the protection of taxpayers' freedom against the State's taxation power, one can conclude that Article 9 of the Tax Enforcement Act gave taxpayers the ability to choose their preferred type of guarantee—cash deposit, surety bond, or bank guarantee—precisely to allow the State's taxation power to coexist with taxpayers' right to exist, therefore upholding the principles of labor, free enterprise, private property, and free competition.

In more practical terms, the Tax Enforcement Act protects taxpayers' freedom by allowing them to choose the most convenient way to offer a collection guarantee so that they can exercise their right to challenge the collection, as per the principles of labor, free enterprise, private property, and free competition. It is the taxpayers' prerogative to analyze their own situation and decide to make a deposit or obtain a guarantee, if the latter makes more sense from a business standpoint, as a deposit may hurt, for example, their cash flow, their ability to invest in workforce and innovation etc. Thus, were a cash deposit mandatory or the preferred form of guarantee, the taxpayers' very freedom to exist would be compromised by taxation.

In view of the above, one cannot argue that obtaining a collection guarantee is not a choice. It is a choice, but a legitimate, fair, ethical one; one that aims to protect taxpayers' freedom to exist against the taxation power of the State. Therefore, it not a choice made with a view to "transferring the risk to the insurer," as stated in the judgment issued by the Federal Court of Appeals of the 2nd Region in Appeal No. 0000556-24.2010.4.02.5120. Neither is it a benefit, as maintained by the Office of the General Counsel for the National Treasury[39]. Rather, it is a

[36] BECHO, Renato Lopes. *Filosofia do direito tributário*. São Paulo: Saraiva, 2009. p 281.
[37] BECHO, Renato Lopes. *Filosofia do direito tributário*. São Paulo: Saraiva, 2009. p 321.
[38] BECHO, Renato Lopes. *Filosofia do direito tributário*. São Paulo: Saraiva, 2009. p 335.

[39] "In a statement submitted to Valor, the press relations department of the Office of the General Counsel for the National Treasury said that the trial court's judgment 'unfortunately mistook the court expenses that the winning party is entitled to recover for the expenses inherent to a benefit given to taxpayers.' According to the National Treasury, the surety bond 'is not only a benefit, but also—and more importantly—a choice given to taxpayers. If they did not have such choice, taxpayers would need a preliminary injunction or a full cash deposit to be able to stay the execution of the tax collection'. Also according to the statement, the 'Union has appealed, based on precedents of the Federal Court of Appeals of the 2nd Region, and expects to the judgment overturned soon.'" AGUIAR, Adriana. União deve ressarcir seguro de contribuinte em execução fiscal. *Valor Econômico*. São Paulo, January 15, 2018 Available at https://valor.globo.com/legislacao/noticia/2018/01/15/uniao-

sound business management decision that is in line with the values of labor, free enterprise, private property, and free competition, which are all enshrined and protected in the Constitution.

One can conclude, therefore, that although the taxpayer does have a choice, the costs related to obtaining and maintaining a guarantee are not superfluous, neither can they be avoided by the taxpayer's willingness to make a deposit, as suggested by the judgments that denied the recovery of such costs and the aforementioned statement by the Office of the General Counsel for the National Treasury.

III. CONCLUSION

In view of the above, one can conclude that, unlike civil execution proceedings in general, in civil actions for the collection of delinquent taxes, the taxpayer must provide a guarantee in order to file a motion to stay execution. The guarantee is, therefore, a procedural prerequisite for the court to accept the motion and for the taxpayer to exercise their right to oppose the collection, if they deem it unfair. The costs incurred by the taxpayer to obtain and maintain the guarantee are, therefore, inextricably linked to their opportunity to be heard.

The cost recovery principles adopted by the Brazilian legal system aim to restore the winning party to the situation they were in before the dispute that gave rise to the lawsuit. Having a court adjudicate the dispute is not enough to restore such *status quo*. The court must also order the party that gave rise to the dispute to reimburse the opposing party for the expenses incurred in the lawsuit, be such opposing party the claimant or defendant. Otherwise, the winning party will not be restored to their condition prior to the dispute, since their assets will have been reduced due to the expenses incurred in the lawsuit. Therefore, if a tax authority files a civil action for the collection of delinquent taxes that is dismissed in because the court grants the taxpayer's motion to stay execution, according to cost recovery principles, the tax authority must reimburse the taxpayer for all the expenses incurred in ensuring the taxpayer's opportunity to be heard.

Additionally, the option provided by the Tax Enforcement Act to choose a surety bond or bank guarantee can be considered neither a favor nor a detriment to the tax authority, because there is no order of preference between a deposit, a surety bond, and a bank guarantee before the foreclosure phase of the lawsuit. Also, the taxpayers' choice between these three types of guarantees is justified by the fact that the tax regulations—substantive or procedural—aim to promote a balance between taxation and taxpayers' freedom, including the freedom to exist (free enterprise), work, own private property, and compete freely in the market. The exercise of such rights involves the taxpayers' sole discretion to decide which type of guarantee—deposit, surety bond, or bank guarantee—is more beneficial to the sound management of their business.

Therefore, even if there is a certain degree of discretion in the choice of the type of guarantee that will be used so that taxpayers can exercise their right to be heard, such discretion is legitimate and supported by the Constitution, and there is no legal reason for surety bond or bank guarantee expenses to be excluded from the general rules governing the recovery of costs.

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