TAXATION, SUPPORT OF STATE ACTIVITY, EXISTENTIAL MINIMUM, AND HUMAN DIGNITY

I – INTRODUCTION

Law is one of the ways of considering ourselves human. The phrase is not an axiom; it is real and true. In the matrix of human behavior, there is an "onto". Any discipline interferes in the social-humanistic aspect of Law, and is not stratified: human behavior, scaled by an imposing state activity, must be respected, subject to constitutional and legislative principles and, above all, to human dignity.

But, conversely, in the old formula that the State must be socially supported by its essential character, one cannot forget, as Abraham Lincoln once said, that power is one "of the people, by the people and for the people". Today what we see, unfortunately, in Brazil is a reality in which the State "safeguards' and "conceals" an alleged cost of a necessary State activity, but which, on the contrary, sustains corruption in large part and for other purposes, bearing no relation to the public interest.

What's worse: honest public agents are forced to "charge" collections "against the law" in order to justify, under the "pseudo" compliance with the Fiscal Responsibility Law, expenditures that do not benefit the people, but only justify the misappropriation of funds improperly obtained. The full concept that taxation must abide by the existential minimum that justifies it is not met. In this short introduction, we would like to illustrate one of such behaviors, in relation to the deductibility of commissions paid to correspondents of the Pis and Cofins' tax basis.

II.1. – DEDUCTIBILITY OF COMMISSIONS PAID TO CORRESPONDENTS OF THE PIS AND COFINS' TAX BASIS

a) LEGISLATIVE BACKGROUND

1. Before specifically demonstrating the possibility of excluding the expenses with commissions paid to correspondents (*economic agents*) from the tax basis of the PIS and COFINS, it is important to bear in mind that the original intention of Law no. 9,718/98 was to subject the total revenue to the levy of the aforementioned contributions, also with regard to financial institutions which, until then, would pay the PIS pursuant to Constitutional Amendment no. 17/97 (until December 1999), and were exempt from the COFINS, pursuant to article 11, sole paragraph, of Complementary Law no. 70/91.

2. However, this intention was invalidated by the Federal Supreme Court, which, in the trial of Extraordinary Appeals (RE) nos. 357.950-9 / RS, 390.840-5/MG, and 358.273-9/RS, ruled on the

unconstitutionality of paragraph 1, of article 3, of Law no. 9,718/98 which, before Constitutional Amendment no. 20/98, aimed to tax the total revenues of legal entities.

3. Although for financial institutions the mentioned discussion continues, especially considering the conclusions of PGFN/CAT Opinion no. 2,773/2007, which originated topic 372 of the general repercussion of the Federal Supreme Court, as of January 2015, Law no. 12,973/2014 has changed the legal provisions for the PIS and COFINS' tax basis, including the one provided for in article 3 of Law no. 9,718/98.

4. In fact, by altering the concept of operating gross revenue, including *"(...) revenues of the main activity or purpose of the legal entity, not encompassed in items I to III (...)"* and at the same time amending Law no. 9,718/98, so that the PIS and COFINS' tax basis may fit into this new definition, Law no. 12,973/2014 intended precisely to end, as of its effectiveness, the discussion surrounding the constitutionality of the collection of the mentioned taxes on revenues other than those from the sale of goods and provision of services.

5. **It occurs that, even in the effectiveness of the unconstitutional paragraph 1, of article 3, of Law no. 9,718/98, which provided for broader limits on the tax basis of the contributions, the intention of the legislature was never to tax the entire gross revenue, but to accept, by express legal provision, the exclusion of given costs and expenses inherent to revenues subject to taxation.**

6. So much so that the Office of the General Counsel for the Federal Treasury ("PGFN"), in the already mentioned PGFN/CAT Opinion no. 2,773/2007, justified the alleged **distinguished treatment attributed to financial institutions in relation to the other legal entities**, based exactly on paragraphs 5 and 6 of article 3, of Law no. 9,718/98, which deal with **allowed exclusions**, as can be seen as follows:

> "(...) the declaration of unconstitutionality stated in letter "d" cannot modify the reality that for financial institutions and insurance companies the tax basis of the COFINS and PIS is still the gross revenue of the legal entity, **with the exclusions contained in paragraphs 5 and 6 of the same article 3**, without including, however, non-operating revenues, since article 2 and the heading of article 3 were not declared to be unconstitutional;" (emphasis added)

7. In other words, although it is not the purpose of this legal measure to question the validity of this conclusion, it is clear that the **PGFN itself acknowledges that the inclusion of other revenues**, other than those consisting of the sale of goods and the provision of services, mainly the revenues earned from financial intermediation, **presupposes the exclusion of expenses related to the exercise of this same activity**.

8. In this sense, article 1, I, and III, "a", of Law no. 9,701/1998, provided that, for the purpose of ascertaining the PIS and COFINS' tax basis, commercial banks and other financial institutions could **exclude/deduct**, inter alia, the "(...) ***fundraising costs in transactions carried out in the inter-financial market, including with negotiable instruments*** *(...)*".

9. In fact, before Law no. 9,718/1998 came into force, for the purpose of ascertaining the PIS, Financial Institutions were allowed

to deduct expenses that were exclusively related to fundraising activities in the inter-financial market.

10. Although Law no. 9,701/1998 only referred to the ascertainment of the PIS, it is worth mentioning that paragraph 5, of article 3, of Law no. 9,718/1998, expressly provided that with respect to financial institutions, **the same exclusions and deductions offered for PIS ascertainment purposes will be accepted in the ascertainment of the tax basis of the COFINS**, as inferred by the possibility of deducting such fundraising expenses from the tax basis of both contributions.

11. However, the enactment of Provisional Measure ("MP") no. 1,807 of 1999 then followed, which led to MP no. 2,158-35, of Aug. 24, 2001, still in force, which included paragraph 6 to article 3, of Law no. 9,718/1998, extending the already provided for exclusions and deductions, and now comprising, more broadly, the "**expenses incurred in the financial intermediation transactions**"[1] supported by commercial banks and other financial institutions.

12. What therefore occurred was the **complement to the statement provided for in article 1, III, "a" of Law 9,701/1998**, which, until then, established the permission to deduct the *"(...) fundraising costs in transactions carried out in the inter-financial market (...)"* from the tax basis of the Contributions to the PIS and COFINS, **making it more comprehensive, which generically encompasses the total *"(...)expenses incurred in the financial intermediation transactions (...)"*, as set forth in article 3, paragraph 6, I, "a" of said Law no. 9,718/1998.**

b) **RELATIONSHIP BETWEEN *EXPENSES INCURRED WITH CORRESPONDENTS AND FINANCIAL INTERMEDIATION* TRANSACTIONS**

13. In this regard, it should be noted that, in the performance of their operations, formed by the funding-investment binomial, they incur several expenses that are intrinsic to their activity, among which, **expenses related to commissions paid to correspondents**.

14. It is worth stressing that the concept of financial intermediation should be analyzed keeping in mind that National Financial System fulfills the function of being a set of bodies that regulates, supervises, and executes the necessary operations for the circulation of currency and credit in the economy, and is thus composed of several institutions, presenting two subsystems: *(i)* normative and *(ii)* operating.

15. In fact, the normative subsystem is made up of institutions that set the rules and guidelines for the operation of the financial system, in addition to defining *financial intermediation* parameters, as well as the inspection and activities of operating institutions.

16. In turn, the operating subsystem is composed of institutions that operate in the *financial intermediation*, whose

[1] "Art. 3. The revenue referred to in art. 2 comprises the gross revenue dealt with in art. 12 of Law Decree no. 1,598, of December 26, 1977
(...) Paragraph 6. In the determination of the tax basis of the PIS/PASEP and COFINS conditions, the legal entities mentioned in paragraph 1 of art. 22 of Law no. 8,212, of 1991, in addition to the exclusions and deductions stated in paragraph 5, may exclude or deduct:
I - in the case of commercial banks, investment banks, development banks, savings banks, loan, financing and investment associations, real estate loan associations, brokerage firms, securities distributors, leasing companies and credit unions: a) **expenses incurred in financial intermediation transactions;** (emphasis added)

function is to put the transfer of funds between fund providers and borrowers into practice, according to the rules, guidelines, and parameters defined by the normative subsystem[2] and 3.

17. To corroborate such a position, article 17 of Law no. 4,595/1964, in defining financial institutions, objectively brings forth the concept of "financial intermediation", as follows:

> "Article 17. For the purposes of the legislation in force, financial institutions are considered the public or private legal entities that have **as their principal or ancillary activity the collection, intermediation, or investment of financial resources of their own or of third parties**, in national or foreign currency, and the custody of third-party values" (emphasis added.)

18. It is of note, therefore, that the financial intermediation activity consists of two ends *(funding and investment)* that necessarily co-exist. Thus, in the development of this activity, **the institution takes on both the commitment** to return to savers the raised funds plus remuneration (*interest*) **and the risk** of non-payment by the borrowers of such funds (*of the credit granted by the institution at the investment end*).

19. Thus, **any default by the borrowers of such credits constitutes an intrinsic expense to the activity carried out by the institution in this intermediation,** since even if the institution has not received the funds from the credit borrowers, the institution is obliged to return them to the investors/savers.

20. In this regard, it is worth pointing out that Resolution no. 1,138, dated Nov. 21, 2008 of the Federal Accounting Council, presents, among other definitions, which expenditure compose the mentioned intermediation expenses:

> "29. In banking activities, by convention, it is assumed that expenses with financial intermediation are to be part of the net wealth formation and not of its distribution.
> Financial intermediation expenses - include **expenses with fundraising operations,** loans, on-lending transactions, leasing and other expenses." (emphasis added)

21. That is to say, financial intermediation consists of the raising of funds for a given term and at a given cost (interest and other charges) with *surplus* economic agents, to later invest said funds for a given term and cost (bank *spread* and other expenses) in transactions entered into with the deficit economic agents, **and the investment risk is assumed by the intermediation institution itself**[4].

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[2] Pursuant to clarifications contained on the website of the Brazilian Federation of Banks ("**FEBRABAN**"), on "http://www.febraban.org.br/febraban.asp?id_pagina=31"

[3] "All economies today have financial systems in which currency, along with many other systems, plays the role of a financial asset. And the operationalization of the system is carried out by the set of financial institutions aimed at the management of the monetary policy of the government through specific markets, such as the credit, capital, monetary, and foreign exchange markets. In order to maximize liquidity and productivity in the economy, it is necessary to distribute the saved funds to those who need them, who in turn will move the economy through investment. Due to this, it is virtually impossible to accurately associate the terms and volumes saved with the demand for loans. Therefore, there is a need for an intermediary that will collect the saved funds, at an indefinite term, indefinitely, for the agents that need them at a predetermined term. In performing this role, the intermediary acquires a great responsibility for taking the risk of non-payment by the borrowers, by adding the savings of several savers in order to supply the demand of big investors." (NOGAMI, Otto. Economia, Ed. IESDE Brasil S.A., 2012, p. 163 - emphasis added)

[4] "As with any definition proposed by the doctrine, among the several works that address the subject, we will find different definitions for the expression "financial market". The traditional current is based on the existence of two distinct markets, one

22. This is precisely the **activity subject matter of the contract between the alleged taxpayers and their correspondents (financial agents)**, since their role is to render services to customers and users of the financial institution, an activity that is regulated by Resolution no. 3,954 of the National Monetary Council ("CMN").

23. This is what may be inferred from the Frequently Asked Questions – FAQ session of BACEN's[5] website:

"**What are the correspondents in the Country?**
Correspondents are **companies hired** by financial and other institutions authorized by the Central Bank to **render customer services to customers and uses of such institution**. Among the best known correspondents are lottery shops and postal banks. The financial institutions themselves and others authorized to operate by the Central Bank may be contracted as correspondents.
(...)

Can the correspondent use the expression "bank" in its name?
Within the financial system, the use of the word "bank" is limited to commercial banks, multi-service banks, investment and development banks. For companies that do not integrate the financial system, there is no legal or regulatory restriction to use the word "bank".

However, the contracting institution must obtain authorization from the Central Bank in order to hire companies that use the term "bank" or other terms that characterize the denominations of the SFN institutions, as well as their derivations in a foreign language." (emphasis added)

24. Among the activities that may be developed through correspondents, article 8 of Resolution no. 3,954 of BACEN lists the following:

"Article 8. The purpose of the correspondent contract may include the following service activities, seeking the supply of products and services of responsibility of the contracting institution to its customers and users:
I – **reception and forwarding of proposals to open demand deposit accounts, term deposit, and savings accounts held by the contracting institution**;
II – reception, payment, and electronic transfers seeking the operation of deposit accounts of customers held by the contracting institution;

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called financial and the other the capital market. Both would have in common the purpose of mobilizing savings from surplus economic units to those in deficit that require money to fund themselves. However, while the former would have as a feature the intermediation of a financial institution by raising funds from savers and lending them to borrowers, the second (capital market) would be characterized by the direct raising of funds by the savers' borrowers, without the participation of a financial institution mediating the operation. It is also worth noting that the intermediation of a financial institution by raising funds among savers and granting credit to borrowers denotes another important feature of the financial market that differentiates it from that of capital, that is, the shifting of the credit risk (originally the saver's, in the capital market) to the financial institution. In fact, the financial institution will perform borrowing activities with the savers, who in turn will provide the funding, that is, the financial resource for its lending activities with the borrowers. Within this context, the difference between the cost of funding with savers and the amount available of said funds to borrowers is what in the financial market is conventionally called spread. (...)" Porchat, Décio, "Mercados Financeiro e de Capitais: Investimentos em renda Fixa." *in Tributação dos Mercados Financeiro e de Capitais e dos Investimentos Internacionais - Série GV Law*, 1ª Ed. Ed. Saraiva, 2011, p. 26 and 27 - emphasis added)

[5] http://www.bcb.gov.br/pre/bc_atende/port/correspondentes.asp, accessed on April 6, 2017.

III – reception and payments of any nature, and other activities arising from the performance of service contracts and conventions held by the contracting institution with third parties;
IV – execution of money orders, sending and receiving them, processed by way of the contracting institution upon the request of customers and users;
V – reception and forwarding of proposals for **credit and leasing operations granted by the contracting institution, as well as other services provided in order to monitor the operation;**
VI – reception and payments relative to bills of exchange accepted by the contracting institution;
VIII – reception and forwarding of proposals for the supply of credit cards of responsibility of the contracting institution; and
IX – exchange transactions of responsibility of the contracting institution, subject to the provisions in article 9.
Sole paragraph. The rendering of complementary services for the collection of registry and document information may be included in the contract, as well as data control and processing." (emphasis added)

25. We may say that the bank correspondents, as intermediary agents of the financial transactions developed by commercial banks, end up performing not only activities for the raising of funds relative to the borrowing transactions of the alleged taxpayers (certificates of deposit, savings, deposits, etc.), but also – *and mainly* – to its lending transactions (loans, financing, etc.).

26. To ratify this position, article 11 of the mentioned Resolution no. 3,954 of the CMN, provides as follows:

"Article 11. The correspondent contract that includes the activities relative to the credit and leasing activities referred to in article 8, item V, shall provide the following, in relation to such activities:
(...)
V - payment of remuneration as follows:
a) upon the hiring of the transaction: payment on demand, relative **to efforts expended in the capture of clients at the origin of the transaction**; and
b) throughout the transaction: payment pro rata throughout the contract term, **relative to other services rendered after the transaction**.

Paragraph 1. With regard to the provisions in item V, letter "a", the amount paid when contracting the transaction must represent:
I - at most 6% (six percent) of the value of the forwarded or renewed credit transaction; or
II - at most 3% (three percent) of the value of the transaction object of portability."

27. It should therefore be inferred that the capture of clients ultimately serves the "origin of the transaction", which provides for the development of other activities in order to achieve the intended *financial intermediation*.

28. This leads **the activities developed by the Petitioner and its correspondents (financial agents) to move towards the same purpose**, namely, the allocation of funds between the surplus and

deficit agents, which may also use the term "bank" in their name, with the authorization of BACEN.

29. It is therefore undeniable that the activities carried out by the correspondents are inherent to the performance of the financial intermediation that constitutes the business purpose of the Petitioner, leading to the conclusion that **any expense deriving from commissions paid on this basis[6] must be deducted from the PIS and COFINS' tax basis**.

30. Furthermore, it should not be alleged, as has been claimed by the Defendant Authority in cases analogous to this one, that PGFN/CAT Opinion no. 325/2009 would be capable of justifying the non-deductibility of such expenses, supported by IN no. 37/1999.

31. The reason is that, in addition to the aforementioned opinion analyzing the activities carried out by brokerage firms, it ended up reinforcing said aspect in relation to "typical" financial companies (*such as the taxpayer's*) with the purpose of avoiding the categorization of their activities as financial intermediation activities; and did so **on the assumption that, for the development of of "intermediated financial activities**", **the "raising of funds is essential"**.

32. That is, the PGFN ends up ratifying said conclusion, when differentiating between the activities developed between banks and brokerage firms, stating that the latter, operating in the capital markets, does not capture or transfer amounts, since "*funds flow between the holder and the borrower of the funds*", *so that they do not practice "fundraising activities".*

33. It can then be inferred otherwise, **since banks are the "typical" financial intermediaries, having as one of their main purposes the raising of funds,** among their borrowing operations, as provided for by the COSIF of BACEN.

34. For the sake of argumentation, even if not operating as a typical financial intermediary, an assumption adopted by PGFN/CAT Opinion no. 325/2009, in order to dismiss the use of the mentioned expenses brokerage and securities firms, the lack of a specific field intended for financial intermediation expenses in the spreadsheets contained in IN's nos. 37/1999 and 247/2002 would not be capable of restricting this concept, justified by the suppression of the right to deduct such expenses, granted by Law no. 9,718/1998, in accordance with the position of the Federal Regional Court ("TRF") of the 3rd Region, which reads as follows:

> "CIVIL AND TAX PROCEEDING. OFFICIAL REMAND AND APPEAL OF THE FEDERAL GOVERNMENT. PIS AND COFINS. TAX BASIS. DEDUCTION. ARTICLE 3, PARAGRAPH 6, I, "A", OF LAW NO. 9,718/98 (MP NO. 2158-35). **EXPENSES INCURRED IN FINANCIAL INTERMEDIATION TRANSACTIONS. PAYMENT TO INTERMEDIARY THIRD PARTIES. POSSIBILITY. NORMATIVE RULE/SRFno. 37/99. ILLEGALITY**.
> I- The scope of the rulemaking power is to enact complementary acts to the law in order to ensure its full performance. The creation, modification or removal of rights by way of a non-statutory rule is prohibited.
> II- Article 3, paragraph 6, I, "a", of Law no. 9,718/98 does not

[6] On the accounting classification of commissions paid to correspondents, Circular no. 3,693/2013 (Exhibit 08):
"Art. 1. The remuneration portion related to the origination of credit or lease transactions sent by correspondents in the Country **shall be recognized as an expense on the date such transactions were entered into, renegotiated or renewed**. "(emphasis added)

state any restriction to the deduction of expenses incurred in the financial intermediation transactions.

III- The prohibition by the SRF of the deduction of amounts paid as intermediation to third parties is then illegal, given the lack of a specific field in the Single Annex - field 8.1.1.00.00-8 of Normative Rule/SRF no. 37/99, since this restriction is not provided under the law. The lack of a provision for the accounting entry in the "expense" field related to the amounts paid as intermediation to third parties in the Accounting Plan of the Institutions of the National Financial System - COSIF (Central Bank) does not affect the specific taxation rules.

IV- Official remand and appeal of the Federal Government are hereby dismissed."
(TRF of the 3rd Region, FOURTH PANEL, AC 00186876820024036100, APPELLATE JUDGE FEDERAL ALDA BASTO, e-DJF3 Judicial 1 DATE: May 19, 2014 – emphasis added)

35. This is to say that, although the mentioned IN's have listed the intermediation expenses, without, however, providing for the "*expenses incurred in the financial intermediation transactions*", said omission may not be used to justify the repeal of said right, expressly provided by law, under penalty of non-compliance with the principle of legality.

36. In this regard, the position of the majority of case law of the Regional Courts of the country is to accept the defended thesis, as follows:

"ORDINARY ACTION – OFFICIAL REMAND CONSIDERED TO HAVE BEEN FILED - **DEDUCTION, FROM THE PIS AND COFINS' TAX BASIS, OF EXPENSES INCURRED IN FINANCIAL INTERMEDIATION TRANSACTIONS: THE RESTRICTION, STATED IN NORMATIVE RULES OF THE SRF NOS. 37/99 AND 247/2002**, WITH REGARD TO PAYMENTS MADE TO INTERMEDIARY THIRD PARTIES / BROKERS, LACKS NO GROUNDS IN THE SYSTEM - PRECEDENT OF THIS COURT - COMPENSATION: ADJUSTMENT SHALL BE MADE UNDER THE SELIC RATE, SOLELY (REPEATED APPEAL no. 1111175/SP) – DISMISSAL OF THE APPEAL AND OFFICIAL REMAND CONSIDERED TO HAVE BEEN FILED (...)
6. According to the initial complaint, the plaintiff is a company engaged, among other activities, in the intermediation of securities, classified as a PIS and COFINS taxpayer**.**
7. Also according to the complaint, **for the achievement of its corporate purposes, the claimant needs to capture clients in the market. This is carried out through agents, that is, people that carry out the intermediation between the clients and the brokerage firm, herein the claimant/appellee**. These agents, it clarified, **are third parties completely disconnected from the plaintiff, which, at its sole expense, captures clients and performs the intermediation for the claimant, earning, as consideration, a share based on the intermediated brokerage (performed intermediation)**.
8. The private party affirmed, in sum, that article 2 of Provisional Measure no. 2.037-24 amended article 3 of

Law no. 9,718/98, allowing the removal or deduction from the PIS and COFINS' tax basis of expenses incurred in the financial intermediation transactions. However, in order to record such expenses, the Federal Revenue Office enacted Normative Rule no. 37 which, in its single annex, brought forth the spreadsheet of intermediation expenses, of mandatory completion by the institutions authorized to operate by the Central Bank of Brazil.
Said Normative Rule, it stated, was repealed and the matter was then governed by Normative Rule no. 247/2002, pointing out that none of the rules expressly described the subitem "expenses incurred in the financial intermediation transactions".

9. The plaintiff finally exposed that, when preparing the Tax Inquiry on the field (in the spreadsheet) in which it was supposed to record said information, the plaintiff received an answer stating that the expenses with its agents could not be deducted from the PIS and COFINS' tax basis, on the grounds that the **Accounting Plan of the Institutions of the National Financial System - Cosif (Central Bank) does not allow the entry of payments through the intermediation of third parties as an expense**. The Federal Government, resorting to the response to the Inquiry as reasons for its defense, presented in the answer that (sheets nos. 367/369): "First and foremost, it is important to highlight that according to BACEN Circular no. 1,273, dated December 29, 1987, the rules and procedures, as well as the standardized financial statements provided for in the Accounting Plan of the Institutions of the National Financial System - Cosif, are mandatory for securities brokerage and exchange firms. Knowing that the brokerage firm was cited in paragraph 1, of article 22, of Law no. 8,212, of 1991, the provisions in paragraph 6, of article 3, of Law no. 9,718, dated November 27, 1998 are to be complied with, including article 2 of Provisional Measure no. 1,807, dated January 28, 1999 (currently Provisional Measure no. 2,158-35, of August 24, 2001), which provides as follows: (...) Due to the foregoing (...) taking into account the mandatory use of the Accounting Plan of the Financial Institutions of the National Financial System - Cosif, created by Circular no. 1,273, dated December 29, 1987, of Bacen, enacted Normative Rule of the SRF no. 037, dated April 5, 1999, creating a calculation spreadsheet for the ascertainment of the contribution to the PIS/Pasep and Cofins, which is mandatory for financial institutions and other institutions authorized to operate by the Central Bank of Brazil.
As the inquirer is authorized to operate by the Central Bank of Brazil, it is obliged to fill in this spreadsheet. By analyzing the list of accounts composing the spreadsheet, contained in the Single Annex of said Normative Rule, it can be verified that the group of code 8.1.1.00.00-8 (fundraising expenses) basically comprises the expenses dealt with in letter "a" of item I, paragraph 6, article 3, of Law no. 9,718, of 1998 (including paragraph 2 of Provisional Measure no. 1,807, dated January 28, 1999). It may also be observed that the group of code 8.1.2.00.00-1 (expenses with Loan and On-lending Obligations), deals with letter "b" and the group o code 8.1.5.00.00-0 comprises the deductions provided for in letters "c", "d" and "e", of said legal provision. Among the codes listed as fundraising expenses there is none that can include expenses with brokerage paid to third parties in

order to present clients to the brokerage firm.
This fact took place because the Federal Revenue Office, for the purposes of deduction from the tax basis of the contribution to the PIS/Pasep and Cofins, adopted only the funding expenses (provided by the Cosif) to consider as "expenses incurred in the financial intermediation transactions", dealt with in letter "a" of item I, of paragraph 6, of article 3, of Law no. 9,718 (...)"
10. By examining letter "a" of item I, of paragraph 6, of article 3, of the mentioned Law no. 9,718/98, it can be inferred that there is no restriction to the deduction of the expenses incurred in the financial intermediation transactions, as claimed in the initial complaint.
11. The Federal Revenue of Brazil, when issuing Normative Rules no. 37/99 and no. 247/2002, and not including a specific field for stating the expenses incurred in the financial intermediation transactions, ended up limiting, without normative grounds, the legally authorized deduction.
12. Under the pretext of regulating compliance with the provisions of 9,718/1998, on the possibility of deducting expenses from the PIS and COFINS' tax basis, it innovated the legal system, by imposing a restriction not provided by law, thus distancing itself from its strictly regulatory function.

13. As already ruled by this Court, in a case analogous to this one:
"The scope of the rulemaking power is to enact complementary acts to the law in order to ensure its full performance, meaning that the creation, modification or removal of rights is prohibited. The limitation lies in the law itself. In this aspect, it seems that the tax supervisory body has restricted the scope of the law by prohibiting the deduction of amounts paid as intermediation of third parties, based on a non-statutory rule (COSIF) issued by another body, namely BACEN.
What happens is that COSIF' scope is the accounting regulation aimed at financial institutions - which does not affect the specific taxation regulation. Thus, the legal assumption of SRF's response to the inquiry made by the plaintiff which forbids the sought deduction appears to be incorrect."(Precedent).
14. The judgment for the plaintiff, within the limits on the merits, is correct, also with regard to the charge of the SELIC, as an adjustment index, as already ruled in the repeated appeal (article 543-C, CPC). (Precedent).

15. Fees properly set, in light of the details of the case, article 20, CPC (amount in dispute of R$ 12,000.00, sheet no. 24).

16. Dismissal of the public appeal and of the official remand, considered to have been filed."
(TRF of the 3rd Region, THIRD PANEL, AC 00306868120034036100, ASSIGNED JUDGE SILVA NETO, TRF3 – THIRD PANEL, e-DJF3 Judicial 1 DATE: JUNE 3, 2015)

"Case records examined.
This is a preventive writ of mandamus filed by SLW CORRETORA DE VALORES E CAMBIO LTDA against an act practiced by the DISTRICT DIRECTOR OF THE SPECIAL OFFICE OF FINANCIAL INSTITUTIONS IN SÃO PAULO - DEINF/SP seeking to obtain

relief authorizing the deduction of expenses incurred with the hiring of autonomous agents in the intermediation of the financial transactions of the PIS COFINS' tax basis, as well as authorization to offset said amounts that were unduly collected.
It claims, among other activities, that it is engaged in practices pertaining to the financial market with the stock exchange. Moreover, it states that for such, it hires autonomous agents that act as actual representatives of the brokerage firm, carrying out the intermediation between the clients and the brokerage firms.
And that the deductibility from the tax basis of the PIS and COFINS of the financial intermediation expenses for brokerage firms is ensured by Law no. 9,718/98.
However, pursuant to Response to Inquiry no. 66, dated June 29, 2010, of the Federal Revenue of Brazil, the amounts paid by the brokerage firms to autonomous agents may not deducted from the tax basis of the PIS and COFINS, for which reason it filed a writ of mandamus on a preventive basis.
(...)
It occurs that the **lack of a specific field intended for financial intermediation expenses in the mentioned COSIF spreadsheet does not have a normative force capable of suppressing the right ensured to the taxpayer in Law no. 9,718/98. So the defendant authority may not limit the rights by way of a Normative Rule under penalty of violation of the sob principle of legality. To deny the petitioner the deduction of expenses with the hiring of agents for the exercise of its end activity would amount to accepting that the regulatory rule could innovate the legal system, which is prohibited under the constitution. Likewise, where the law does not make distinctions, it is not up to the law interpreter to do so, which means that the broad and extensive expression used by the lawmaker ("financial intermediation expenses") allows one to conclude that, also with regard to the benefit at issue, the payments of agents hired by securities brokerage firms to intermediated financial transactions are included**.
(...)
In examining the case records, I can verify that the arguments presented by the defendant authority are grounded in PGFN/CAT Opinion no. 325/2009. For this Court, it is necessary to check whether the commission paid to autonomous agents by securities brokerage firms may be framed as expenses incurred in financial intermediation transactions, more specifically as fundraising expenses.
The reason is that, pursuant to item 20 and following items of said Opinion, the intermediated financial activities could only be performed by typical financial institutions, since it is an activity for the raising of funds with surplus economic entities and then on-lending them to deficit economic units. In this sense, it exposes that it is clear that the legislation, when referring to expenses incurred in financial intermediation transactions, related to the transactions practiced by typical financial institutions, that is, to the intermediated financial activity, in which the raising of funds is essential (sheet no. 194).
(...)
Due to the foregoing, I HEREBY GRANT THE SOUGHT WRIT OF MANDAMUS AS WELL AS THE PLEADING, dismissing the proceeding with prejudice, pursuant to article 487, I, of the

NCPC, **for the recognition of the petitioner's right to deduct the expenses incurred with its autonomous agents in the intermediation of the financial transactions from the tax basis of the PIS and COFINS, and the defendant authority shall refrain from demanding the inclusion of said amounts in the tax basis of the PIS and COFINS**.

As a result, I hereby recognize the right to offset the amounts that were unduly collected in this regards against any taxes administered by the Federal Revenue Office, after a final and unappealable decision has been rendered (article 170-A), adjusted by the Selic Rate, subject to the five-year statutory period. Court costs to be determined under the law. No attorneys' fees to be paid.

This decision is subject to any necessary review. In due time, these case records are to be sent to the Federal Regional Court of the 3rd Region.

May this be published, registered, and the parties notified."

(JFSP – 12th Civil Court. Proceeding no. 0013695-10.2015.403.6100, Available on Sept. 22, 2016, page 34/50)

"SOCOPA-SOCIEDADE CORRETORA PAULISTA S/A X SPECIAL DISTRICT DIRECTOR OF FINANCIAL INSTITUTIONS OF THE FEDERAL REVENUE OF BRAZIL, S. PAULO; SOCOPA SOCIEDADE CORRETORA PAULISTA S/A, identified in the initial complaint, filed this writ of mandamus against the Special District Director of Financial Institutions of the Federal Revenue Office of Brazil in São Paulo, for the reasons presented below: The petitioner affirms that, in the capacity of a securities brokerage firm, it is subject to the collection of the Pis and Cofins, under Law no. 9,718/98.

It further affirms that, in the performance of its main brokerage activity, it resorts to the execution of intermediation services by autonomous agents, whose hiring represents costs that are deductible from the PIS and COFINS' tax basis, as set forth in article 3, 6, letter 'a' of Law no. 9,718/98, with wording provided by MP no. 2,158-35/01.

However, it states that the defendant authority does not allow the deduction of such amounts from the PIS and COFINS' tax basis, pursuant to IN RFB no. 37/99 and to IN RFB no. 247/02.

It claims that the defendant authority was questioned on the possibility of deducting said expenses as a record in subaccount 8.1.1.00.00-8, denominated fundraising expenses of the Annexed of INs RFB nos. 37/99 and 247/02, having informed that the fundraising expenses did not comprise financial intermediation expenses with autonomous agents, and that it would not be possible to deduct the intermediation expenses from the PIS and COFINS' tax basis, since the annexes of the mentioned INs were silent about that.

It further adds that IN RFB no. 1285/12 repealed the previous INs, though the impossibility of deducting the financial intermediation expenses from the tax basis of such contributions remains.

It claims that this prohibition is illegal, since the deduction of financial intermediation expenses is provided under the law.

The petitions seeks the granting of the injunction so that its right to deduct the expenses incurred with the hiring of financial intermediation services of investment autonomous agents from the tax bases of the Pis and Cofins may be guaranteed.

(...)

The danger of delay is also clear, since the collection of these contributions excluding the expenses challenged herein from their tax bases will subject the petitioner to the assessment by the tax auditors, which see them as being due.
Due to the foregoing, I hereby GRANT THE INJUNCTION in order to ensure that the petitioner may deduct the expenses incurred with autonomous agents in the intermediation of financial transactions from the tax basis of the PIS and COFINS.
May the defendant authority be informed hereof, requesting the information, and may its legal representative be notified, by way of a power of attorney.
May this be published.
Thereafter, the Federal Prosecution Office shall examine these case records, which will then be sent to the judge for a final decision."
(JFSP – 26th Civil Court, Proceeding no. 0019931-75.2015.403.6100, Available on Jan. 22, 2016)

"(...) The petitioner pays for the autonomous agents' services as they are directly involved in the performance of their fundraising and intermediation activities, therefore relative to its business purpose, as provided for in the legislation, in the mentioned provisions, when guaranteeing the deduction. Thus, they are not qualified as administrative expenses, which are more connected to the maintenance of the activity than to its core activity, specifically its business purpose.

The virtual approximation with personal expenses is then ruled out, under the pretext of qualifying them as administrative expenses, since, under the CVM regulations mentioned above, the agents operate on an autonomous basis, without any employment relationship, through the issue of the respective invoice.
On the difficulty of adjusting said expenses to the accounting provisions standardized by the RFB, I believe that the argument is not justified. If there is no specific field for their inclusion as "autonomous agents", may they be included as they in fact are, that is, intermediation expenses."
Furthermore, it makes no sense for the deduction provided for in the Legislation to be prevented until the accounting standard has changed or due to lack of standardization, but rather an otherwise rationale.

(...)

PROVISION

I hereby partially grant the pleadings, granting the injunction in order to: (1) recognize the petitioner's right not to include the expenses with the hiring of autonomous agents in the PIS and COFINS' tax basis, preventing the defendant authority from adopting collection measures as to such contributions, in relation to the tax basis which is recognized herein as deductible;"
(JFRJ – 18th Civil Court, Proceeding no. 0044637-42.2015.4.02.5101, Available on Nov. 27, 2015)

II - CONCLUSION:
The corruption in the interpretation of the Law itself can therefore be seen, which patently violates the principles of human dignity, mainly the Law itself and the Federal Constitution.