

The Brazilian Supremo Tribunal Federal and the tax immunity of electronic books, newspapers and periodicals.

Introduction

This paper intends to verify whether the tax immunity of books, newspapers and periodicals (which are provided by Brazilian Constitution in order to promote culture and freedom of speech) can be applied to the so-called "electronic books" and similar devices, now part of our day-to-day life because of the popularization of various technologies and electronic-readers (Kindle, iPad, among others).

1. The constitutional issue: books, newspapers, and tax immunities.

The Brazilian Constituent legislator of 1988 established a limitation to the "power" to tax the act of selling books, newspapers, periodicals and the paper intended for printing them. This tax immunity is provided by Article 150, VI, "d" of the Constitutional Text (transcript below):

“Article 150. Notwithstanding any other guarantees ensured to the taxpayer, it is forbidden for the Union, the States, the Federal District and Municipalities:

VI - institute taxes on:

(...)

d) books, newspapers, periodicals and paper intended for printing”.

It is known that the rules of tax immunity, provided by Brazil’s Fundamental Text, consist of constitutional limitations on the capacity to impose taxes that prevent the tax liability in situations covered by them. There are tax immunities provided for in the Constitution that are purely casuistic and can be considered actual political issues (such as the immunity regarding the “ICMS”¹ on oil - Article 155, X, "b" of the Constitution). There are other tax immunities, however, that consist on actual guarantees of fundamental rights (the so called “instrumental immunities”), since they aim to protect the free exercise of a personal right regarded as more important than others, such as freedom of religion, political choice and (specially regarding the tax immunity over books), the freedom of expression and the dissemination of culture.

In this regard, see below the following ruling of the Brazilian Supremo Tribunal Federal (STF, Brazil’s Supreme Court regarding the interpretation of the Constitution), delivered on the RE 221.239:

“The scope of the tax exemption on books, newspapers, periodicals and paper used to print is to avoid embarrassment to the exercise of freedom of intellectual, artistic

¹ICMS = “Imposto sobre Circulação de Mercadorias e Serviços”, basically a tax imposed over the act of selling goods.
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and scientific speech and the freedom of communication, in order to facilitate people's access to culture, information and education. The Constituent Assembly, when establishing this boon, did not make reservations as to the didactic or artistic value, the relevance of the information disclosed or the cultural quality of a publication. It is not up to the applier of the constitutional norm set aside this important right to protect the exercise of democracy, under subjective judgments about the quality of cultural or educational value of a publication aimed at children and teenagers". (RE 221,239, Rel. Min. Ellen Gracie, trial 05/25/2004, 2nd Class, DJ of 06/08/2004).

Or, as stated in another judgement conducted by Justice Marco Aurelio:

"The reason for the immunity provided for in the Constitution, and nothing comes without a cause, a sufficient reason, a necessity, is in the interest of society in seeing forbidden some procedures, although standardized, that could inhibit the material or intellectual production of books, newspapers and periodicals". (RE 174.476, Rel. Min Marco Aurelio, trial 09/26/1996, Plenum, DJ 12/12/1997).

The interpretation about the tax immunity, especially of the book and its accessories, has never been peaceful on the Judiciary. Thus the Supreme Court has already signed understandings by which:

a) Photo Paper (photo paper, tele, film, unexposed, for monochrome images, photo paper w / laser typesetting, - RE 178.863) and everything that integrates the final product (book / journal) covered by the tax immunity (RE 392,221, Rel. Min Carlos Velloso, trial 18/05/2004, 2nd Class, DJ of 11/06/2004)

b) inputs that are not part of the "final product" are not covered (RE-324600-AGR), for example, the services of typesetting (RE 230.782) and the advertising inserts (RE 213094)

c) "less traditional" publications as handouts (RE 183403) sticker albums (RE 221.239) and telephone directories (RE 199.183 RE) are covered by the Constitutional Immunity.

Based on this series of trials, the Supreme Court issued the digest² 657, that says: "The immunity provided for in art. 150, VI," d "of the Constitution covers the photographic films and papers needed for publishing newspapers and periodicals. "

The quoted digest was edited based on a series of precedents in which the Court discussed the impact of immunity on the photographic paper and on other inputs. Importantly, in a trial of these (RE 203.859) the basis used by Justice Mauricio Correa to deny the applicability of immunity to "other inputs" was the historical aspect that, during the Constituent Assembly of

²Digests ("Súmula", in Portuguese) are phrases approved by the Court that summarize its understanding based on a series of judgements over the same issue. The regular digests have only rhetorical value, since the other Courts are not obligated by it. Recently (2004), Congress approved an amendment to the Constitution that authorized STF to edit binding digests. This authorization was only implemented in 2006.

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1988, some Constituent Deputies intended the inclusion of other inputs (different than paper) on the immunity rule. As such proposal was not approved by the Assembly, the interpretation of the constitutional text would be conditioned by this aspect.

Justice Mauricio Correa said at the time :

“...during the Constituent Assembly of 1988, as is known, a proposal was presented to introduce a modification on the current Article 150, VI, letter "d" of the Constitution, in order to include some other inputs.

This proposal, however, was not approved, which means that the mens legislatoris certainly understood that there is immunity solely for the print paper, as it was permanently enshrined in the constitutional provision above, away if so, its extension to other types of inputs”.

This idea was then followed by the Court, serving as a leading thought on the interpretation of digest 657. Namely, as the Constituent expressly rejected the inclusion of other inputs other than the standard paper in the tax immunity rule, one could not make such inclusion by judicial decision.

On the other hand, this summary does not apply itself to the interpretation of the scope of the words “books”, “newspapers”, “periodicals” or “paper”, as used by Brazilian Constituent, since this issue was not discussed on the trials that based the digest.

This summarizes the state of the issue as far as it is understood by the Brazilian Supreme Court nowadays.

2. The issue of CD-ROM's

Recently, Justice Dias Toffoli issued an individual decision on RE 330.817 upholding the appeal and reforming the ruling of the Court of Rio de Janeiro. The constitutional issue raised was the applicability of the tax immunity of “books, newspapers, periodicals and paper used for printing” to an “Electronic Legal Encyclopedia”, that was sold through CD-ROM's.

The Justice understood that a book sold in the physical format of a CD-ROM is not protected under the tax immunity rule, which would be limited to books sold “on paper”. The reasons for the decision can be summarized in the following excerpt:

The appeal deserves to prosper, given that the Court's rulings are to the effect that the immunity provided for in article 150, VI, “d” of the Federal Constitution, given to books, newspapers and magazines, does not apply to other inputs that are not covered by the meaning of the phrase “paper for their printing.”

In its individual decision, Toffoli cites other decisions (all equally monocratic) issued by the

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Court on similar cases, that would justify his conclusion: RE 416,579, RE 282,387 and AI 530.958.

Below are the excerpts that summarize the basic rationale behind each of these individual decisions:

"Given that the physical media that acts as media ("cd-rom") is not confused and can not be assimilated to the paper, the contested decision overturned the guideline established by this Court. " (RE 416579. Justice Joaquim Barbosa).

"The immunity provided for in Article 150, VI," d "of the Constitution is confined only to paper or similar material, intended for the printing of books, newspapers and periodicals." (RE 282387. Justice Eros Grau).

"The contested decision is in accordance with the guidance of this Court abridged in the sense that the immunity provided for in art. 150, VI, "d", of the "Magna Carta", reaches only films and papers deemed necessary to publish books, newspapers and periodicals, such as photo paper, including those designed for laser typesetting, photographic films, unexposed, for monochrome images, and the role for telephoto (Digest 657). " (AI 530958. Justice Cezar Peluso).

In these trials (all individual and isolated, it must be said), the Justices considered that the Digest 657 would prevent the characterization of tax immunity when the electronic book would be sold in CD-ROM, because it's physical support would not be among the inputs provided on the tax immunity rule, the way it is understood by the Court. In one of them, the ruling stated clearly that the CD could not be assimilated to paper as an input on the manufacturing of books.

We believe that this interpretation is extremely limited and must be reviewed by the Supreme Court, preferably in a trial to be conducted by the Court itself, as a whole, not by the Justices in an isolated way. Below there are some reasons that support this conclusion.

3. The interpretation of the tax immunities and the understanding of the words "book" and "paper": defensive jurisprudence of the Court

As previously mentioned, the rule of immunity commented here can be regarded as an "instrumental immunity ", a rule that forbids the Union or the States to demand the payment of taxes, in order to conserve some fundamental rights. In this case, the tax immunity is meant to protect the fundamental rights of freedom of expression and access to culture.

On the subject, we quote a previous paper that has been written by us in which we approached specific immunity of workers unions:

"Basically because the constitutional immunities were created as a tool for maintenance

and implementation of basic rights is that the interpretation of these immunities should always bear in mind the goal sought by the Constituent Assembly.

In this sense it is the teaching of professor Clélio Chiesa: "... it is important that on the analysis of immunity, is used primarily the teleological method of interpretation, in order to obtain conditions for choosing among the possible interpretations that best meet the desideratum intended by the legislature in the protection or promotion of particular values." (Colnago, Cláudio de Oliveira Santos. INCIDENCE OF TAX IMMUNITY ON WORKERS UNION ENTITIES. Tributario.net, São Paulo, a. 5, 3/9/2008. Available at: www.tributario.net. Accessed : 4/9/2008.)

However, if the goal sought by the Constitution to immunize "books, newspapers, periodicals and paper for its printing" was to "... avoid embarrassment to the exercise of freedom of intellectual, artistic and scientific speech and the freedom of communication, in order to facilitate people's access to culture, information and education. "(as STF ruled on RE 221.239), it is essential that the interpretation of the Constitutional clause takes into account such purpose. In other words, one must seek a teleological interpretation.

Currently, the Brazilian Supremo Tribunal Federal has, paradoxically to its own understanding, applied a literal and restrictive interpretation to the statements that define the constitutional tax immunity. Expressions such as "book" and "paper" have been taken in its narrowest possible conception, which led to decisions such as those mentioned above, in which the CD-ROM was treated as a possible input for the production of a book, and not a physical mean of transmitting and promoting knowledge, which would have been more appropriate.

It is clear that the Supremo Tribunal Federal is adopting a "defensive jurisprudence"³ on the issue, which is, at least in our opinion, completely against the will of the Constituent Legislator, that could not foresee the technological advances that led to the current discussions about the rules of tax immunity mentioned here.

Regarding the book tax immunity, there has been a lot of discussion involving what is commonly called the "electronic book" and its correspondence to the tax immunity clause, which we will seek to address below.

3.1 The book on CD-ROM

If an editor decides to sell a work of literature in printed form and on CD-ROM, would that intellectual work be covered by tax immunity only in the first case?

In the opinion of Justice Dias Toffoli, yes. And this misunderstanding interpretation assumed that the CD-ROM would be considered to be an input in the production of the printed book. However, one should agree that when you buy a "book", the overriding interest is in its content.

³As opposed to a supposed Judicial Activism, that either way would not be present if the Court ruled otherwise.
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The word "book", in our understanding, has very different connotations nowadays from those used in 1988 (year when the Constitution was approved), since today the access to content may occur by various means. People can buy the printed book in the bookstore, as they can buy a CD-ROM with the book's content into an electronic file, but also can purchase their own electronic file via the Internet without even requiring a physical medium.

Therefore, the sale of a book, by any of the possible means (printed, CD-ROM or direct transfer of electronic files) can not be hit by any tax, otherwise it would undermine the goal sought by Brazilian Constituent Legislator of 1988, which was to promote freedom of speech and access to culture.

3.2 The Kindle

In the context of this discussion another question arises: would the Kindle, the popular e-reader from Amazon, be subject to the rules of immunity that protect "books, newspaper, periodicals and paper used to its printing"?

We think affirmatively. In our opinion the Kindle consists of a technological invention whose only purpose is to read electronic books. Therefore, it can be considered immune to taxes, not due to some comparison to a book, but because it matches the constitutional concept of "paper". Indeed, without the paper for printing, you can not read a book. Likewise, the Kindle is essential to read the electronic book. Hence the conclusion for which would be for the Kindle electronic book in the same position that the paper would be to the printed book.

3.3 The iPad

Applying to the iPad (the Apple tablet which has sold over 300,000 units only on the first weekend of sales) the same assumptions above, we do not think it would be possible to conclude that it would be covered by the rule of tax immunity. And this conclusion is based on the simple fact that despite being able to use it for reading electronic books, this is not the iPad primary function.

Therefore, as soon as the iPad is more like a computer than a book or even paper for the printing of the book, we understand that it is not covered by the constitutional rule of tax immunity.

3.4 The "electronic paper"

The Epson company announced recently it had created a product that can be considered as an "electronic paper for the world's highest resolution." According to what was announced in the company's website:

Epson has successfully developed A6-size electronic paper (18 cm. Diagonal (71.1 inches)) and only 0.47 mm. thick, using a plastic substrate. Thanks to the use of technology SUFTLA (* 1) original Epson's new electronic paper achieves Quad-XGA resolution (1536 x 2048 pixels), the highest in the world (* 2) and has the potential to increase the screen size . This breakthrough was announced at the International Symposium of Society for Information Display (SID), held in San Francisco.

Just one slight detail: the aforementioned "electronic paper" is not made of paper! It consists on "... a plastic substrate" as the news report above. Its function, however, is unequivocal: it aims to project information for reading, whether of journals, or books.

Would then the "electronic paper" and similar technologies be covered by the Constitutional clause of tax immunity?

It is worth noting that, according to the Constitution, only the paper for the printing of books, newspapers and periodicals can be considered immune. Applying the same idea to the "electronic paper", its immunity would also be subject to its exclusive use for the viewing and reading of the aforementioned means of communication and expression. So, if this condition is met, the electronic paper would be immune to taxes in Brazil.

4. Conclusions about the "electronic book"

If in 1988 the word "book" had a tight and unequivocal meaning, it is true that currently the multiplication of physical media (digital media, electronic files, and the paper itself) by which it is possible to express the freedom of expression and ensure access to culture demand a reinterpretation of its constitutional significance. We interpret the word "book", so as to include any and all copyright manifestation written, printed or otherwise, for any marketable physical support.

We feel that the jurisprudence of the Supreme Court needs to review its conclusions and think about changing the tight way of interpreting the expression "book", applying this thought also to newspapers, periodicals and paper for the printing, adapting its ruling to the reality of today.

After all, German Professor Konrad Hesse once said: "The interpreter can not understand the content of the norm of a point outside of the historical existence, in an Archimedes like way of interpretation, but only in concrete historical situation in which it lies, whose maturity underpinning its content of thought and determines their knowledge and their (pre)-judgment. " (HESSE, Konrad. Elements of constitutional law of the Federal Republic of Germany. Translation to Portuguese by Luis Alfonso Heck. Porto Alegre: Sergio Antonio Fabris, 1998, p. 61)