Application of Binding Precedent n. 24: opening of Police Inquiry before the final decision of the Administrative Tax Procedure

Aplicação da Súmula Vinculativa n. 24: Abertura de Inquérito Policial antes da decisão final do Procedimento Tributário Administrativo

Rafael Coelho Pacheco Nogueira

Bachelor of Law, certified by the extension course in Corporate Criminal Law and master's candidate in Constitutional Law and Tax Procedure, all from PUC-SP. Corporate lawyer in a large American multinational in the education sector.
rafaelcpnogueira@gmail.com

Áreas do Direito: Tributário; Penal; Administrativo

Abstract: This article aims to analyze and demonstrate the understanding of the Federal Supreme Court in relation to binding precedent n. 24. It is clear that after several judgments of the High Court and with the issuance of the precedent mentioned herein, there is a need for prior exhaustion in the administrative proceeding in order to analyze the consummation of the crime foreseen in art. 1 of Law 8,137 1990 (crime of suppression or reduction of tax). In this sense, the Supreme Court's understanding that an investigation and the criminal prosecution itself can only be opened after the final decision of the administrative tax procedure, even if resistance from some organs of the Judiciary and those responsible for investigation and also by criminal prosecution.

Keywords: Federal Court of Justice – Binding precedent n. 24 – Crimes against the tax order – Tax administrative procedure – Previous exhaustion – Criminal lawsuit – Police inquiry.

Resumo: Este artigo tem como objetivo analisar e demonstrar o entendimento do Supremo Tribunal Federal em relação ao texto da Súmula Vinculante 24. Resta claro que, após diversos julgamentos da Suprema Corte e com a edição da súmula mencionada, há uma necessidade de esgotamento prévio do processo administrativo para que se analise a consumação do crime preconizado no art. 1º da Lei 8.137/1990 (crime de supressão ou redução de tributo). Nesse sentido, o entendimento da Corte Suprema é de que a investigação e o processo penal só podem ser instaurados após a decisão final do processo administrativo tributário, ainda que haja resistências por parte de alguns órgãos do Judiciário e responsáveis pela investigação e, também, pelo processo criminal.

Palavras-chave: Supremo Tribunal Federal – Súmula Vinculante 24 – Crimes contra a ordem tributária – Ação criminal – Inquérito policial.

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1. Introduction

It is noted that after the position of the Federal Supreme Court in relation to the need for prior exhaustion in the administrative way so that one can consider the consummation of the crime of suppression or reduction of tax listed in art. 1st of Law 8,137/1990, it has been since from the initial term of the adoption of such positioning grounds, reason for discussions and controversies on the part of some organs of the Judiciary Branch and those responsible for criminal investigations and criminal prosecution.

One of the arguments most used to support the understanding contrary to the one published by the High Court would be that the administrative body would have representatives of the taxpayers and, in a sense, would not be immune to corruption. It remains crystal clear that such an argument does not deserve to flourish after all corruption, in theory, can be present anywhere and not necessarily only among the authorities of the Treasury. When there is any suspicion of any kind of corruption, it is necessary to investigate and, if applicable, corrupt authority is punished. It is therefore inadmissible that a mere conjecture would diminish or suppress constitutional procedural guarantees of the citizen. Another point that deserves to be brought to the present is that there is no prejudice to the understanding of the Supreme Court in relation to the prescription, since the prescriptive period is suspended, or rather, it does not start until there is a definitive definition in the administrative process to control the legality of the launch.

With the edition of the binding precedent n. 24, the right of the citizen is guaranteed in relation to the control of the legality of taxation prior to his case. The edition of the binding precedent was made necessary due to the fact that other instances of the Judiciary did not follow such decisions because of the nonexistence of binding force jurisprudential, different from what happened after the edition of the binding precedent here in comment.

Even with the edition of the binding precedent n. 24, it is clear that resistance to understanding has not been overcome. There has been a request for revision, as well as the use of other expedients to circumvent its application, which will be discussed below. One of these expedients consisted of the argument that the provisions of the binding precedent would bar the filing of a criminal lawsuit and not, for example, the initiation of a police inquiry. Even more compelling would be the case if such an inquiry were to be opened in order to investigate other crimes such as gang formation, ideological falsehood and money laundering. In the present work, such questions will be examined in the light of the jurisprudence of the Federal Supreme Court and its own grounds, and also from a viewpoint of a contrast between crimes against the tax order which are provided in the binding precedent with others possibly related to them.

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2. THE REQUEST FOR REVISION OF BINDING PRECEDENT N. 24

The Federal Prosecutor's Office requested to the Federal Supreme Court a review of the binding precedent n. 24, whose arguments consisted of:

a) Violation of the Theory of Activity, after all, according to art. 4th of the Penal Code, it can be considered "crime committed in the time of action or omission, even if it is otherwise the moment of the result";

b) Understanding of the Federal Supreme Court that there is independence between administrative and criminal agencies; in addition, also, the bond between the Judiciary Branch with the administrative decision, contrary to the provisions of art. 5th, XXXV[1], of the Federal Constitution of 1988;

c) Violation of art. 5th, XXXIX, of our Major Law, considering that the binding precedent would have modified the typical structure of the crime created by the legislator. In this sense, it will be said that the law does not consider "tax credit", but "tax";

d) Alteration of the prescriptive period, and also of the form that it is counted, after all with the understanding of the precedent it is extracted that the crime only exists after the exhaustion in the administrative sphere;

e) There has been relativization of the application of the precedent in other situations;

f) Existence of a systemic deprotection in the investigation of crimes, after all, it would be impracticable preventative measures prior to proving the crimes; and

g) The investigation of the crimes would be limited to fiscal authorities that could not carry out the investigation due to lack of convenience.

The fact that the Federal Supreme Court has ceased to apply the binding precedent in some cases is not a justification for its revision, since to have ceased to apply in such cases is due to the fact that the provisions of the binding text in question did not really apply in the cases. In this sense, it can be said that the well-constructed arguments brought by the Public Prosecutor's Office are, in short, those that were already used before the issuance of the binding precedent 24, that is, there is no new fact or innovation to what had already been brought before by the body and duly rejected by the Supreme Court.

In relation to the violation of the activity theory, it is important to mention that the suppression of the due tax is the central element of the type, that is, without this there is no materialization. In this way, it can be seen that the action or omission is not completely configured without the final result of the administrative process. It can be concluded that the tax is an institutional reality that exists only in the conditions and terms in which the rules that compose it disciplines its existence. Without the launch, one cannot speak of the existence of a due tax and in the case of the crime

1. "XXXV – the law shall not exclude from the appreciation of the Judiciary any injury or threat to law." – free translation.

that the taxpayer did not pay through fraudulent means. Thus, one of the particular problems of the request for revision is that it confuses gross realities and institutional realities.

In this tuning fork, it can be said that the same is true of the point of the autonomy of instances; after all, it is not a question of a calculation that can occur autonomously in the tax administrative way or in others. In the case, that is, in the text of the binding precedent n. 24, it is noted the existence of a due and defaulted tax by means of fraudulent ways, a conduct that is only completed as soon as the competent authority proceeds to the respective launch, as recommended in art. 142[2] of the National Tax Code.

Regarding the alteration of the definition of crime, considering that the law refers to the "tax", while the binding precedent requires us to "tax credit", it can be said that there is also an argument that does not deserve to prosper, since the term "tax" is used in several different contexts by the legal system itself. The context brought by Law 8,137/1990 seems clear to us in relation to the sense that it is rather speaking of tax credit, that is, of net tax liability, certain and demandable.

Regarding the prescriptive period, it is noted that it is not spoken of its actual alteration, but of the consummation of the crime. Therefore, it is clear that the period of five years brought by articles 150[3] and 173[4] of the National Tax Code refers to the decay period of the

2. "Article 142. It is the administrative authority's sole responsibility to set up the tax credit for the launch, which is understood as the administrative procedure to verify the occurrence of the event generating the corresponding obligation, determine the taxable amount, calculate the amount of tax due, identify the taxable person and, if applicable, propose the application of the applicable penalty.

   Single paragraph. The administrative activity of launch is bound and obligatory, under penalty of functional responsibility." – free translation.

3. "Article 150. The release by homologation, which occurs in respect of taxes whose legislation assigns to the taxpayer the duty to anticipate payment without prior examination by the administrative authority, shall be carried out by the act in which said authority, taking cognizance of the activity thus exercised by the taxpayer, expressly homologous.

   Paragraph 1 – The prepayment by the obligor under the terms of this article extinguishes the credit, under the condition of resolving the subsequent homologation to the launch.

   Paragraph 2 – The tax obligation shall not affect any acts prior to homologation, practiced by the taxable person or by a third party, aiming at the total or partial extinction of the credit.

   Paragraph 3 – The acts referred to in the previous paragraph shall, however, be considered in the calculation of the balance due and, if applicable, in the imposition of a penalty, or its graduation.

   Paragraph 4 – If the law does not set a homologation term, it will be of five years, from the occurrence of the generating fact; after expiration of this period without the Public Treasury pronouncing it, the credit is deemed to have been ratified and definitively extinguished, unless proven fraud, fraud or simulation." – free translation.

4. "Art. 173. The right of the Public Treasury to constitute the tax credit extinguishes after 5 (five) years, counted:

   I – on the first day of the fiscal year following that in which the launch could have been made; and

launch, and it is obvious that failure to exercise this right means that there is no due tax. This is something totally different from changing a criminal statute of limitations.

Following in the wake of the ideas hitherto conveyed, when talking about systemic deprotected, it is worth mentioning that it exists when it is admitted that a certain authority in charge of asserting whether or not there are due taxes has a decision that affirms that there are no due taxes, at the same time, it ends up admitting that another authority asserts the existence of a crime on account of non-payment of the same tax. There are several precautionary measures possible for other crimes that are not directly related to the crime of suppression or reduction of tax, what cannot be admitted here is an attempt of various legal procedures by the organs contrary to the text of the binding precedent to circumvent what this predict.

When talking about a restriction of the investigation, it must be brought to the present that there are no restrictions regarding the attributions of other investigative authorities in the investigation of any crimes. The important thing here is that it cannot be considered that there was a consummation of the crime of suppression or reduction of tax before its launch. A systemic inconsistency is noted in the *Parquet* argument, since the binding precedent does not create an obstacle to investigate the authorities responsible for the launch and apply, if applicable, punishments that are necessary.

Considering what has hitherto been stated, it is of great value to bring forward, in addition to the issues presented to justify the revision of the binding precedent 24, there are other aspects that will be brought to the present, which are indirect attempts to circumvent what is at the heart of the precedent here exposed.

3. THE NEED FOR PRIOR EXHAUSTION IN THE TAX ADMINISTRATIVE PROCEDURE TO OPEN A POLICE INQUIRY.

It remains clear that there are crimes that depend on the realization of a conduct related to the reduction or suppression of taxes to be configured, as it happens in art. 1 of Law 8.137/1990, described below:

> "Art. 1st It is a crime against the tax order to suppress or reduce tax, or social contribution and any accessory, through the following conducts:
>
> I – omit information, or give a false declaration to the fiscal authorities;

II – the date on which the decision that has annulled, due to a formal defect, the previous release becomes final.

Single paragraph. The right referred to in this article shall cease to exist definitively with the expiry of the period provided for therein, counting from the date on which the tax credit was initiated by notifying the taxable person of any preparatory measure necessary for the launching." – free translation.

> II – fraudulent tax inspection, inserting inaccurate elements, or omitting operation of any nature, in a document or book required by the tax law;
>
> III – falsify or alter invoice, invoice, duplicate, sales note, or any other document related to the taxable transaction;
>
> IV – to elaborate, distribute, supply, issue or use document that knows or should know false or inaccurate;
>
> V – deny or fail to provide, where required, invoice or equivalent document, regarding the sale of goods or rendering of service, effectively carried out, or provide it in disagreement with the legislation.
>
> Penalty – imprisonment of two (2) to five (5) years, and fine.
>
> Single paragraph. Failure to comply with the authority's requirement within 10 (ten) days, which may be converted into hours due to the greater or lesser complexity of the matter or the difficulty in meeting the requirement, characterizes the infraction set forth in item V." – free translation.

It is concluded that there is no way to speak of crime without the existence of a tax because this is the object of a suppression or reduction. Through the apparent pacified question of the need for prior exhaustion resulting from the edition of binding precedent 24, taking into account that its revision should not prosper, we must bring to the present what concerns the doubt regarding the applicability of the inquiry. It is through this question that we can confirm that the precedents do not make dispensable the hermeneutic work connected to the verification of its applicability to future cases, even when sediments in precedents of binding character.

When one considers the case of the police inquiry, one could deduce that the criminal lawsuit and police inquiry consist of different institutes. In this way, one thing would be to propose a criminal lawsuit, in which the understanding of the binding precedent does not allow expressly until there is the exhaustion in the administrative route; another would be the situation in which an investigation by the police authority would be carried out, the purpose of which would be to investigate possible criminal practices.

However, although the two institutes are not really confused, it is more than clear that the motives that prevent the bringing of the action are similar to those that prevent the initiation of the inquiry. The inquiry serves to investigate the occurrence and perpetration of the criminal offense. It would be legally inadmissible to allow the initiation of an investigation to ascertain the occurrence of facts which do not constitute a crime, even in theory. It should be emphasized that it could not be allowed to be instituted before the final decision made in the administrative seat of internal control of the legality of the launch, that is, before the previous exhaustion of the administrative route. This conclusion is clear from the moment in which an investigation cannot be instituted if the crime that is intended to be investigated lacks one of the objective conditions of punishment, neither is contemplated here nor its consummation.

In a nutshell, it is worth bringing to the fore that if, before the conclusion of the administrative review process of the launch, the existence of a crime cannot be considered, the same obstacle presented by binding precedent n. 24 in relation to the bringing of a criminal lawsuit should be applied to the case of the initiation of investigations or other investigation procedures of such a crime, after all, it is non-existent.

Such an understanding also applies to other crimes that have lawsuits related to taxes due as an element of the type (e.g., misappropriation of social security). The Brazilian Supreme Court has decisions in this regard and also reiterates the conclusion that otherwise there would be an offense against the principle of non-contradiction, the configuration of which would be due to the fact that the State cannot exercise criminal prosecution but can keep open investigation (Inq-AgR 2537/GO). In this sense, when considering that there can be no inquiry for the investigation of conduct that is not typical, it is noted that the improper installation in such situations should lead to the cancellation by judicial decision, in *habeas corpus*.

4. Opening of a police inquiry to investigate other crimes without previous exhaustion.

Following the current expose, it is worth mentioning that all abstractions lead to the other practice used by investigating and accusing authorities regarding the repression of what they consider crimes against the tax order, namely: inclusion of crimes other than crimes against the tax order. It should be noted that this is done as a way of avoiding the application of Binding Precedent 24.

Notorious is the fact that an individual may be accused or even being investigated for suspected criminal offense of various crimes such as receivership, drug trafficking, active corruption, etc. It is of great importance to note that pending a final administrative decision on the crime of reduction or suppression of taxes is not an obstacle that prevents the investigation and prosecution of other crimes with which it does not have a necessary relationship.

However, a different situation occurs when the true imputation to the subject is only in relation to the suppression or reduction of tax and the supposedly practiced crimes are inserted to the prosecution as a mere play so that the force of the criminal threat can be used to embarrass, for example, the payment of the charge without questionings, contradicting notoriously the due legal process. This is a clear and undue mockery of the understanding that led to the publication of the binding precedent by the Federal Supreme Court.

An example that can be exemplified here is the question of the ideological falsehood associated with the suppression or reduction of taxes. In this scenario, there is an obvious hypothesis of middle-conduct that consequently cannot be punished autonomously due to the principle of specialty, which is reflected in the criminal court, in the idea of

absorption that underlies the principle of consummation. It remains crystal clear that when you notice two norms that prescribe different consequences in situations that seem the same, the apparent conflict is resolved by the prevalence of the more specific over the more general. Therefore, the end crime that uses the other means ends up absorbing this.

In this sense, it is worth bringing to the surface that when one suspects a suppression or reduction of tax that is awaiting the completion of the administrative procedure of launching for a possible occurrence of criminal prosecution, there is no way to speak of a possibility of investigation and punishment, autonomous, of the conduits-means of a crime order, considering that the former are absorbed by the latter.

5. Conclusion

Considering the analysis in this article, it is concluded that the Federal Supreme Court should not accept the revision of the binding precedent n. 24, in spite of all the doubts and inquiries imposed by some members of the Judiciary Breach and the Public Prosecutor's Office who claim to the receive of the Complaint 16,087/SP. Due to the non-agreement that gave rise to the complaint mentioned above, it is noted that many measures are taken to circumvent the provisions of the binding precedent 24 (e.g. insertion of other allegedly autonomous crimes). This should not occur, because its occurrence generates a notorious legal insecurity and affront to the individual fundamental rights foreseen in constitutional seat. In this way, it is definitively concluded that there must be a prior exhaustion of the administrative procedure to consider the filing of the criminal lawsuit and also the opening of a police inquiry regarding the crime of suppression or reduction of taxes mentioned in art. 1 of Law 8,137/1990.

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