Dialogic fiscal administration*

Administração fiscal dialógica

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ABSTRACT:

The purpose of this article is to analyze the new paradigms of public administration and its repercussions within the scope of fiscal administration. The contemporary context requires new procedures for the taxpayer and taxpayer agents, with a faster, transparent, efficient and collaborative action of the players involved in the tax relation. Both the Tax Authorities and the taxpayers must strive to establish dialogue and, consequently, to reduce litigation. It will be demonstrated that the search for agreement of the tax credit is, besides a rational and effective measure in the resolution of the tax conflicts, a demand of the contemporary world.

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KEYWORDS:

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RESUMO:

O presente artigo analisa os atuais paradigmas da administração pública e seus reflexos no âmbito da administração fazendária. O contexto contemporâneo exige novos procedimentos dos agentes fazendários e dos cidadãos-contribuintes, com uma atuação mais célere, transparente, eficiente e colaborativa dos agentes envolvidos na relação tributária. Tanto o Fisco como o contribuinte têm de se esforçar na instauração do diálogo e, consequentemente, na redução dos litígios. Demonstra-se que a busca de acordo acerca do crédito tributário é, além de medida racional e eficaz na resolução dos conflitos tributários, uma exigência do mundo contemporâneo.

PALAVRAS-CHAVE:

Relação tributária cooperativa — conciliação — desjudicialização — novos paradigmas — diálogo institucional

1. Initial considerations

The early years of the XXI century having elapsed, the arguments for a necessary review of the role of fiscal administration have gained ground. The old model, which is still based on the assumptions that were the foundations for the 1966 National Tax Code, required adjustments to bring them into line with contemporary requirements. The change in the attitudes of both the State and society have to be taken into account in order to clear the way for more robust measures for collecting, monitoring, managing, controlling and spending taxes.

The main change necessarily involves the conduct of tax agents. There has been significant progress in the field of legislation, but much still needs to be done if the rules are to be correctly applied, and to improve the perception of current requirements by those working in the field of law.

Taxation has to be seen from the standpoint of accountability, transparency, good governance, fiscal and social responsibilities, the inclusion

of environmental criteria in the system and, primarily, the adoption of dialog with taxpayers, a fundamental item for improving the National Taxation System, whose participation has been somewhat neglected.

Tax administrations whose goals continue to be focused merely on collection and penalization are doomed to failure. Sound international experiences[1] are proof of the importance of taking steps that enhance the relationship and trust between Tax Authorities and taxpayers by aligning taxation and social rules.

In Brazil, reviewing this relationship which, by the way, has run its course and is no longer accepted, is long overdue. The fact that administrative solutions no longer carry any weight means that these issues increasingly end up in Court. This situation is no longer sustainable. It is necessary to review this court-centered culture that has become the sticking point in tax relations, placing huge demands on the courts. And to corroborate this statement, 2.7 million lawsuits are reported to have been filed with the Office of the General Counsel to the National Treasury in 2017 alone[2].

One of the options for breaking this unproductive cycle is to adopt a dialogic model. Of course there are many obstacles to reaching this degree of evolution, but we must begin sometime. The first step is the search for new paradigms of fiscal administration. And to do this, it is necessary to look for grounds in administrative law.

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1 "In Australia, the role of the Board of taxation shows how new tools of the information society can be strategic in implementing this new paradigm. The entity was created by the Australian government in the turn of the millennium to assist the Australian Taxation Office (ATO) — the equivalent to the Brazilian Federal Revenue Service — and the Treasury in putting into effect the dialogic model formulated by Braithwaite. The Board of taxation consists of people who work in governmental and non-governmental sectors and whose function is to ensure that the processes for making decisions and implementing tax policies are more participative and sensitive to the peculiarities of the taxpayers affected. The Treasury and/or the Ministry request the Board of taxation to prepare diagnoses, suggestions for changes to the rules, evaluating the effectiveness of international rules or agreements. This work must be participative, which is why a large part of the entity's tasks consists of ensuring that representatives of society, especially the sections of society most affected by the tax rules under evaluation, actively participate in the process" (SANTI, Eurico Marcos Diniz de. Diagnóstico do sistema tributário brasileiro: sigilo fiscal, autismo do modelo de *civil law* e patrimonialismo de Estado. In: SANTI, Eurico Marcos Diniz de. *Kafka, alienação e deformidades da legalidade:* exercício do controle social rumo à cidadania fiscal. São Paulo: Revista dos Tribunais; Fiscosoft, 2014. pg. 525).

2 *Relatório PGFN em números* — 2017/2018. Available at: <www.pgfn.fazenda.gov.br/ arquivos-de-noticias/pgfn_em_numeros_final_2_web.pdf>. Accessed on: April 13, 2018.

2. Contemporary paradigms of government

Administrative law has been built on several pillars recently called into question or relativized, such as the principles of legality, the supremacy of public over private interests as well as the unavailability of public interest, which are usually argued as being the barriers to mediation, negotiation, settlement and arbitration involving the government.

The relations between the government and the governed have been inundated with "hypermodernity". The complexity, plurality and the speed of change that characterize the post-modern "liquid" society require a new model of government that is more flexible, transparent, horizontally structured, democratic and open to dialog.

Where the principle of legality is concerned, there have been significant changes. According to Di Pietro, the principle of legality became stronger during the post-modern era, because not only did it start to encompass the law in the formal meaning of the word (corresponding to the legal reserve principle), but also the regulatory acts of the Executive Branch and the direct and indirect government bodies and entities, in addition to constitutional principles and values, whether explicit or implied. In this way, it has expanded its reach, because an administrative act would only be valid where formal law (the principle of legality in its strictest sense), constitutional principles and values and the regulatory acts of the Executive Branch (the principle of legality in the *wider*[3]sense*)* are duly respected.

Portuguese legal theory usually designates the principle of legality in the widest sense of the principle of lawfulness[4]. From the point of view of controlling administrative acts, the scope has indeed widened, while the control parameter has been extended, since it now encompasses not only the laws, but also the study of law in line with the provisions of the Basic Law of Bonn (article 30, paragraph 3: "The executive and the judiciary are bound by directly applicable law").

One cannot deny that this amplification of the scope of the legality principle has resulted in a certain loss of prestige for the law on account of

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[3] DI PIETRO, Maria Sylvia Zanella. Da constitucionalização do direito administrativo: reflexos sobre o princípio da legalidade e a discricionariedade administrativa. In: DI PIETRO, Maria Sylvia Zanella; RIBEIRO, Carlos Vinícius Alves (Coord.). *Supremacia do interesse público e outros temas relevantes do direito administrativo.* São Paulo: Atlas, 2010. pg. 184.

[4] ANDRADE, José Carlos Vieira de. *A justiça administrativa.* 16th ed. Coimbra: Almedina, 2017. pg. 15.

it being placed on the same level as the regulatory acts of direct and indirect government. Therefore, during this evolution, the principle of legality may have been strengthened, but not the applicable law.

This loss of prestige by the law, in the formal sense, can also be attributed to other factors, such as parliaments' representativeness and legitimacy crisis. The greater transparency in the legislative process has contributed to the secularization of the law, which is no longer seen as the expressions of the ideals of justice and the collective will, but as the fruit of pressure groups, parties and momentary private interests which, in turn, results in the volatility and multiplication of laws, thereby lessening their value and credibility. Popular participation in the drafting of laws has turned out to be ineffective and illusive.

Overlaying political criteria on technical criteria, in addition to the inability of parliaments to arrive at timely consensual solutions in a hypercomplex society demanding agile solutions in the face of ever-changing reality has also contributed to the loss of prestige for the law and the resulting delegation of its natural competence to the regulatory acts of government, markedly to the regulatory acts of the regulatory agencies.

In the suggestive image of Adrian Vermeule, the law has abnegated its authority, relegating itself to the margins of governmental arrangements[5].

Within this context of the erosion of the role of law and the subsequent delegation of competence to the regulatory acts of government, invoking the absence of law as an obstacle to the utilization of consensual mechanisms involving the government is running out of steam.

In turn, the principle of the supremacy of the public over private interest has been a target for doctrinal attacks with the aim of showing that the public

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[5] *"Law has voluntarily abandoned its imperial pretensions, for valid lawyerly reasons. Although in earlier eras law claimed (rightly or not) to represent the overarching impartial power that resolved and reconciled local conflicts over the activities of government, the long arc of the law has bent steadily toward deference— a freely chosen deference to the administrative state. Law has abnegated its authority, relegating itself to the margins of governmental arrangements. Although there is still a sense in which law is constitutive of the administrative state, that is so only in a thin sense— the way a picture frame can be constitutive of the picture yet otherwise unimportant, compared to the rich content at the center. [...]In area after area, lawyers and judges, working out the logical implications of their principles with a view to rational consistency, have come to the view that administrators should have broad leeway to set policy, to determine facts, to interpret ambiguous statutes, and even—in an intolerable affront to the traditional legal mind—to determine the boundaries of the administrators' own jurisdiction, acting as "judges in their own cause"* (VERMEULE, Adrian. *Law's abnegation:* from law's empire to the administrative state. Cambridge: Harvard University Press, 2016. pg. 1).

interest has no primacy over private interests, whereby the former must be the weighted with the latter[6].

The apologists of the principle themselves argue that the supremacy of the public interest has never been absolute and irrevocable, and that it can give way in the face of certain private interests, as the case may be. Otherwise, there would be no individual guarantees and the government would have free reign[7].

Actually, sometimes public and private interests converge and, quite often it is in the public interest that certain private interests be accommodated[8]. Or is the defense of basic rights not in the public interest? Therefore, if a given private interest is raised by the Constitution to the category of a basic right, obviously the invocation of the public interest to the contrary may not overrule it, because it is in the very nature of individual basic rights to represent counterfoils to the will of the majority, therefore opposing the will of the State.

Thus, if a given secondary or primary public interest is considered to clash with a basic right, one is forced to conclude that the constitutionally assured basic right will prevail which, ultimately, corresponds to satisfaction of the public interest itself, globally speaking, from a more extensive perspective[9].

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[6] Humberto Ávila even denies it the status of a fundamental rule: ÁVILA, Humberto. Repensando o "princípio da supremacia do interesse público sobre o particular". *RTDP,* São Paulo, v. 24, pg. 159-180, 1998.

[7] "The idea that the public interest, in any situation, always takes precedence over private interests has never been the norm (except, perhaps, in totalitarian regimes). Its importance is exaggerated, and later contested, quite often in an inconsequential, irresponsible manner and under false pretexts" (DI PIETRO, Maria Sylvia Zanella. O princípio da supremacia do interesse público: sobrevivência diante dos ideais do neoliberalismo. In: Maria Sylvia Zanella Di Pietro and Carlos Vinícius Alves Ribeiro, *Supremacia do interesse público e outros temas relevantes do direito administrativo,* op. cit., pg. 94).

[8] "It happens that defending, guaranteeing and realizing private interests may be in the public interest. Nevertheless, there may be cases where even where a public interest is at stake, it gives way in the face of an actual private interest protected by a right. It is in the collective interest that private interests are guaranteed; however, this same general rule gives rise to the fact that the possibility therefore exists of collective interests being thwarted by individual interests" (GABARDO, Emerson. O princípio da supremacia do interesse público sobre o interesse privado como fundamento do direito administrativo social. *Revista de Investigações Constitucionais,* Curitiba, v. 4, n. 2, pg. 95-130, May/Aug. 2017. pg. 111).

[9] "There may be conflicting public interests, such as occurs with the construction of highways and nuclear plants whose interest, generally speaking, conflicts with environmental protection interests. In this case, it is up to the Government and, as a last resort, the Courts to decide which interest to protect. It is important that there exist public interests that deserve the protection of the State, even to the detriment of individual interests. It is from the legal framework that one extracts the idea of public interest and which public interests to protect. Public interests, whether representing, or not, the sum of individual interests, have always

Moreover, it is perfectly possible that mutually conflicting public interests exist, it being up to the State (the government and/or the Judiciary) to decide which public interest should prevail or, to put it another way, which of them best serves the public interest, globally speaking.

In addition, although the public interest is an implied constitutional principle, its nature is one of an indeterminate legal concept with a high degree of abstraction, and it is essentially up to the legislator within his freedom of conformation and, of a residual nature, to the government official, to put it into action [10].

When the law elevates private interests to the category of subjective rights (even where not provided for in the Constitution), it is assumed that, unless otherwise proven — even by virtue of assuming the constitutionality of the laws — that it does so in tune with the implied constitutional principle of the public interest, by making it happen.

This ambience that values weighting public and private interests provides fertile territory for consensus to take root.

Finally, the third barrier usually erected against consensus in government relations is the principle of the absence of public interest, which correlates with the principle of legality and the principle of the supremacy of the public interest. Indeed, if it is primarily incumbent on legislators to bring about the implied constitutional principle of the public interest, and the government is not the owner of the public interest, but merely manages it on behalf of the

existed and will always exist, unless one wishes to deny the role of the State as guarantor of the common good" (DI PIETRO, Maria Sylvia Zanella. O princípio da supremacia do interesse público: sobrevivência diante dos ideais do neoliberalismo. In: Maria Sylvia Zanella Di Pietro e Carlos Vinícius Alves Ribeiro, *Supremacia do interesse público e outros temas relevantes do direito administrativo,* op. cit., pg. 99).

[10] The principle of public interest — which can be reduced to the notion of the common good — is so deep-rooted and fundamental that it is frequently not even expressly inserted in Constitutions, figuring as an implied constitutional principle. In this respect: "Under democratic, social and environmental rule of law, binding it to the purposes of Government functions means safeguarding and promoting the public interest or the common good. Here, this involves a structural unwritten principle of every type of Government manifestation. That is why acting in the public interest is part of the most striking conceptual and functional elements of Government [...] and constitutes the foundation of every government action. [...] In spite of the meaning of the public interest as a key concept of administrative law and as a general principle, that is, valid for the application, interpretation and consideration of administrative law [...], the Government's orientation to the common good appears so evident that it is only referred to in a rudimentary manner in primary community law, constitutional texts and in administrative law in general as a permanent structural maxim [...]" (WOLFF, Hans Julius; BACHOF, Otto; STOBER, Rolf. *Direito administrativo.* Translation by António F. de Sousa. 11th German ed. Lisbon: Fundação Calouste Gulbenkian, 2006. v. 1, pg. 424).

collectivity, one can easily infer that it cannot draw on this public interest when it sees fit.

The image of the government, however, as a mere automaton enforcing the law, is as out of date and unreal as that of the judge as a mere mouthpiece for the law bereft of any margin of freedom of interpretation.

Kelsen, for example, had already stated that the law can give rise to more than one plausible interpretation, and that within their interpretative frame, the choice of the best interpretation is an act of volition of the person applying it[11].

Herbert Hart, in turn, laid emphasis on the open texture of both constitutional and legal rules, permitting more than one reasonable interpretation of their meaning and scope by virtue not only of polysemy and the imprecise nature of the language, but also human fallibility itself and the inability to predict all future factual ramifications and applications of the legal rules[12].

Even where a binding administrative act is involved, it is especially common for a margin of appreciation by the government to remain, whether concerning the indeterminate legal concepts employed in the law, or involving the very concept of public interest assumed to be in the constitution (an indeterminate legal concept *par excellence*), or pertaining to certain difficulties in incorporating facts into the legal rule, in valuing the facts, in occasional obscurity when describing what came before or after the rule etc.[13].

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[11] KELSEN, Hans. *Teoria pura do direito.* Translation by João Baptista Machado. 6th edition. São Paulo: Martins Fontes, 1998. pg. 247 et seq.

[12] *"Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an open texture. So far we have presented this, in the case of legislation, as a general feature of human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. Natural languages like English are when so used irreducibly open-textured. It is, however, important to appreciate why, apart from this dependence on language as it actually is, with its characteristics of open texture, we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, afresh choice between open alternatives. Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods. It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim. [...]. Plainly this world is not our world; human legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring. This inability to anticipate brings with it a relative indeterminacy of aim"* (HART, Herbert Lionel Adolphus. *The concept of law.* 2nd ed. Oxford: Clarendon Press, 1994, pg. 127-128).

[13] "This binding is not the be-all and end-all of Governmental activity. On the contrary, all legal production, abstract and concrete, is located between the extremes of total freedom and strict binding. Thus, the most bound legal application remains free relative to its modalities. As a

Thus, for example, although the government is recognized for a margin of appreciation when it finds itself in the indetermination zone of the concept of public interest and/or the concepts used in the law, there is nothing to prevent the government from voluntarily opting to initiate dialog with the governed in the search for a consensual solution.

Thus, if that is so, as far as administrative acts are concerned, it also is so, to a greater degree, with what are understood to be discretionary administrative acts, since in these cases the government's freedom of choice is much greater.

Indeed, *strictu sensu* discretionary government begins when the work of interpreting the law ends.

Article 3 of the CTN certainly defines tax collecting as an activity "totally" connected to the law.

The notion that the government can only do what is *expressly* provided for in the law, however, is out of date, even with regard to binding acts, because as already emphasized, in the case of the latter there is usually a certain outstanding margin of freedom to interpret the legal concepts and *intentio legis* itself, especially in the light of the explicit and implied constitutional principles (public interest, efficiency, proportionality, reasonableness, legal security, morality, transparency etc.), and interpretations may even be lent to the law in accordance with the Constitution.

Within the framework of Kelsenian interpretation, the government can engage in dialog with the governed. If, within this, it is at the government's discretion to choose how to achieve the public interest, why not do so together with the governed?

There are numerous advantages of a dialog-based solution: greater efficiency, greater transparency involving decision-making criteria, greater accountability, more guaranteed compliance with what has been agreed, in comparison with what is imposed. Moreover, a dialogic debate benefits global understanding of different points of view, thus contributing to the discovery of the best possible choice in the light of the public interest itself; in other words, it favors the discovery of what the public interest will actually be in

result, freedom and binding are not contradictory opposites, but may be mutually connected. Thus, between the Government bound by the law in a given manner (II) and compliant Government (V) lies Government bound in an indeterminate manner (III), Government bound by 'duty rules' and generally discretionary Government. (IV). Literature and case law also employ the terms 'compliant act margin,' 'discretionary act margin' and 'appreciation margin' to characterize these forms of manifestation [...]" (Hans Julius Wolff, Otto Bachof and Rolf Stober, *Direito administrativo,* op. cit., pg. 446-447).

that real situation. In addition, consensual administrative rulings especially reduce the risk of judicialization of the issue and, consequently, court fees, saving both parties time and money.

Bearing in mind that the government is the major litigant within the Judiciary, the judiciary system itself would stand to gain a lot from this dialogic attitude. Therefore, sharing with the governed the preparation of the sense and scope of the rule has shown itself to be clearly more advantageous than a discretionary interpretative choice vertically by the government.

3. Simplification of procedures and countering bureaucracy

If dialog within the scope of fiscal administration is to come about, it is imperative to simplify the procedures and, consequently, reduce bureaucracy.

It is a fact that Brazilian tax relations are characterized by extensive and costly litigation between the parties. Consensus-based conflict resolution models are ineffective and discredited.

A review is required of the behavior of relations between Tax Authorities and taxpayers in order create a permanent communication channel between both of them, which will lead to greater and better tax levies and which is much more productive that imposing penalties and fines.

Within corporations in both the private and public sectors, the necessity has been identified for simplicity and clarity in everyday operations. Cass Sunstein[14] exemplifies this necessity to make things as simple as possible, using current computers and tablets. Technology is becoming more sophisticated with every day that passes and, proportionally, much easier for users to

[14] *"Think again about the best tablets and computers. They don't leave people at sea, asking them to use common sense to figure out what to do next. They are easy to use because the rules are clear and easy to understand and follow. Even three-year-olds can do that. (I have one, and he can). Of course, companies often sought, and seek, greater discretion rather than less. Undue specificity can be a real problem, in part because it is connected with undue complexity and might create bureaucratic nightmares. We can therefore identify two fallacies. The first is that the future of government lies in fewer rules and more discretion. The second is that the future of government lies in more rules and less discretion. To make progress on this question, we need to avoid abstractions and chest-thumping. The context matters. If government can reduce cost and increase flexibility by granting discretion, and if it can do so without creating uncertainty, evasion, or confusion, it should grant discretion. If government can reduce cost and increase simplicity by producing clear rules, and if it can do so without creating expensive and pointless rigidity, it should opt for clear rules. The project of simplification will call for an increase in discretion in some domains and an increase in clear requirements in others"* (SUNSTEIN, Cass. *Simpler:* the future of government. Nova York: Simon & Schuster Paperbacks, 2013. pg. 12).

handle. The rules for using it are clear and intuitive. User manuals are no longer required. Governments must follow this example.

Unfortunately, within the Brazilian context, the opposite can be seen in the fiscal area, where the ancient oxymoron between taxation and simplicity prevails.

Bureaucracy has always been an impediment within the Brazilian tax system. In 2014, the OECD had already tagged Brazil as the country that spent most time to pay taxes, with an average of 2,600 hours per annum[15].

The bureaucratization process of the government has dragged on throughout the country's history[16] and its effects can be seen every day in tax relationship which, because they involve mandatory tax collection, are even more latent.

Quite often bureaucracy is justified to prevent fraud and to ensure greater control of the agents of the state, and here, once more, the issue of corruption raises its head This feeds the vicious circle of the Brazilian tax system: an excess of rules because of excessive distrust of everyone, supported by corruption. As Susan Rose-Ackerman and Bonnie J. Palifka[17] rightly point out, corruption is a symptom that something is wrong with the government.

According to the World Bank Report published in March 2018, entitled *Jobs and growth: Brazil's productivity agenda*[18], Brazil would have to prioritize tax reform that would radically simplify the taxes and contributions system, unify the rules and eliminate the countless inefficient fiscal incentives. These

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[15] OCDE. *Paying taxes 2014: the global picture — a comparison of tax systems in 189 economies worldwide* Available at: <www.pwc.com/gx/en/paying-taxes/assets/pwc-paying-taxes-2014.pdf>. Accessed on: March 26, 2018.

[16] See: MENDONÇA, Maria Lírida Calou de Araújo; OLIVEIRA JÚNIOR, Vicente de Paulo Augusto de. O processo de burocratização da administração pública brasileira, as transformações do regime de servidores públicos, e o direito fundamental à boa administração pública. In: SILVA FILHO, Arnaldo Coelho da; MENDONÇA, Maria Lírida Calou de Araújo; HOLANDA, Marcus Maurício. *Administração pública e tributação no Brasil.* Rio de Janeiro: Lumen Juris, 2017. pg. 97-119.

[17] *"Corruption is a symptom that something has gone wrong in the management of state. Public institutions govern the interrelationships between the citizen and the state. If corruption is present, such institutions are used, not to further public values, but, instead, for personal enrichment and the provision of benefits to the corrupt. The price mechanism, so often a source economic efficiency and a contributor to growth, can, in the form of bribery, undermine the legitimacy and a contributor to growth, can, in the form of bribery, undermine the legitimacy and effectiveness of government. Poorly designed government institutions cause economies to stagnate and inequalities to persist"* (ROSE-ACKERMAN, Susan; PALIFKA, Bonnie J. *Corruption and government:* causes, consequences and reform. 2nd ed. Nova York: Cambridge University Press, 2016. pg. 51).

[18] *Jobs and growth: Brazil's productivity agenda* — 2018. World Bank Report. Available at: <http://documents.worldbank.org/curated/en/203811520404312395/Emprego-e-crescimento-a-agenda-da-produtividade>. Accessed on: Mar 26, 2018.

should be the basic principles of a reform, the Report suggests. In the eyes of the World Bank, besides reassessing the tax structure, an adjustment to public spending would be needed.

Simplicity is based primarily on transparency. When one defends transparency and the sharing of information, one cannot position oneself between state-owned entities alone. As Hugo Segundo and Raquel Machado are quick to point out, this transparency must also be shared with the taxpayers, also avoiding repetition in personal information and compliance with countless ancillary obligations[19].

One hopes that transparency will henceforth be a rule in the society of the future. We are currently experiencing a transition phase between the culture of secrecy and the era of transparency, and this is a fundamental step towards dialogic fiscal administration, since one cannot resolve conflicts without knowing all the facts.

4. Surpassing old paradigms

The use of consensus mechanisms is still encountering resistance within the sphere of both administrative and tax law. However, a clear trend is emerging towards surpassing old preconceptions in this respect, both in comparative and Brazilian law.

By way of example, PGFN Ordinance No. 33, dated February 8, 2018, prior to taking effect (120 days following publication), was subjected to public debate undertaken by the PGFN itself. The public hearing was held on May 5, 2018, with the participation of business representatives, judges, public and private attorneys and auditors of the Brazilian Federal Revenue Service, among others.

PGFN Ordinance No. 33/2018 regulates articles 20-B and 20-C of Law No. 10.522, dated July 19, 2002, and governs the procedures for referring debits for registration as overdue federal tax liabilities, while also establishing the criteria for submitting requests for review of registered debt, for advance offering of assets and rights to be pledged and for selective filing of tax executions.

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[19] MACHADO SEGUNDO, Hugo de Brito; MACHADO, Raquel Cavalcanti Ramos. Repensando a administração pública na era da internet. In: Arnaldo Coelho da Silva Filho, Maria Lírida Calou de Araújo Mendonça and Marcus Maurício Holanda, *Administração pública e tributação no Brasil*, op. cit., pg. 41.

PGFN Ordinance No. 33/2018 received criticism not only from the business and legal community, but also from within the Brazilian Federal Revenue Service (Codac Note No. 80, dated March 23, 2018), including criticism that the Ordinance was being submitted to public consultations by the PGFN, but without consulting the Brazilian Federal Revenue Service (RFB).

In the academic world, it was pointed out that dialog should have commenced not only after publication of the Ordinance, even if the implementation date was deferred, but rather commencing with a draft of the ordinance whose final wording would have taken into account the contributions of the dialogic debate.

In any case, it is certain that the dialog has already born some fruit, since PGFN Ordinance No. 42, dated May 25, 2018, put off the implementation date of PGFN Ordinance No. 33/2018, in addition to partly amending it, and the Attorney's Office of the General Treasury has stated that "the other contributions received at the public hearing are under analysis and that, in June, it will undertake a public consultation about the text of PGFN Ordinance No. 33, of 2018[20]".

There is evidence to the effect that even with regard to tax collection — which article 3 of the CTN states is "totally bound" to the law— there is room for productive dialog. Therefore, *de iure condito,* even the exercise of regulatory power can be open to the beneficial inflow of an effective and cooperative dialog with taxpayers and other stakeholders.

In this regard, it is important to mention the fact that article 29 of the Law on Introduction to the Rules of Brazilian Law (LINDB), included by Law No. 13.655/2018, in effect 180 days after publication (on April 26, 2018), instituted a relevant dialogic mechanism fully applicable to the taxation realm by providing for the possibility of a prior public consultation for manifestation by stakeholders, which "will be taken into account in the decision". Although holding a prior consultation is optional ("may be preceded by a public consultation") and the manifestations of the stakeholders are not binding on the decision to be made by the government, which may decide against such manifestations; in this case, the argumentative burden showing that the manifestations are not justified, rests with the government[21].

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[20] Available at: <www.pgfn.fazenda.gov.br/noticias/2018/pgfn-promove-ajustes-e-altera-o-inicio-da-vigencia-da-portaria-no-33-2018>. Accessed on: June 10, 2018.

[21] "Art. 29. In any body or Branch, any normative act taken by the government, except for those merely for internal organization, may be preceded by a public consultation for stakeholders to express their opinion, preferably electronically, which will be taken into account in making the decision.

Therefore, if it opts to hold the prior consultation, the government will not be able to ignore the manifestations of the stakeholders, and it must expressly address them in the justification for the administrative act ("which will be considered in the decision"). This legal requirement is important for creating room for proper dialog and argumentative debate, avoiding a mere *mise-en-scène* engaging in dialog to lend democratic legitimacy to an administrative ruling already taken unilaterally.

On the other hand, even in the absence of legal authorization, agreements are reached between professional accreditation councils (self-managed federal entities) and debtors of annuities ("contributions in the interest of professional categories"-type taxes) in tax executions already filed. These are taxes created by the Federal government in favor of those corporate self-managed entities, as approved in article 149 of 1988 Constitution of the Federative Republic of Brazil. Given the modest value of these annuities, the cost of collecting them is usually higher that the amount of the debt.

The *ratio* underpinning such agreements makes it very clear that in the conflict between the principles of legality and efficiency, the latter prevails: instead of receiving nothing — or perhaps creating a loss for the State by collecting the debt which, even when paid in full, will be less than the amount disbursed to collect it — the public interest is better served by entering into agreements to immediately receive part of the debt, thus putting an end to the litigation.

Another step forward towards new models of dialogic fiscal administration is Law No. 13.140/2015, which rules on mediation between private parties as a means of resolving controversies and about of conflicts within the sphere of government.

The law defines mediation as the technical activity carried out by an impartial third party with no decision-making power who, chosen or accepted by the parties, assists them and fosters the identification or development of consensus solutions for the controversy.

As for self-mediation of conflicts to which a legal entity of public law is a party, article 32 provides for the creation of chambers for the prevention and administrative resolution of conflicts.

Paragraph 1 The call notice will contain the draft of the normative acts and will set the deadline and other conditions for the public consultation, with due regard for the legal and regulatory, as the case may be" (Law. No. 13.655/2018).

The most controversial point of that law refers to the application of article 38 that deals with negotiation in taxation matters, an issue of great resistance in the Brazilian context, as we will see below.

5. New approaches to fiscal administration: negotiation and arbitration

Excessive litigation involving taxation results in incalculable losses for society as a whole. In defense of the institution and the growing consolidation of a new profile in fiscal administration, one has to take into account the dynamics of contemporary society that subject law to a transformational role, with negotiation and arbitration as recent viable instruments for eliminating conflicts[22].

The fact is that there is a lot of resistance to the idea of negotiation in tax matters in Brazil, usually based on the argument of the absence of the power to tax and the government's monopoly of exercising the jurisdictional function[23]. Such restrictions must be overcome and approached from a different angle. Firstly, because not all tax discrepancies imply the cancellation of the tax credit, which may also happen before the tax credit is set up. Quite often these issues involve interpretation of the legislation, where arbitration and negotiation would be very useful and would prevent countless lawsuits.

This is corroborated by the understanding of Casella and Escobar, whereby denying the possibility of more effective and efficient solutions for fiscal administration representing the overall public interest would be to subvert the constitutional and structural logic of the State itself[24].

In spite of the resistance within the Brazilian level, settlement and arbitration as alternative methods of conflict resolution have been successful in several other countries.

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[22] See: GUERRA, Sérgio. Arbitragem nos serviços públicos delegados. In: FREITAS, Juarez; COSTA, Renato Saeger Magalhães (Coord.). *Direito público:* grandes temas — homenagem a Urbano Vitalino de Melo Filho. Curitiba: Juruá, 2017. pg. 112.

[23] In this respect: MELLO, Celso Antônio Bandeira de. *Curso de direito administrativo.* 32nd ed. São Paulo: Malheiros, 2015. pg. 812.

[24] CASELLA, Paulo Borba. Arbitragem tributária e a Câmara de Conciliação e Arbitragem da Administração Federal. SCHOUERI, Luís Eduardo; BIANCO; João Francisco (Coord.). *Estudos de direito tributário:* em homenagem ao professor Gerd Willi Rothmann. São Paulo: Quartier Latin, 2016. pg. 744.

In Portugal, Decree-Law No. 10/2011, using the authorization granted by article 124 of Law No. 3-B/2010, regulated arbitration as an alternative means for jurisdictional resolution of conflicts involving taxation issues, with binding efficacy on fiscal administration. Since then, there has been a noticeable improvement in Portuguese administrative law, traditionally jealous of the absence of public interest and resistant to arbitration, especially in tax issues, classically considered an "area of aggressive management ", not a "zone of cooperation" between Tax Authorities and taxpayers. The legislative turning point was extremely sharp, going as far as arguing that arbitration in tax issues stood more to gain than other fields of Portuguese administrative law[25].

In the United States, since 1990 permission has existed for consensual submission to arbitration in tax litigations between the Internal Revenue Service (IRS) and the taxpayers, under the terms of Tax Court Rule 124, partially amended in 2011[26]. The result is binding on fiscal administration[27]. Other dispute resolution methods are permitted, such as mediation, but this is non-binding in nature. In the USA, almost 90% of tax disputes are resolved through negotiation, mediation and arbitration, which evidences the clear dominance of dialog-based solutions over those unilaterally imposed by the fiscal administration, the majority of which would subsequently end up in the courts[28].

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[25] As per, inter alia: OLIVEIRA, Ana Perestrelo de. *Arbitragem de litígios com entes públicos.* 2nd edition. Coimbra: Almedina, 2015. pg. 101-107.

[26] Well before Tax Court Rule 124, however, alternative methods were routinely applied for resolving taxation disputes: *"The IRS, despite its notorious reputation, has been in the alternative dispute resolution business for over seventy-five years. Perhaps only recently, however, has the Service made customer service a priority. In pursuit of this goal, and in an effort to comply with congressional mandate, ADR mechanisms have been developed to supplement the success of the Appeals Division. In addition, arbitration and mediation remain viable options even after a case leaves Appeals without a settlement"* (MATHEWS, Gregory P. Using negotiation, mediation, and arbitration to resolve IRS-Taxpayer disputes. *Ohio State Journal on Dispute Resolution,* v. 19, n. 2, 2004, pg. 736).

[27] *"RULE 124. Alternative Dispute Resolution (a) Voluntary Binding Arbitration: The parties may move that any factual issue in controversy be resolved through voluntary binding arbitration. Such a motion may be made at any time after a case is at issue and before trial. Upon the filing of such a motion, the Chief Judge will assign the case to a Judge or Special Trial Judge for disposition of the motion and supervision of any subsequent arbitration. [...]".* Available at: <www.ustaxcourt.gov/rules/ rules. pdf>. Accessed on: June 10, 2018.

[28] *"The use of negotiation by Appeals represents a system designed to cover a broad range of disputes and has shown great success statistically. In fact, between eighty-five and ninety percent of the cases that reach Appeals result in settlement. However, in 1996, Congress mandated that all government agencies begin to implement ADR into their administrative dispute resolution processes. Additionally, the IRS Restructuring and Reform Act of 1998 has led the IRS to develop more formal ADR policies and procedures. This congressional action, along with a desire for greater efficiency, has brought about the development of mediation and arbitration programs designed to supplement the existing Appeals process"* (Gregory P. Mathews, Using negotiation, mediation, and arbitration to resolve IRS-Taxpayer disputes, op. cit., pg. 715).

In France, negotiation is provided for in article 247 of the *Livre des procedures fiscales*, which authorizes the fiscal administration to negotiate and attenuate tax penalties, including waiving certain taxes. Worthy of note in this country are the mixed departmental commission consisting of representatives of the Tax Authorities and the taxpayers, who get together in a location that favors dialog to search for a consensual solution before the litigation phase begins[29].

There is evidence that settlement has advanced in several countries[30], and it is clear that attempts to reach an agreement about the subject of a tax credit is, in addition to being a rational and effective measure for resolving taxation conflicts, something the contemporary world demands.

In Brazil, the issue has come under discussion again, both through the enactment of Law No. 13.140/2015 whose article 38 provides for the possibility of negotiation in the case of taxes managed by the Brazilian Federal Revenue Service (SRF) or credits registered as Overdue Federal Tax Liabilities (OFTL), and by impulse given by Bill of Law No. 5.082/2009, which was forwarded to the Finance and Taxation Commission (CFT) on April 25, 2018.

Bill of Law No. 5.082/2009 is worth highlighting because article 38, I, of Law No. 13.140/2015 (c/c article 32, II and III) excluded the possibility of reaching an auto-compositive solution with private citizens regarding those taxes managed by the SRF or registered as OFTLs, as well as entering into a consent decree (TAC) in this regard[31].

It is convenient to put on record the fact that, as a general rule, the National Taxation Code provides for negotiation as the means of extinguishing tax credits, allowing ordinary law to stipulate the conditions for entering into negotiation with mutual concessions, which does not infringe the provisions of articles[32] 150, paragraph 6, and 155, paragraph 2, XII, g, of the 1988 Constitution of the Federative Republic of Brazil, since negotiation cannot be confused with fiscal waivers or favors, thereby overruling the old arguments that to institute this would be unconstitutional or even incompatible in

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[29] MELO FILHO, João Aurino de. *Racionalidade legislativa do processo tributário.* Salvador: JusPodivm, 2018. pg. 361.

[30] About comparative law in issues of taxation conflict resolution, see: ibid., pg. 329- 422.

[31] "Article 38. In cases where the legal controversy involves taxes under the remit of the Brazilian Federal Revenue Service or credits registered as overdue federal tax liabilities: I — the provisions of items II and III of the main section of article 32 do not apply; [...]"

[32] "Article 156. Extinguish the tax credit: [...]; III — the negotiation; [...]." "Article 171. The law, under the conditions it establishes, may permit the tax body and taxpayer to enter into a negotiation which, under mutual concessions, results in an end to the litigation and consequent extinguishment of the tax credit" (National Tax Code).

taxation issues[33]. In this respect, Law No. 10.259/01 expressly authorizes negotiation in cases that fall within the remit of the Federal Small Claims Courts, not excluding tax cases[34]. It is also clear that the dogmas of strict legality and absolute supremacy of public interests over private interests no longer represent barriers to the implementation of negotiation.

It is a fact that Bill of Law No. 5.082/2009 deserves revision on several accounts, including because of the inherent evolution in procedures involving oversight, management and collection of tax credits over the last decade; but it must also be reassessed if it is to advance and become effective, enabling negotiation as a measure for resolving conflicts and ending litigations to extinguish tax credits, as is the case in several countries.

One must also take into account the country's serious economic crisis, which demands the adoption of new instruments and strategies for levying taxes, primarily the reduction of excessive litigation, ineffective and damaging to everyone. Negotiation allows taxpaying citizens to participate within the scope of fiscal administration, resulting in legal certainty in tax relations, in addition to the enhancement and necessary standardization in interpreting and applying tax legislation.

The important thing right now is that instead of opposing the advance of rules that enable dialogic fiscal administration, as is the case of negotiation in tax issues, immediate action needs to be taken to improve legislative bills of law that promote a fair tax system.

There is absolutely no doubt that Bill of Law No. 5.082/2009, or any other that proposes the immediate regulation of tax negotiation, is part of a growing movement of interaction between the tax authorities and society, a contemporary requirement of the rule of law.

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[33] In this respect, emphasizing that it is not a matter of the supremacy of the supplementary law governing negotiation in taxation matters: "Direct action for the declaration of unconstitutionality: writ of mandamus [...] II — Extinction of tax credits: moratorium and negotiation: implausibility of the allegation of violation of articles 150, paragraph 6 and 155, paragraph 2, XII, g, of the CF, as it does not involve tax breaks. [...]" (ADI 2405 MC, Judge Rapporteur for the Appellate Decision: Justice Sepúlveda Pertence, Full Court, decision rendered on November 6, 2002, JG February 17, 2006).

[34] "Article 10. [...] Sole paragraph. The legal representatives of the federal government, autonomous government entities, foundations and federal state-owned companies, as well as those indicated in the main section, are authorized to settle, compromise or desist in proceedings within the remit of the Federal Small Claims Courts."

6. Final considerations

Until such times as the ideal point of correction and adaptation of tax legislation to the contemporary world is reached, the creation of an institutionalized dialog between Tax Authorities and taxpayers in the search for differences of interpretation may be an effective instrument in the quest for good practices.

One is not advocating that all administrative decisions must be dialogic, nor that the simple fact that they are not dialogic would render them unconstitutional by violating the constitutional principle of efficiency. Indeed, there will never always be enough time to bring about the actual participation of the governed, just as the likely gain in efficiency will not always offset the burden arising from the dialogic proceduralization of the administrative ruling (the burdens of finance, time, human resources, opportunity costs, etc.). With this in mind, article 29 of the LINDB, introduced by Law No. 13.655/2018, did not make it mandatory to hold a prior public consultation in all situations.

Moreover, given its nature as a principle-based rule ("commandment of optimization", as expressed by Alexy), the efficiency principle supports several degrees of achievement whereby, above the line of inefficiency, there are several possible levels for satisfying the principle that cannot be labeled as invalid. Thus, although one can assert that certain measures are more efficient than others, the least efficient do not infringe the principle of efficiency if they exceed the acceptable level of efficiency, in other words, they cannot be invalidated solely because there are other more efficient measures.

Negotiation in tax issues has been strengthened by the new paradigms of dialogic fiscal administration which are proposed herein. Thus, one can predict that Brazilian fiscal administration, increasingly geared to practical results, perceiving the advantages involved, will become increasingly dialogic and, therefore more democratic.

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