DOES TAX AVOIDANCE STILL EXIST IN BRAZIL?

Many people live the present thinking about the future and completely forget about the past. All areas of human knowledge have followed this trend, making predictions about an uncertain future!

In fact, even in the most "current" matters, there is always uncertainty. As to issues related to the human being and their essence, the Law would also fall under this influence (uncertainty).

Those who read newspapers, magazines, doctrines, and case law are clearly aware of this situation, given the existing legislative, doctrinal and case law variations on the most varied topics, especially in electoral, criminal and tax law.

Thus, the past should serve as a basis to understand the present and to prospect the future, since, as Jack Welch would say, "you can't see what is to come without looking through the rearview mirror."

Brief considerations on the title of this article derive therefrom: Is there tax avoidance in Brazil? Considering the amendments made by Complementary Law no. 104/2001, with the non-statutory regulations, there is no clear answer to this question yet.

Doctrine continues to proclaim and champion tax avoidance, with changes of positions in view of the new legislation. The Administrative Court of Tax Appeals, CARF, in turn, has already defined that the fact that the taxpayer seeks a business option that is more favorable thereto, in terms of tax burden reduction, would already legitimize the disqualification of tax avoidance to tax evasion. As will be shown, such meanings are legally considered to be absolutely distinct, but the reasons that qualify them, in principal, are so too.

This is why case law has been lacking, which should be rooted out in order to serve as a guide for all lawyers.

Thus, the purpose of this study, drawing from the lessons of the past in order to collaborate with the present and shape the future, is to foster the discussion related to the existence of tax avoidance in Brazil.

Although this seems corny, discussing the possibility of making an option under the Rule of Law/Democratic State (the inversion is absolutely critical), respecting the former and effecting the latter, pursuant to the Constitution, is extremely relevant.

With all due respect to Descartes, in his anthological work "*Le Candide*", I am not an optimist, but a realist, who looks first at the country's situation, not forgetting the crucial influence of the legal system on people's lives.

Unfortunately, as told by Aesop, the hen is killed on the assumption that more golden eggs will be obtained.

But at what cost? Law and Economics intersect and influence rulers' decisions and directly impact the population. Article 170, item IV, and its Sole paragraph provide the possibility and freedom of private agents to choose the best way in order to be more productive and efficient in the economy. This, of course, increases it and consequently improves people's lives.

Reiterating: the Constitution provides citizens with the right to choose a path that is less burdensome to them, but our rulers have forgotten this maxim. That is the question!

It should be noted, initially, that the particular behavior tending to exclude or reduce the tax burden on their activity, through legal mechanisms, with the purpose of achieving a more favorable economic result than the one that tax laws intended to encumber, cannot be censored in any respect, whether as to its legitimacy, legality, or morality.

In that regard, A. Becker's lesson is very fitting when asserting that it would be absurd if the taxpayer, finding several legal (and therefore lawful) ways to arrive at the same result, was to choose exactly the one that would determine the highest tax payment ("*in*" Teoria Geral do Direito Tributário, 2ª Ed., Saraiva, São Paulo, 1972, page 122).

Antônio Roberto Sampaio Dória, on the other hand, masterfully states that the legitimacy of resorting to tax avoidance cannot be refuted, since, if the taxpayer is using lawful means before the occurrence of the taxable event, so as to exclude or reduce a tax, "an act that resulted from the use of such means could not be considered illegitimate." ("*in*" Elementos de Direito Tributário, Editora Revista dos Tribunais, São Paulo, 1978, page 455).

Furthermore, in the words of the abovementioned master, even from an ethical aspect, it should be said that there is little importance in the field of law, its relevance being limited to social relations, with no impediment to the use of tax avoidance:

> "Tax avoidance presupposes, as we have emphasized several times, an option to pay less, or not to pay, and it would really be a conception of very strong morals, within a country where the sense of economic utilitarianism prevails, for the individual to choose the best option to pay, or to pay more; it would be hypocritical to look at the problem from that perspective. Thus, in conclusion, it seems that there is no moral impediment to the practice of tax avoidance". *("in"* ob. Cit., page 458)

This behavior, in fact, according to Appellate Judge Diva Malerbi, would consist of a public right, since it would be "a right related to freedom ensured by the Constitution and that is translated in the claim that the State will not interfere in a field defined by law as not being managed by the State in relation to taxation". Ultimately, "a right with a negative content, that is, a right to an omission by the State in this field, defined as one not managed by the State as to taxation" ("*in*" Elisão, Coleção de Textos de Direito Tributários, Vol. 7, Ed. Revista dos Tribunais, 1984, page 81). Said claim (right) to the State's non-management in collecting taxes is in fact essentially based on the principle of legality in tax matters, which we will see more thoroughly throughout this work.

Along these lines, it is necessary to establish the typical contours of the tax avoidance concept and its specific extension and application.

Tax avoidance, in sum, consists of the use of legal acts or legal transactions, that is, it is admissible in law and seeks to produce or remove the imposition of tax rules.

As stated earlier, the use of this "tax savings" mechanism, as preferred by the German doctrine, finds no impediment. However, it is necessary to question when its use could result in the appearance of other schemes that are totally antagonistic to tax avoidance, such as tax fraud, simulation, and theories of underlying economic reality and of the abuse of forms.

A preliminary concept and of utmost importance to clear up the subject under study refers to the principle of legality in tax matters which, as Roque Antônio Carraza rightly states, is "one of the most important principles on which tax law is based" ("*in*" Curso de Direito Tributário, 2ª Ed., Editora Revista dos Tribunais, 1991, page 139).

The past Constitutions, and in particular the current one (article 5, II and article 150, I of the FC), established in their texts the strict need for using laws to create or increase taxes, said constitutional protection constituting a guarantee of the taxpayer in relation to the Treasury.

As to tax matters, the principle of legality manifests itself, given its own features, with a greater specificity, that is, the State's claim to demand the tax can only be effective and only when all the elements and presuppositions of the legal tax relationship (levy event, tax basis, rate, etc.) are present. This is what Alberto Xavier calls the principle of absolute reserve of procedural law or, in the words of Prof. Geraldo Ataliba, of strict legality.

In this regard, the lesson of Appellate Judge Diva Malerbi is conclusive:

> "Therefore, the relation established in the tax rules, between events and consequence, is that which in legal logic is called intensive implication, since, under the constitution, the essential aspects of a fact described in the event of this rule are the sole and exclusive assumptions revealing the tax consequences created by this established rule, and tax consequences ensue if all the essential aspects of a fact described in the rule are verified, in the occurring fact, but only ensue if and when they are verified.
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> Therefore, if there are no tax effects of other assumptions other than those defined in their levy events, the tax rule determines a legal system in which everything is opposite to what it sets forth in its levy events, for cases not expressly considered". ("*in*" ob.cit., page 52)

It may be inferred by such a position that other methods of measuring the imposition of the tax rule, such as the (judicial) analogy or (administrative) discretion (administrative), do not lend themselves to serve as a basis for the tax requirement. As a matter of fact, it is up to lawmakers, by virtue of the constitution, to accurately delimit the levy event of the tax rule, since, if they fail to do so, the tax requirement will be unequivocally obstructed.

In this primacy, in our opinion, lies the main source of the tax avoidance doctrine, which Antônio Roberto Sampaio Dória aptly terms tax avoidance due to a gap in the law. In this form of tax avoidance, according to the above master, "the taxpayer uses certain loopholes, certain gaps, left by the lawmakers, that are used to minimize or entirely eliminate the tax liability" ("*in*" ob. cit., page 451)."

We must now examine when the use of the tax avoidance concept is verified, or, oppositely, as already pointed out earlier, when the legal concept of tax fraud, simulation and of the theories of the underlying economic reality will occur and abuse of forms will occur

On this matter, Prof. Antônio Roberto Sampaio Dória, in an enlightening way, pointed out the differences between the concept under analysis and the concept of fraud:

"How is tax fraud verified? How can tax avoidance be verified? Some may already have concluded that such phenomena present certain common features. In both, what the individual intends is to eliminate or reduce a tax liability, a tax sacrifice. This is the intent or motivation of the parties. The results are therefore identical. For this reason, we cannot distinguish said concepts based on these aspects. What differentiates avoidance from fraud is the fundamental aspect, the way in which they are realized. In tax fraud, the individual always resorts to many unlawful means, while in tax avoidance, to lawful means.

Here, unlawful means are fraudulent means, which are not permitted by Law. Among these means we can highlight, mainly, the falsehood, of the statements.

In fraud, the individual achieves the result of not paying taxes, using an unlawful process and, in tax avoidance, as an assumption of its validity, they have to employ a process in which the right is accepted.

The second aspect, which distinguishes these two concepts, is that of the moment in which the use of these means is verified. In tax fraud, the individual uses certain means or instruments, in the act or after the occurrence of the triggering event. In other words, at the time the taxable event is being externalized, the individual uses unlawful means to reduce or eliminate the tax liability, for example: a deed of sale of a property for a price lower than the parties actually agreed to. We will not discuss the merits of the moment in which the taxable event occurs. An example of fraud subsequent to the taxable event - a change to invoices made later - an individual issues an invoice for less than the amount actually charged, or destroys the invoices or documents, which prove a given transaction.

In tax avoidance, on the contrary, the use of these unlawful means must always occur before the occurrence of the taxable event. Tax avoidance is a preventive procedure, meaning that, if it loses its preventive character, it becomes a fraud. Since the moment the tax arises, there is nothing left to do other than pay it. Any measure that the taxpayer takes after the taxable event occurs, will be fraudulent; tax avoidance must always be preventive - to avoid said situation described in the law as taxable to manifest itself. ("*in*" ob. cit., pages 452 and 453).

It is therefore clear that a transaction may never be considered fraudulent if (i) the legal acts or legal transactions practiced are lawful (permitted or not permitted by law) and (ii) if said transaction precedes the occurrence of the taxable event stipulated by the levy event of the tax rule.

As to the availability of simulation occurrence, the excellent conclusion of D. Appellate Judge Diva Malerbi is transcribed below:

> "In fact, what exists in tax avoidance is precisely a manipulation of legal forms in order to achieve a given economic result, which may incur more or less burdensome taxation.
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> The events presented by the doctrine, such as the manipulation of legal forms, essentially based on the intention to avoid certain tax consequences by means of diversified legal forms, are therefore ultimately framed in the concept of simulation or in that of indirect legal transactions in tax matters.
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> The question therefore arises: to what extent and under what conditions should a legal transaction be regarded as one intended for a "*non-suo*" purpose, that is, a simulation purpose.
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> "In the words of Emilio Betti, in his exponential "General Theory of Legal Transactions" (*Teoria Geral do Negócio Jurídico*), "the discrepancy between the typical cause of the chosen transaction and the intended practical intention can constitute true incompatibility: and then we will have the simulation phenomenon. But it may also have the character of a simple incongruity or disagreement (or inadequacy) between means and scopes that are mutually compatible: in this case we will have the phenomenon of indirect transaction or fiduciary transaction.
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> This means that the mismatch between the real intention and the declared one, which exists in the simulated transaction, constitutes true incompatibility, resulting only in an appearance or means of achieving its dissimulated scope.
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> In the indirect transaction, on the other hand, there is only an inadequacy (incongruity) between the means used by the parties to reach a given economic result and the scopes achieved with said transaction. Despite this

> inadequacy, means and scopes always seem compatible with each other.
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> There is, therefore, in the simulated transaction, a real intention of the parties to create an artifice, a transaction form that is different from the one actually desired, while in the indirect transaction the legal effects peculiar to this transaction are actually pursued by the parties, influencing their choice and achievement.
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> Therefore, in the indirect transaction, there is no incompatibility between the real intention and the declared one, but only an inadequacy between the structure of the performed transaction (inadequacy is thus defined, in relation to the sole function of a so-called "typical cause of transaction") and the purpose to be achieved is to avoid a tax levy or obtain a lower tax charge". ("*in*" ob. cit., pages 24 and 25)

According to the technical terminology adopted by the Appellate Judge, we may simply conclude that no legal act or transaction should be considered simulated when it presents a proper correlation between the legal form adopted and the result obtained. For instance, if a private person intends to make a sale, they will not be able to make a donation (where, let's say, the tax rule does not apply), receiving the amount, nevertheless, that would be due as a result of the intended sale. Undoubtedly, in this example, there would be a simulation event. However, as in the abovementioned statements, if there is no incompatibility between the transaction and the result achieved, there is only incompatibility between the result objectively intended (tax saving) and the "typical cause of the transaction" (in the example used above, the sale itself), it is not possible to claim the existence of simulation. In other words, there will be no simulation if the result of the act or transaction carried out does not demonstrate incompatibility with the "legal purpose" that said act or transaction has, leaving only the "typical" cause of the transaction incompatible and the purpose objectively sought by the taxpayer, namely, of avoiding taxation. The example presented by Tulio Ascarelli in this sense is transcribed below, due to its didactic connotation:

> "A German that adopted, in order to have an heir, actually wanted to adopt, because without adoption he could not achieve his intention, although the predominant (and widely known) reason of adopting was not the desire to artificially have offspring, but rather to have someone be his heir". ("*in*" Problemas das Sociedades Anônimas e Direto Comparado, 2ª Ed., São Paulo, 1969, page 111)

Another aspect that is usually argued as an obstacle to the use of the concept of tax avoidance is related to the "underlying economic reality" of the legal act or transaction practiced (currently, business purpose).

The theory of the underlying economic reality is based on the fallacious premise that the purpose of tax law, in order to verify the tax liability charge, would only be the economic effect obtained through the legal act or transaction performed. However, as we have already pointed out, there is a strict need in the Brazilian tax law to provide for the levy event (strict legality principle), regardless of the "factual (economic) result" obtained in determining the tax charge. A. Becker peremptorily states his position on such a theory:

> "What the doctrine of the interpretation of tax law in fact does, according to the economic reality of the phenomenon of life (supported by K. Ball, J. Hein, W. Merk, Amilcar de Araújo Falcão, E. Vanoni, D. Jarach, and B. Griziotti), also called "constructive", is demolish what is legal in tax law. In the name of tax law, they kill the "right" and keep only the tax". ("*in*" ob. Cit., pages 117 and 118)

Therefore, in the "underlying economic reality (currently, the business purpose)" there is an uncontroversial and already outdated subject, since, as stated, the lawmakers are required under the constitution to accurately specify, in description of the tax, the events to be covered by the tax rule. It therefore does not matter whether the economic result obtained is analogous to the event described in the legal norm, but rather whether the essential aspects described by said levy event actually occurred in the operation that rendered the tax avoidance; if the answer is negative, it is impossible to require the tax. This is also the conclusion of Appellate Judge Diva Malerbi:

> "Thus, the content of the extension of the principle of strict legality is inevitably showing that the Brazilian Constitution imposed on the ordinary legislator that, in making use of their prerogatives, they must exhaust the creative task of the tax, under penalty of declaring the inexistence of the tax intended to be created, in case one or some essential aspects are missing in the legislative description; and of declaring the unconstitutionality of this law in case it exceeds the (constitutional) field of levy of the tax in question, or its unconstitutionality in case, although having jurisdiction to create taxes, this law authorizes in its terms, the possibility that a new taxable situation is established by the administrator or the law enforcement body. ("*in*" ob. cit., pages 77 and 78)

Lastly, it is necessary to study the theory of the abuse of forms, which some also intend to use so as to disregard the argument to the use of tax avoidance. In the words of Antônio Roberto Sampaio Dória, "this theory starts from the assumption that in tax avoidance there is always abusive manipulation of the legal formula in order to reach a result that the legal formula used normally does not allow." Criticizing such a theory, the above master accurately concludes the following:

> "The problem is that this theory of abuse of forms is still more ambiguous than the theory of economic interpretation, since this theory assumes that the legally valid formula is the one

> that is normally used for the performance of a transaction. So we are posed with the problem of discovering which is the normal form - A or B - but in essence the law allows for an alternative, a series of options, for the performance of the same transaction, same economic reality, and if we verify that an act is legitimate because it is normal or not, we will be adopting an entirely empirical criterion..
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> Secondly, it would also be a wholly subjective classification to determine the extent to which there was abuse of form and the extent of such abuse, in order to conclude that the abuse, by having reached that point, actually invalidate the act itself". ("*in*" ob. cit., page 457)

The main aspect to be pointed out in this legal concept is that, for its configuration, the transaction used must be "abusively manipulated" in relation to its "typical purpose". In other words, it is necessary for the private party, when conducting the business, to distort or modify its typical purpose, aiming at excluding the tax requirement.

In sum, tax avoidance persists in the Brazilian legal system due to constitutional precepts and rights granted to taxpayers. To disregard such a situation is to place the country more and more into a state of deep uncertainty and, strongly, of lack of new resources coming from abroad to foster the economy. For our rulers and those who want a better country, to follow CARF's current case law, given the case law instability, will be counterproductive to what is intended for our country.