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Class Actions for a Writ of Mandamus Concerning Tax Matters in Brazil: Between Law and Political Philosophy

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***Abstract*—** *This article aimed to analyze, exclusively from the point of view of Law, whether or not the judicial precedents from the Brazilian higher courts are sufficient to deal with the problems related to the use of class actions for a writ of mandamus concerning tax matters. Faced with a negative answer, the authors sought a multidisciplinary approach and found in Political Philosophy elements to broaden the debate and find more robust solutions to the problems presented. The first part of this analysis focuses on the Brazilian Supreme Court of Justice, which prescribes that lawsuits for a writ of mandamus seeking to assert the right of the taxpayer to tax offset must be filed together with prima facie evidence that the taxpayer is entitled to receive a tax credit, although the credit amount itself is not discussed at this stage of the lawsuit. Then, our research turned to the analysis of whether or not the content of these precedents is compatible with the specificities of class actions claiming several rights affected by a common question of law. To do so, we looked into the nature of trade associations and entities' extraordinary standing to sue by substitution, which is inherent to class actions for a writ of mandamus, and the need for the common aspects of the dispute to prevail over its individual aspects. Otherwise, the collective relief granted in such class actions would be ineffective. The methodology used was analytical, comparing general objectives (indicated by Political Philosophy) and specific objectives of the legal system (related to Law) with statues, jurisprudence and, mainly, precedents related to the theme. The conclusion of this analytical study between Law and Political Philosophy is that the limitations imposed by the judicial precedents from the Brazilian higher courts are not compatible with class actions for a writ of mandamus.*

I. INTRODUCTION

It is known that, differently from the United States and the United Kingdom, there is no strong collectivist culture in Brazil, a fact that can be verified in the still meager role performed by collective lawsuits in our country. The problem, however, does not lie in the lack of instruments to seek collective relief, but their poor application, which causes legal uncertainty around how they should be used.

In the Brazilian legal system, there are appropriate instruments aimed at the protection of collective rights pertaining to tax matters, such as the ordinary class

action and the class action for a writ of mandamus. However, the government's resistance to comply with the decisions arising from these actions—endorsed by complacent legislatures that create obstacles to the effectiveness of collective claims, such as those enshrined in Article 2-A of Law 9494/96, and a Judiciary that is reluctant to reject the application of such restrictions—leaves taxpayers with extreme legal uncertainty, and they often resort to individual lawsuits to claim their rights.

Among the many hurdles hindering effective collective relief in tax matters in Brazil, the application of Repetitive Theme[1] No. 118 of the Superior Court of Justice to class actions for a writ of mandamus has drawn attention. Repetitive Theme No. 118 prescribes that an action for a writ of mandamus aiming to assert a taxpayer's right to tax offset in case of overpayment must be accompanied by documentary, prima facie evidence of such overpayment capable of proving the petitioner's status as a tax creditor. Therefore, taxpayers wishing to file for a writ of mandamus to claim that the collection of a certain tax is illegal or unconstitutional and, consequently, to claim their right to offset any overpayment made in the past 5 years, must submit prima facie evidence of such payments at the moment of filing the application for the writ of mandamus. However, the requirement to submit evidence that the taxpayers are entitled to a tax credit in class actions for a writ of mandamus has been proving detrimental to the effectiveness of such a critical collective relief instrument.

To better illustrate the situation, let us take the hypothetical situation described below as an example.[2]

A trade association filed a class action for a writ of mandamus seeking a declaratory judgment that a certain tax liability does not exist because the assessment of such tax is illegal or unconstitutional. The association also asked the court to declare that its members are entitled to offset the amount paid in excess, respecting the statute of limitations. In his decision, the judge recognized that the collection was illegal or unconstitutional and declared that the petitioner is not mandated to pay such tax. However, the judge denied the right to tax offset because the trade association did not produce the proof of payment of the disputed tax made by its members or associates.

In this situation, one cannot help but wonder: was the judge right in his decision to follow Repetitive Theme No. 118 of the Superior Court of Justice and reject the trade association's claim to have their member's right to offset recognized, on the grounds that they failed to submit proof of payment? In other words, is the Repetitive Theme in question applicable to class actions for a writ of mandamus? This is the question that this article intends to tackle and answer.

To that end, we will first analyze the content and background of Repetitive Theme No. 118 to identify the reasons why the Superior Court of Justice arrived at the conclusion that petitioners must prove their status as tax creditors when filing for a writ of mandamus. Subsequently, we will analyze the specifics around class actions for a writ of mandamus in order to determine if the requirement set forth in Repetitive Theme No. 118 is compatible with such procedural instrument. Our analysis will involve two fronts. The first concerns trade associations and entities' standing to sue to defend the interests of their members by means of a class action for a writ of mandamus. Investigating this element will allow us to conclude whether or not proof of a taxpayer's status as a tax creditor is requirable in cases of plaintiff substitution. The second front concerns the very procedural requirements of class actions whose subject matter is several rights with a common origin and their compatibility with the requirement set forth in Repetitive Theme No. 118.

We expect that the analysis of these elements will bring a satisfactory answer to the proposed question not only from a strictly legal point of view but facing the very ends that the State must pursue. Thus, while the answer may satisfy the legal system, it needs to be confronted with elements of Political Philosophy, in the terms that will be exposed. It is Political Philosophy that works with the general objectives of the State, while Law works on its specific microsystem, notably as an instrument for conflict resolution, using statutes, jurisprudence and precedents.

The methodology used was analytical, confronting general objectives, pointed out by Political Philosophy, and specific to the system, related to Law. All this has been done in order to find the best possible answer to satisfy greater social aspirations than the mere legal formalities that may be involved, regarding the use of class actions for a writ of mandamus concerning tax matters in Brazil.

[1] The Repetitive Themes are an attempt of summarizing the *ratio decidendi* of the leading cases ruled by the Brazilian Superior Court of Justice. After ruling a leading case, the Justices of Superior Court of Justice must summarize, in general terms, what has been decided and publish this summary it on their websites.

[2] Legal understanding under Repetitive Theme No. 118: "(a) In actions for a Writ of Mandamus compelling a court to declare the right to tax offset, due to the recognition of such tax collection as illegal or unconstitutional, without the need to verify the respective amounts, prima facie evidence of the petitioner's status as a tax creditor shall be sufficient, since evidence of undue payment will be required later, at the administrative level, when the offset procedure is submitted to verification by the Tax Authorities."

II. REPETITIVE THEME NO. 118 AND THE NEED TO PROVE THE TAXPAYER'S STATUS AS A TAX CREDITOR

The applicability and the requirements related to suits for a writ of mandamus aiming at the declaration of the right to tax offset are the subject of an old discussion. However, it gained new attention with Controversy 43, which was submitted to the 1st Section of the Superior Court of Justice and analyzed by the Court from April 2018 through March 2019.[3]

In the long-gone 1990s, there was discussion about the applicability of a suit for a writ of mandamus to claim the right to tax offset in cases of undue payment. The dispute reached the Superior Court of Justice which, in view of its repeated precedent confirming the suit's applicability, issued Precedent No. 213 on October 2, 1998. Precedent No. 213 established that "a suit for a writ of mandamus constitutes an appropriate action to claim the right to tax offset."

The wording of the Precedent, however, turned out to be excessively broad and gave rise to a new dispute between the government and taxpayers. The government no longer challenged the applicability of actions for a writ of mandamus to claim a taxpayer's right to offset undue tax payments. It disputed, however, that this could be done without taxpayers proving their right to the full amount of credit claimed at the time of filing for the writ of mandamus.

The government's argument was that if prima facie evidence of the petitioner's right is required to apply for a writ of mandamus, then the petitioner should be mandated to submit, at the time of the application, evidence that they paid the tax in dispute. Otherwise, there would be no proof of undue payment and, consequently, there would be no liquidated and clear legal right to be protected by a writ of mandamus. Taxpayers, on the other hand, argued that there is no need to submit proof of undue tax payment at the time of the application, since the right to offset would be a logical consequence of the recognition of the illegality or unconstitutionality of the tax assessment, and the amount would only be determined at the administrative level after the mandamus becomes final and unappealable.

The discussion was once again taken to the Superior Court of Justice. On May 13, 2009, the Court heard Appeal No. 1.111.164/BA, which was the case representing the controversy, and established Repetitive Theme No. 118: "effective proof of overpayment or undue payment is required for the purpose of claiming the right to tax offset in applications for a writ of mandamus."[4]

Once again, the wording of the decision was not sufficiently clear and discussions on the topic continued, until the Superior Court of Justice had to deliberate on the matter again in 2019. The Court analyzed Appeals No. 1.715.256/SP, 1.715.294/SP and 1.365.095/SP, as representatives of Controversy No. 43, to determine the scope of Repetitive Theme No. 118.

After the trial, the Superior Court of Justice explained the content of Repetitive Theme No. 118 as follows:

> (a) In actions for a Writ of Mandamus compelling a court to declare the right to tax offset, due to the recognition of such tax collection as illegal or unconstitutional, without the need to verify the respective amounts, prima facie evidence of the petitioner's status as a tax creditor shall be sufficient, since evidence of undue payment will be required later, at the administrative level, when the offset procedure is submitted to verification by the Tax Authorities; and
>
> (b) In actions for a Writ of Mandamus compelling a court to declare the specific amount to be offset, in which the petitioner claims to have a liquidated and clear legal right to a tax credit, or, in cases in which the court decision assumes that the offset would be confirmed by the relevant administrative authority, the taxpayer's credit must be quantified, and failure to submit sufficient evidence of the amounts unduly paid shall result in failure to submit prima facie evidence, which is imperative in actions for a writ of mandamus.

[3] BRAZIL, Superior Court of Justice (1st Section). *Controversy 43*, May 18, 2018. Available at https://processo.stj.jus.br/repetitivos/temas_repetitivos/pesquisa.jsp. Accessed on January 11, 2021.

[4] BRAZIL, Superior Court of Justice (1st Section). *Repetitive Theme 118*, May 25, 2009. Available at https://bityli.com/gG8cJ Accessed on January 11, 2021.

The Superior Court of Justice ruled, therefore, that petitioners must prove their status as tax creditors in suits for a writ of mandamus seeking to assert the right to tax offset as a result of the recognition that the tax is not due because of illegality or unconstitutionality, although no judgment will be delivered on the amount of the credit itself. In other words, the Court decided that there is no need to enter in the docket all the documentary evidence of undue payment, but petitioners must prove that they are mandated by law to pay that specific tax and that the payment was made before the application.

Although there are fair reasons to criticize the Court's decision[5], which will not be analyzed here so as to not overstep the scope of this article, the solution found by the Superior Court of Justice is feasible in individual actions for a writ of mandamus. In such individual suits, the petitioner is usually the holder of the right and, therefore, is able to produce the documentation required according to court precedents. However, in class actions, the solution found by the Court is absolutely inapplicable. Such is the object of our analysis henceforth.

III. CLASS ACTIONS FOR A WRIT OF MANDAMUS FILED BY TRADE ASSOCIATIONS OR ENTITIES FOR COLLECTIVE RELIEF IN TAX CLAIMS.

3.1. THE TRADE ASSOCIATIONS AND ENTITIES' STANDING TO SUE FOR A WRIT OF MANDAMUS: SUBSTITUTION, NOT REPRESENTATION

Legal relationships pertaining to tax matters involve, in most situations, several rights affected by a common question of law. As a result, disputes arising from such legal relationships can be protected by collective mechanisms, such as ordinary class actions and class actions for a writ of mandamus.[6]

The class action for a writ of mandamus, as well as the individual one, is provided for in the Federal Constitution of 1988 as a fundamental guarantee against abuses by public authorities. Pursuant to Article 5, item LXX, of the Constitution, the class action for a writ of mandamus can be filed, among others, by "trade associations or entities legally constituted and in operation for at least one year to defend the interests of their members or associates."

Regulating such constitutional provisions, Law No. 12016/2009, in the main paragraph of Article 21, prescribes that these trade associations and entities may file for a writ of mandamus "to claim liquidated and clear legal rights of all or some of their members or associates, in accordance with their articles of association and provided that such rights are related to the association's or entity's purposes, and a *special authorization shall not be required to that end.*" Article 22 of Law No. 12016/2009 mandates that a court judgment on a class action for a writ of mandamus has res judicata effect "limited to the members of the group or category who were *substituted* with the petitioner."

Emphasis was placed on "special authorization shall not be required" and "substituted" because these excerpts are critical to understand whether Repetitive Theme No. 118 can be applied to tax class actions for a writ of mandamus. The two phrases show that, in class actions for a writ of mandamus, trade associations and entities act as substitutes, not as representatives, for their members or associates.

In individual lawsuits, usually the holder of the substantive right is the only person entitled to seek protection in court, under penalty of having the case dismissed for lack of standing.[7] In class actions, on the other hand, usually persons or entities that are not part of the legal relationship pertaining to the substantive right in question have a legal standing to seek the protection of such right in court. Thus, in class actions, the holder of the right will, as a rule, be *represented* by or *substituted* with such person or entity.[8]

According to Chiovenda's classic lessons, there are situations in which the law allows someone to

[5] Although the requirement of prima facie evidence of creditor status is formally correct, the fact that the petitioner is paid that tax is a logical result of their interest to sue. After all, if the petitioner had not made the payment, they have no interest to sue and the petition should be dismissed under Article 330, III, of the Code of Civil Procedure. Additionally, the existence of the tax liability and its amount will be calculated and verified by the Brazilian Federal Revenue Service, upon taxpayer's submission of the administrative offset request. Thus, there is no use or need to prove the taxpayer's status as a tax creditor.

[6] According to: BUENO, Cassio Scarpinella. *Curso sistematizado de direito processual civil*: direito processual coletivo e direito processual público. 4th ed. São Paulo: Saraiva, v. 2, t. 3, 2014, p. 182. MAZZILLI, Hugo Nigro. *A defesa dos interesses difusos em juízo*: meio ambiente, consumidor, patrimônio cultural, patrimônio público e outros interesses. 21st ed. São Paulo: Saraiva, 2008, pp. 708-709. MARINS, James. *Direito processual tributário brasileiro*: administrativo e judicial. 9th ed. São Paulo: Revista dos Tribunais, 2016, p. 687. FERREIRA NETO, Olsy da Silva. *Ações tributárias coletivas.* Porto Alegre: Sergio Antonio Fabris Editor, 2013, pp. 133-135.

[7] Article 18, main paragraph, of the 2015 Code of Civil Procedure. No one can claim another's right in his or her own name, unless so authorized by law.

[8] BUENO, Cassio Scarpinella. *Curso sistematizado de direito processual civil*: teoria geral do direito processual civil. 4th ed. São Paulo: Saraiva, 2010. pp. 400-402.

exercise someone else's rights *in the name of the holder* and others in which it allows someone to exercise someone else's rights *in their own name*. In the first situation, in which one acts in the name of others to defend their rights, there is procedural representation. In the second situation, in which one acts in their own name to defend the rights of others, there is procedural substitution.[9]

The main practical difference between these two legal concepts lies in the fact that in cases of representation, in which one acts in the name of others, authorization by the holder of the right is mandatory for the third party to appear in court. In cases of substitution, in which one acts in their own name, authorization is not required, after all, the third party is acting in their own name.[10]

Considering that Article 21 of Law No. 12016/2009 expressly states that no authorization is required for trade associations and entities to file a class action for a writ of mandamus to defend the interests of their members or associates, requiring only that their articles of association give permission to do so, one can only conclude that substitution is the mechanism that gives such entities standing to sue. After all, in these cases, the associations act in their own name—i.e., according to their institutional purposes—to assert other people's rights.

The conclusion that, in class actions for a writ of mandamus, associations have standing to sue by substitution, not by representation, is supported by Brazilian jurists. Hely Lopes Meirelles, for example, affirms that such actions "must always be filed by the eligible entity in its own name" "to assert the rights or prerogatives of its associates or affiliates."[11] Similarly, Cassio Scarpinella Bueno maintains that "representation takes place whenever authorization is required to appear in court (Federal Constitution, Article 5, item XXI). When such authorization is not required, substitution is the mechanism used (for example, in the case provided for in Article 5, item LXX, b, of the Constitution)."[12] Also, James Marins asserts that "item LXX has nothing to do with representation, but rather with substitution, at the very least, or extraordinary standing to sue." The author proceeds to to criticize the need for a provision in the articles of association allowing the entity to file a class action for a writ of mandamus, as such requirement set forth in Law No. 12016/09 is not supported by the Constitution.[13] Eduardo Arruda Alvim echoes this understanding, stating that, for trade associations and entities to have the authority to seek collective relief for their associates via a writ of mandamus, "the convergence between the objectives pursued by the entity and the interests in dispute suffices."[14]

Brazilian jurists are not the only ones who support the conclusion that, in class actions for a writ of mandamus, associations or entities have standing to sue by substitution, not representation. In addition to issuing Precedent No. 629, which states that: "authorization is not required for a trade association to file a class action for a writ a mandamus in favor of its associates," the Federal Supreme Court expressly stated the following in the records of Appeal No. 573.232, which pertains to a matter of general repercussion:

> 3. Indeed, trade associations have standing to file lawsuits in favor of their associates as per Article 5, item XXI, of the Federal Constitution, and the unions' standing to sue is provided for in Article 8, item III, of the Federal Constitution. However, in the case of trade associations, the Constitution establishes a specific requirement as a condition for such lawsuits, which does not apply to unions, namely, that such associations must be "expressly authorized" to sue. *A different situation is that of class actions for a writ of mandamus, provided for in Article 5, item LXX, of the Federal Constitution, which do not require special authorization (individual or collective) from the substituted parties (Precedent No. 629 of the Federal Supreme Court),*

[9] CHIOVENDA, Giuseppe. *Instituições de direito processual civil*. *Vol. II*. Campinas: Bookseller; 1998, pp. 300-302.

[10] GRINOVER, Ada Pellegrini. Legitimação das associações às ações coletivas. representação ou substituição processual em face do princípio dispositivo e da teoria da asserção, March 2017, p. 3. Available at: <https://goo.gl/daJjEk>. Accessed on: January 12, 2020.

[11] MEIRELLES, Hely Lopes. *Mandado de segurança*. 29th ed. updated by Arnoldo Wald and Gilmar Ferreira Mendes. São Paulo: Malheiros, 2006. p. 25

[12] BUENO, Cassio Scarpinella. *O poder público em juízo*. 5th ed. São Paulo: Saraiva, 2009, p. 143

[13] MARINS, James. *Direito processual tributário brasileiro*: administrativo e judicial. 9th ed. São Paulo: Revista dos Tribunais, 2016, p. 698.

[14] ALVIM, Eduardo Arruda. *Mandado de segurança no direito tributário*. São Paulo: Revista dos Tribunais, 1997. pp. 355-356.

> *even if the lawsuit relates only to the interests of some of the members or associates (Precedent No. 630 of the Federal Supreme Court and Article 21 of Law No. 12016/2009).*[15]

Having said that, one cannot help but wonder: if specific authorization from members or associates is not required even for the association to file a class action for a writ of mandamus, is it reasonable to require prima facie evidence that they are tax creditors? Is it reasonable to waive members' or associates' authorization to file a class action for a writ of mandamus, but to require that proof of payment of the tax in question be submitted together with the application?

The answer is certainly no. The requirement to prove the associates' or members' status as tax creditors is absolutely incompatible with the associations' standing to sue by substitution. If our legal system has authorized a certain entity to file a lawsuit to assert the rights of a third party without authorization from such third party, it does not make sense that this entity has to ask the substituted parties for proof of payment of the disputed tax, as this would ultimately mean authorization to file the application.

Therefore, one cannot escape the conclusion that the very mechanism chosen by the Brazilian legal system to give trade associations and entities standing to sue—by substitution, not representation—and seek collective relief for their associates or members through a class action for a writ of mandamus renders such action incompatible with Repetitive Theme No. 118 of the Superior Court of Justice. This conclusion becomes even clearer considering that the relief sought through a class action for a writ of mandamus, which is the protection of several rights that have a common origin, must necessarily be *generic*. Otherwise, the individual aspects of the dispute would prevail over shared ones and make collective relief simply ineffective. This is why the Brazilian legal system determines that judgments rendered in class actions seeking the protection of several rights must be generic, allowing each person benefited by the judgment to pursue liquidation and execution individually.

3.2. GENERIC JUDGMENTS AND THEIR ENFORCEMENT

Law No. 12016/2009 contains only two articles—21 and 22—on collective applications for mandamus. It does not mean, however, that there are no important legal requirements in the Brazilian legal system for such instrument. As it is a collective procedural instrument, it must follow the rules that are part of the *collective procedural microsystem* in every matter that is not contrary to the specific provisions of such microsystem.

Jurists and courts widely recognize the existence of a collective procedural microsystem comprised, in particular, of Law No. 7347/85 (Public Interest Civil Action Law) and Law No. 8078/90 (Consumer Protection Code).

For example, Ada Pellegrini Grinover expressly states that the Public Interest Civil Action Law and the Consumer Protection Code must always be interpreted together, as these laws constitute the so-called "Brazilian collective procedural microsystem."[16] Similarly, Fredie Didier Jr. and Hermes Zaneti Jr. consider it possible to see the Consumer Protection Code as the "Brazilian Class Action Code," as Title III of the Code harmonized the collective relief microsystem by changing the Public Interest Civil Action Law and unifying the provisions of the two laws on the protection of diffuse and collective rights.[17] Ricardo de Barros Leonel also argues that the procedural rules of the Consumer Protection Code are applicable to all other collective relief cases.[18] Specifically on class actions for a writ of mandamus, Cassio Scarpinella Bueno reminds us that Article 21 of the Public Interest Civil Action Law expressly provides that Title III of the Consumer Protection Code can be applied to diffuse, collective, and several rights, as appropriate.[19]

When it comes to court precedents, two of the main examples are the judgments rendered in Interlocutory Appeals to the Superior Court of Justice No. 1521617/MG[20]

[15] BRAZIL, Federal Supreme Court (Full Court). *Appeal to the Supreme Court No. 573.232*. Judge-rapporteur: Justice Ricardo Lewandowski. May 14, 2014. Available at https://bityli.com/wMFyU. Accessed on January 11, 2021.

[16] GRINOVER. Ada Pellegrini. Direito processual coletivo. In: GRINOVER. Ada Pellegrini WATANABE, Kazuo; NERY JR, Nelson. *Código Brasileiro de Defesa do Consumidor*: comentado pelos autores do anteprojeto. Arts. 81 a 104 e 109 a 119. 10th ed. Rio de Janeiro: Forense, v. 2, 2011, p. 25.

[17] DIDIER JR, Fredie; ZANETI JR, Hermes. *Curso de direito processual civil*: processo coletivo. 7th ed. Salvador: JusPodivm, 2012, p. 49-51.

[18] LEONEL. Ricardo de Barros. *Manual do processo coletivo*. 4th ed. São Paulo: Malheiros, 2017, p. 163.

[19] BUENO, Cassio Scarpinella. *Curso sistematizado de direito processual civil*: direito processual público e direito processual coletivo. 4th ed. São Paulo: Saraiva, 2014. p. 231.

[20] "CIVIL PROCEDURE. INTERLOCUTORY APPEAL. 2015 CODE OF CIVIL PROCEDURE. CITIZEN SUIT. ARTICLE 7 OF LAW NO. 8429/92. APPLICABILITY. [...] II - By virtue of the principle that compels the Court to fill in the gaps of the law, the Superior Court of Justice understands that Laws No. 4717/65, 7347/85, 8078/90 and 8429/92, among others, make up a collective procedural microsystem that aims at providing an appropriate, effective protection of the legal interests covered by them."

and 1379659/DF[21], recognizing the need for joint, supplementary and integrative application of the laws that make up the collective procedural microsystem.

Title III of the Consumer Protection Code provides, in Article 95, that "if the plaintiff's claim is granted, the judgment shall be generic."

In fact, Brazilian jurists understand that the best interpretation for this provision is that the judgment must be generic if the claim is too. If the petitioner can make a specific, determined claim, the judgment can also be so.[22] However, as explained by Ricardo de Barros Leonel, as a rule, the claims stated in class actions dealing with several rights with a common origin, as is the case of class actions in tax matters, must be generic.[23] And this is due to the fact that, in the discovery and trial phases of the collective actions for the protection of several rights with a common origin, the collective aspects must necessarily prevail over the individual aspects. Otherwise there is no *superiority* of the collective relief over numerous individual reliefs, which is critical to maintain legal certainty and effectiveness.

Although Article 81, item III, of the Consumer Protection Code defines several rights as those arising from a common origin, having a common origin is not the only factor that makes individual substantive rights eligible for collective relief. More important than having a common origin is the need for collective aspects to *prevail* over individual aspects and for collective relief to be *superior* to individual relief in terms of justice and judgment effectiveness.[24]

About this topic, Ada Pellegrini Grinover explains that prevalence and superiority can be equated with the legal possibility of the claim and the interest in the suit. According to the author, the prevalence of shared issues over individual ones can be interpreted as proof of the legal possibility of the claim because the Brazilian legal system does not have a mechanism for the collective protection of purely individual rights, but only for individual—or several—rights affected by a common question of law. In turn, the superiority of collective over individual relief in terms of justice and effectiveness of the judgment can be equated with interest in the suit because the existence of more individual aspects than common ones would extinguish the interest and effectiveness of the collective action. That means to say that the suit would not be effective to settle the dispute. [25]

Indeed, for a tax legal relationship to be eligible for protection through a class action for a writ of mandamus, first and foremost, the common aspects of the dispute must prevail over the individual ones. Thus, if the dispute concerns, for example, the size of a property for the purposes of calculating Real Estate Tax, or the tax category in which a certain manufactured product should be included, strictly speaking, such dispute would not be eligible for a class action. After all, the specific aspects of these cases prevail over their collective aspects. On the other hand, if the dispute arises, for example, from the incorrect application of a tax regulation by the tax authority, resulting in a tax overcharge, then, in general, the entire group of people who paid that tax is affected in a reasonably homogeneous way. In this situation, the common aspect of the dispute prevails over the individual ones. Additionally, in this case, a single class action judgment would be effective to settle the dispute in relation to all taxpayers substituted with the trade association or entity. That would avoid an overwhelming number of repetitive claims and conflicting decisions on similar individual cases. In the second scenario, the dispute would meet the prevalence and superiority criteria, and, therefore, would be eligible for collective relief mechanisms, with support in Political Philosophy (in the terms as will be seen below).

Due to the prevalence of collective aspects over individual ones, the relief sought in tax class actions, as well as their judgments, will be invariably generic, as per Article 95 of the Consumer Protection Code. The judgment

(BRAZIL. Superior Court of Justice (1ST Panel). *Interlocutory Appeal to the Superior Court of Justice No. 1521617/MG.* Judge-rapporteur: Justice Regina Helena Costa, May 16, 2017. Available at https://bityli.com/ypNlY. Accessed on January 11, 2021).

[21] "CIVIL PROCEDURE. MISCONDUCT IN PUBLIC OFFICE. ACTIONS WITH RECOVERABLE LITIGATION COSTS BELOW 60 MINIMUM WAGES TO BE PAID BY THE UNION. *COLLECTIVE RIGHTS MICROSYSTEM. PROVISION FOR MANDATORY REVIEW IN THE CITIZEN SUIT ACT. ANALOGY. APPLICABILITY.* [...] 2. It is clear that the law governing Citizen Suits (Law No 4717/65) can be used to regulate the collective procedural microsystem, and that it shall prevail over general provisions of the Code of Civil Procedure. The existence of procedural microsystems in our Legal System is recognized in several areas pertaining to collective rights, and their instruments can be used for the purpose of providing appropriate, effective relief. [...]" (BRAZIL. Superior Court of Justice (2nd Panel). *Interlocutory Appeal to the Superior Court of Justice No. 1379659/DF*. Judge-rapporteur: Justice Herman Benjamin, March 28, 2017. Available at https://bityli.com/2f3fz. Accessed on January 12, 2021).

[22] BUENO, Cassio Scarpinella. *Curso sistematizado de direito processual civil*: direito processual coletivo e direito processual público. 4th ed. São Paulo: Saraiva, v. 2, t. 3, 2014, p. 222.

[23] LEONEL, Ricardo de Barros. *Manual do processo coletivo*. 4th ed. São Paulo: Malheiros, 2017, p. 499.

[24] GIDI, Antonio. *A class action como instrumento de tutela coletiva de direitos*: as ações coletivas em uma perspectiva comparada. São Paulo: Revista dos Tribunais, 2007, pp. 160-161.

[25] GRINOVER. Ada Pellegrini. Da defesa do consumidor em juízo. *In*: GRINOVER. Ada Pellegrini; WATANABE, Kazuo; NERY JR, Nelson. *Código Brasileiro de Defesa do Consumidor*: comentado pelos autores do anteprojeto. Arts. 81 a 104 e 109 a 119. 10th ed. Rio de Janeiro: Forense, v. 2, 2011, p. 133.

will thus establish only the existence of credit, but not the credit amount.

In this regard, Ricardo de Barros Leonel's lessons are accurate:

> "a condemnatory judgment on several claims with a common origin establishes, in general terms, the defendant's liability for damages caused to the plaintiffs in the circumstances described in the claim [...] making liquidation imperative, in most cases. In the liquidation phase, the aggrieved party must prove that an individual damage was caused, the causal link between the damage and the situation or action described in the judgment, and the amount of such damage."[26]

The logic behind class actions seeking the protection of several rights with a common origin, therefore, is that, in the discovery and trial phases of the suit, the common aspects of the dispute are taken into account, and individual aspects take a secondary role. In the liquidation and execution phase, the opposite happens: individual aspects prevail over shared ones.[27] Thus, after the generic judgment is rendered, the aggrieved party must prove that there is a causal link between their situation and that described in said judgment, as well as the amount lost due to the illegal actions taken by the defendant, as recognized in the judgment.

Due to this logic, in our opinion, only after this point must evidence of the substituted party's status as a tax creditor be required, as such evidence will prove the existence of a causal link between the situation experienced by the substituted party and the situation generically described in the judgment. Therefore, equipped with the court's decision that a certain tax is undue, the taxpayer should appear before the Federal Revenue Service of Brazil, and, after proving their status as a tax creditor, apply for the offset of the undue tax at the administrative level.

In other words, in class actions, including for a writ of mandamus, considering that the claim and judgment are usually generic, evidence of tax creditor status should not be required at the time of the application, pursuant to Repetitive Theme No. 118. Requiring such evidence would place a higher emphasis on the individual aspects of the dispute to the detriment of the shared aspects, which is why it should not be required at the time of application, but only after the judgment is rendered, in the phase of liquidation and execution.

Thus, considering that tax offsets can be requested out of court, it is our understanding that such evidence should only be presented at the administrative level. In other words, taxpayers should prove the origin of the credit, demonstrating their status as a creditor, upon requesting the recognition of the credit and subsequent offset by the Federal Revenue Service.

Alternatively, in case the recognition of credit is denied by the Federal Revenue Service, each taxpayer benefiting from the decision rendered in the class action can seek the liquidation and execution of the judgment. In this case, the taxpayers can submit to the competent court, under Articles 97 and 98 of the Consumer Protection Code, proof of payment of the tax, proving their status as creditors and requesting the confirmation of such status. Subsequently, they will be able take the court's decision to the administrative level and pursue the relevant offset. It is in this context that Political Philosophy brings important argumentative reinforcement.

IV. A THEME OF POLITICAL PHILOSOPHY: THE JUSTICE MANAGEMENT

In several parts of the world, the issue of procedural management, or the efficient administration of justice, came into the agenda. Paul Martens, president emeritus of the Constitutional Court of Belgium, prefaced the book Le Nouveau Management de La Justice et L'Indépendance des Juges, referring to Political Philosophy, on the one hand, and jurisprudence, on the other. On this side (jurisprudence) are the classic legal categories, such as discussions about the effectiveness and validity of the rule and the independence of judges; while on the other side (Political Philosophy) issues of collection management, litigation costs, Judiciary budget, etc., effects of the "voice of Anglo-Saxon economic realism", in the words of the jurist. He critically stated:

> With the irruption of management in the administration of public affairs, a new type of normativity is creeping into the work of judges. Management obeys another logic, pursues other ends, introduces other

[26] LEONEL, Ricardo de Barros. *Manual do processo coletivo*. 4th ed. São Paulo: Malheiros, 2017, p. 499.

[27] LEONEL, Ricardo de Barros. *Manual do processo coletivo*. 4th ed. São Paulo: Malheiros, 2017, p. 501.

> parameters. Axiologically neutral, it is – at least in appearance – not the bearer of an ideology to which another could be opposed. It is slyly, without displaying any pretensions other than quantitative, that he could insidiously summon justice to sacrifice his humanist ends on the grounds that they are unproductive.[28]

For our part, we understand that Political Philosophy applied to Justice Management does not need to be opposed to Law. The search for legal interpretation can consider the managerial effects of choices, in order to obtain the best social benefit. In the specific case discussed in this article, the removal of limitations for the use of the class actions for a writ of mandamus concerning tax matters illustrates well how it is possible to reconcile the interests of taxpayers and the State's, providing tools for judges to resolve issues of merit for the largest number of taxpayers with lower burden for the Judiciary, which is possible with the smallest number of lawsuits.

In fact, the concerns expressed by the Brazilian National Council of Justice – CNJ in the annual report Justice in Numbers add to the arguments presented here.[29]

V. CONCLUSION

This article aimed to analyze whether the limitations imposed by the judicial precedents from the Brazilian higher courts on the use of class actions for a writ of mandamus in tax matters meet the social objectives aimed both by Law and Political Philosophy. In order to contextualize the problem, Repetitive Theme nº 118 of the Brazilian Superior Court of Justice was explored as an example

To that end, we first looked into the content and background of Repetitive Theme No. 118. Such analysis allowed us to observe that the discussions regarding the possibility of claiming a taxpayer's right to offset tax overpayment by means of mandamus is old and has been developing in an inconsistent way. First, Precedent No. 213 established in 1998 that "a suit for a writ of mandamus constitutes an appropriate action to claim the right to tax offset."[30] Due to this precedent, the government no longer challenged the applicability of an action for a writ of mandamus to claim a taxpayer's right to offset undue payments of taxes and started to require prima facie evidence of such payments. The discussion was once again taken to the Superior Court of Justice, which heard Appeal No. 1.111.164/BA, in 2009, and established Repetitive Theme No. 118: "effective proof of overpayment or undue payment is required for the purpose of claiming the right to tax offset in applications for a writ of mandamus." However, the issue continued to spark controversy and, in 2019, the Superior Court of Justice had to rule on the issue again for the third time. This time, the Court explained that, when seeking solely a declaratory judgment on the right to offset, with no judgment on the credit amount, taxpayers only need to prove their status as tax creditors. Proof of the specific amount that was overcharged is not required at the time of application.

An analysis of the background of Repetitive Theme No. 118, however, revealed that the solution found by the Superior Court of Justice takes into account only aspects inherent to individual suits and completely ignores the specifics of class actions for a writ of mandamus.

To prove this statement, the article investigated two aspects inherent to such class actions in tax matters.

The first concerns trade associations and entities' standing to sue—by substitution, not representation—to defend the interests of their members by means of a class action for a writ of mandamus. It was demonstrated that, in collective procedural law, the plaintiff usually has extraordinary standing to sue. This means that, in collective actions, as a rule, the holder of the right to sue is not the holder of the substantive right in dispute. The legal system gives a third party extraordinary standing to sue to claim the rights of others. However, there are situations in which such party acts in someone else's name, and others in which the party acts in its own name. In the first case, the mechanism allowing the third party to sue in the name of

[28] *Préface*. *Le Nouveau Management de La Justice et L'Indépendance des Juges*. Coord. Benoit Frydman e Emmanuel Jeuland. Paris: Dalloz, 2011. p. 2. Our free translation. In the original: "Avec l'irruption du management dans l'administration de la chose publique, c'est un nouveau type de normativité qui s'insinue dans le travail des juges. Le management obéit à une autre logique, poursuit d'autres fins, introduit d'autres paramètres. Axiologiquement neutre, il n'est – du moins en apparence – pas porteur d'une idéologie à laquelle on pourrait en opposer une autre. C'est sournoisement, sans afficher de prétentions autres que quantitatives, qu'il pourrait insidieusement sommer la justice de sacrifier ses fins humanistes au motif qu'elles sont improductives"

[29] BRAZIL, National Council of Justice. *Justice in numbers 2021*. Brasília, DF, 2021. Available at https://bityli.com/NlFRqc. Accessed on July 23, 2022.

[30] BRAZIL, Superior Court of Justice (1st Section). *Precedent 213*, September 23, 1998. Available at https://bityli.com/Dskw5 Accessed on January 11, 2021.

others is representation, and authorization from the holder of the substantive right to be represented in court is mandatory. In the second case, the mechanism is substitution: the third-party files the collective lawsuit in its own name and does not need authorization from the holder of the substantive right.

As explained throughout the article, the Brazilian legal system gives trade associations and entities standing to file class actions for a writ of mandamus to assert the liquidated and clear legal rights of their members or associates without their specific authorization. Thus, when filing a class action for a writ of mandamus, trade associations and entities act in their own name to claim the rights of others as substitutes for the holders of the right, not representatives.

In view of these findings, one can conclude that the requirement of presenting prima facie evidence of the taxpayers' status as tax creditors when filing for a writ of mandamus—i.e. proof of the disputed payment by the substituted parties—goes against the non-requirement of authorization for trade associations or entities to bring class actions claiming the rights of their members or associates. After all, the only lawful way for trade associations or entities to have access to proof of payment of the disputed tax by their members or associates is requesting such documents from them, which is equivalent to requesting their authorization to file a lawsuit. Therefore, applying Repetitive Theme No. 118 to class actions for a writ of mandamus would create an exceptional, unlawful situation in which the entity would have extraordinary standing to sue by representation, not by substitution.

The article also shed light on another reason why Repetitive Theme No. 118 cannot be applied to class actions for a writ of mandamus: the fact that, in the discovery and trial phases of the collective actions for the protection of several rights with a common origin, the collective aspects must prevail over the individual aspects of the claim. By definition, several rights are individual and have common characteristics, which authorize their protection through collective relief. If individual characteristics prevail over the shared characteristics of these rights, there is no sense in claiming them through a collective instrument, under penalty of rendering such claim ineffective. The requirement to submit prima facie evidence the taxpayer's status as a tax creditor places emphasis on very individual characteristics of the dispute, which must be analyzed in the phases of liquidation and execution of the judgment, not in the discovery and trial phases.

In view of the above, to objectively answer the question proposed in the introduction of this article, Repetitive Theme No. 118 was defined based on individual suits for a writ of mandamus and cannot be applied to class actions, otherwise it could render such actions ineffective. Evidence that each of the substituted parties are tax creditors and that they are covered by the collective judgment can and must be submitted, but only later, in the phases of liquidation and execution of the judgment.

In practical terms, such evidence should only be required for the recognition of the credit by the Federal Revenue Service, under the terms of Article 101 of Normative Instruction No. 1717/2017[31], since that is the moment when the agency requests the submission of a court decision stating that the taxpayer is a creditor of the Federal Revenue Service.

A feasible alternative—although unnecessary from a judicial economy standpoint—would be allowing taxpayers covered by the collective judgment to enforce it, under Articles 97 and 98 of the Consumer Protection Code, upon submission of proof of payment of the tax, proving their status as creditors and requesting the confirmation of such status. Subsequently, they would be able take the court's decision to the administrative level and pursue the relevant offset.

The removal of the aforementioned limitation for the use of class actions for a writ of mandamus in tax matters meets the parameters of Political Philosophy, notably the search for greater social pacification at the lowest possible cost to the public coffers, which reinforces the importance of the search for interdisciplinary elements. for solving legal problems.

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[31] "Article 101. The request for credit recognition shall be granted by the Tax Auditor of the Federal Revenue Service of Brazil, upon confirmation that:
I - the taxpayer is the plaintiff in the lawsuit;
II - the action refers to a tax administered by the Federal Revenue Service;
III - the court decision is final and unappealable;
IV - the request was formalized within a period of five (5) years from the date in which the court decision becomes final and unappealable or from the date of the confirmation of abandonment of the execution of the judgment; and
V - if the credit is declared in an enforceable court decision, a court of justice has confirmed the abandonment of the execution of the judgment and the assumption of all costs and attorneys' fees related to the execution process, or a personal declaration of non-execution of the judgment has been presented before a Federal Court with a court certificate attesting to it;"

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