Scientific Research Publishing

Beijing Law Review, 2024, 15, 2134-2148
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

Per Incuriam: An Exception to Rule of Precedents—The Siscomex Tax Rate Leading Case at Brazilian Supreme Court

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How to cite this paper: de Toledo, M. D. R., & de Carvalho, R. V. G. (2024). *Per Incuriam*: An Exception to Rule of Precedents—The Siscomex Tax Rate Leading Case at Brazilian Supreme Court. *Beijing Law Review, 15,* 2134-2148.
https://doi.org/10.4236/blr.2024.154118

Received: July 11, 2024
Accepted: December 9, 2024
Published: December 12, 2024

Abstract

The maxim *per incuriam* is derived from the Latin expression which means "through inadvertence". "Incuria" means "carelessness". In practice, *per incuriam* appears to mean per *ignoratium*. And with this precedent construction the Brazilian Supreme Court changed the decision about the Siscomex fee rate increase to recognize the unconstitutional of the Ordinance 257/2011 that increase the original value of the Siscomex fee, in disaccording with the Federal Constitution, especially the limitations on power to tax, deciding to refund what was overpaid, and after the first judgment, the leading case n. RE 959.274, the Supreme Court in the general repercussion (case law) Theme n. 1085 the Justices decided to limit the tax increase to the official inflation index. Our purpose is to demonstrate the precedent review and the good effects of the *per incuriam* precedent recognize to correct the wrong decision to protect constitutional guarantees of the taxpayer.

Keywords

Precedents, *Per Incuriam*, Distinguish, Overruling, Siscomex Fee, Supreme Court

1. Introduction

The purpose of this article is to analyze the change in the position originally adopted by the Federal Supreme Court on the Siscomex fee, highlighting the revision of precedents based on mistaken premises, the correction of which has proved essential for the construction of effective judicial protection, in the exact procedural manner outlined by the Federal Constitution.

From this perspective, the procedural issue is characterized as a *per incuriam*

precedent, i.e. disregarding a factual or legal aspect that is essential to the case under consideration, and its full understanding requires a contextualization of the regulation of foreign trade in Brazil, which has even been used to justify the increased use of the Siscomex System.

Thus, in the year 1992, the Integrated Foreign Trade System (Siscomex) was created by Decree No. 660, September 25th, 1992, as an "administrative instrument that integrates the activities of registration, monitoring and control of foreign trade operations, through a single, computerized flow of information" (art. 2 of the aforementioned decree), to manage, under the terms of § 1 of art. 545 of Decree No. 6.759, February 5th, 2009 (Customs Regulation) and art. 14 of Brazilian Federal Revenue Office normative instruction No. 680, October 2th, 2006, the registration of import declarations (DI).

In 1993, Siscomex System began operating with the export modules, and in 1997, the import modules were inaugurated. In 2002, procedures were established to enable importers, exporters and Manaus Free Trade Zone operators to operate on Siscomex System, and to accredit their representatives to carry out activities related to customs clearance.

During 1997 and 1998, no fees of any kind were charged for using the system in question. This behavior was only adopted on 01-01-1999, especially since the regulation of Law No. 9.716, November 26th, 1998. It is important to note that the fee is linked solely and exclusively to the type of import and is required when the Import Declaration (DI) is registered.

The initial amount was R$ 30.00 per DI and R$ 10 for each addition of goods, subject to the limits set by the Brazilian Federal Revenue Office in normative instruction No. 680, October 2th, 2006, and the amounts collected were linked to the Fund for the Development and Improvement of Inspection Activities (FUNDAF), as governed by Law No. 9.716, November 26th, 1998, art. 3, § 4.

Originally, there was disagreement between importers and exporters, as the former objected to the fact that only import operations were charged, while export operations also made use of the same system. The importers claimed that there was a breach of equality between taxpayers and operators of the system, because the tax should represent the cost of using and investing in the system and should not be related to the immunity for export operations.

However, the argument did not prosper before the Legislative and Judicial Powers, and the charge for registering import operations has been maintained to this day.

On May 23, 2011, the Ministry of Finance, by means of Ordinance MF No. 257, May 20th, 2011, established an exorbitant increase in the fee for using Siscomex System, without clearly demonstrating the justification and motivation for this decision. The amounts became R$ 185.00 per DI and R$ 29.50 for each addition of goods to the DI, subject to the limits set by the Brazilian Federal Revenue Office in normative instruction No. 1.158, May 24th, 2011.

At this point, litigation began between importing taxpayers and the Federal Government (the National Treasury) on the grounds that there had been a violation

of taxpayers' fundamental rights, of the principle of legality (a tax increased without a law), of the principle of non-confiscation and, finally, that there had been a clear misuse of purpose, given that the purpose for which the tax was collected differed from that provided for in the rule establishing the tax.

The judiciary has oscillated on the violations indicated. In a first analysis, in 2015, the Supreme Court expressed its opinion unfavorably[1], a position maintained until October 2017, when this Court changed its opinion, including recognizing that the precedents used to support the previous decision were not pertinent to the matter, distinguishing itself to dismiss these judgments, in addition to recognizing the configuration of unserviceable precedents, or *per incuriam*, because they are built on mistaken premises.

In a second stage, the Supreme Court partially overcame its own precedents on the matter to build a new position, already based on the General Repercussion system, mitigating the principle of legality, as will be shown below.

2. Taxpayer's Grounds for Recognizing the Illegality and Unconstitutionality of the Increase in the Siscomex Fee

For a better understanding of the issue, an analysis should be made of the legal and economic grounds on which the legal dispute involving the increase in the Siscomex fee is based. Among the arguments put forward by the importing taxpayers to rule out the increase sought by Ordinance MF No. 257, May 20th, 2011, four main aspects are highlighted and detailed below:

"Deviation in the destination of the collection": the proceeds of the fee for using Siscomex were linked by Law No. 9.716, November 26th, 1998, art. 3, § 4, to the Special Fund for the Development and Improvement of Inspection Activities (FUNDAF), established by art. 6 of Decree-Law No. 1.437, December 17th, 1975.

It was argued that the purpose of the revenue collected by the Siscomex fee had been misappropriated, given that the funds were not being specifically earmarked to cover the costs of operating and investing in the system, thus distorting the institution of the tax under the type of fee, which would be integrally linked to the consideration for the service provided and the investments necessary for the development of the computerized system itself.

"Principle of strict tax legality". Art. 150, I of the 1988 Federal Constitution deals with the principle of legality in tax matters, guaranteeing that no tax shall be instituted or increased except by virtue of Law.

The fact is that the increase in the Siscomex fee was carried out by an Ordinance

[1]And it couldn't be different, if we consider that there were, at that time, five Federal Regional Courts to analyze the same issue, although the same arguments and legislation were used, the interpretation was different, as Alexander Hamilton had already foreseen when dealing with the powers of the Judiciary, with several courts sharing the same competence for judgment: "The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." *In FEDERALIST No. 80. The Powers of the Judiciary.* Availiable in <https://www.foundingfathers.info/federalistpapers/fed80.htm> Accessed on 18.11.2022.

of the Minister of Finance, i.e. an ordinary rule normative act, by the Executive Branch, which was authorized, by delegation granted by Law 9.716, November 26th, 1998, to update the tax, linked to proof of the costs of the system and the investments necessary for its maintenance.

In fact, in addition to the constitutional provision in art. 150, I, there is a need to preserve the minimum guarantee that a law must be enacted to institute and increase taxes. It is important to note that the National Tax Code, in its article 97, regulates and clarifies the scope of the principle of legality, the interpretation of which allows us to state that in the event of a monetary update based on law, which does not imply remodeling the hypothesis of incidence, there is no need to speak of a violation of the principle of legality, but of maintaining its economic content.

However, Ordinance MF 257, May 20th, 2011, and IN RFB 1.158, May 24th, 2011 did not respect the constitutional and infra-legal commands, including the legislative delegation provided for in art. 3, § 2, of Law n. 9.716/1998. This is because the criteria applied for updating the amount to be charged were not clearly demonstrated, given that the delegating rule imposes that the readjustment must consider the costs of using the system and the investments necessary for its maintenance and development.

"Principle of non-confiscation and legal certainty": The increase in the Siscomex fee by Ordinance 257/2011 was not related to any official monetary correction index, since it was a 400% increase, which did not represent the cost of the service used and the investments needed in the system, since no reliable data was provided or demonstrated to justify the readjustment applied. The Siscomex tax was thus clearly confiscatory in nature, exceeding its purpose, a situation prohibited by art. 150, IV, of the 1988 Federal Constitution.

Violation of legislative delegation: The increase applied by the Minister of Finance did not comply with the criteria imposed by the legislation in the delegation for the exercise of tax competence, given that the increase did not observe or demonstrate a pattern of variation in operating costs and investments in Siscomex, within the strict dictates of the legislative delegation referred to in Law 9.716, November 26th, 1998, art. 3, § 2.

In fact, the rule is free of any interpretative nature when it states that "The amounts referred to in the previous paragraph (fee) may be readjusted annually, by act of the Minister of State for Finance, according to variations in operating costs and investments in Siscomex". Therefore, as this data was not shown in MF Ordinance 257, May 20th, 2011, it is illegal.

In the section that is deemed appropriate to demonstrate the foundations of judicial decisions, especially those handed down by the Supreme Court, those arguments presented by taxpayers as the most relevant are delimited.

2.1. Judicial Decisions—First Judgments of the STJ (Brazilian Superior Court of Justice) and STF (Brazilian Federal Supreme Court)—Courts of Precedent

The first decisions on the increase in the Siscomex fee by the STF date back to

2015 and 2016. The first of this decision was identified in appeal to the Federal Supreme Court—RE No. 919.668, when, after analyzing the taxpayer's arguments, the claim that the increase in the Siscomex fee was unconstitutional was rejected on the following grounds:

1) constitutional requirements of the fee: not "corresponding to the consideration of a specific and divisible public service and because its value does not meet the criteria for updating operating costs, Precedent n. 279 of the STF applies, insofar as, in the case in question, the Court of origin understood that it is a fee arising from police power, and not from the provision of a public service".

2) nature of the fee: "conclusions adopted by the Court of origin as to the nature of the fee, whether it derives from the exercise of police power or the provision of public services, would only require a re-examination of the body of evidence contained in the case file", which is prohibited by the STF's constitutional procedural system.

3) Infringement of legality: "the allegations that the readjustment of the fee would infringe legality, or even that the amount established by Ordinance would go beyond the provisions of article 3, paragraph 2, of Law 9.716, November 26th, 1998, the appellant's claim goes against the understanding of this Court".

4) Exclusive basis in infra-constitutional legislation: the legal controversy "was decided based exclusively on infra-constitutional legislation, since the need for a law is not the matter in dispute, but rather the requirements for the validity of the quantum determined by Law No. 9716/1998 in conjunction with MF Ordinance No. 257/2011 and IN RFB No. 1158/2011). Therefore, any constitutional offense, if any, would be of a merely reflexive nature, which does not authorize the opening of an extraordinary appeal."

5) value of the fee: "it would not correspond to the actual cost and would not respect legality; note that this is again a matter that would require re-examination of the factual and evidentiary set".

6) cause of the fee increase: "the cause of the fee increase, whether it was a readjustment or a simple increase, or even the lack of proof of non-compliance with the criteria for updating Siscomex operating costs, would also require a re-examination of the body of evidence in the case file, which is forbidden at this procedural stage."

In the year 2016, there was a new assessment of the matter, as can be seen in another appeal to the Federal Supreme Court, RE 919.752, in which the Supreme Court ruled on the constitutionality of the increase in the Siscomex fee, deciding based on the following arguments:

1) STF case law analyzes Article 237 of the 1988 Federal Constitution from the perspective of the delegation of administrative and normative powers to the Ministry of Finance to supervise and control foreign trade;

2) The fee for using Siscomex is linked to police powers, and not to a public service;

3) Analyzing defects in the formation of the administrative act that adjusted the

fee would require a re-examination of facts and evidence, as well as a re-examination of infra-constitutional legislation, a situation prohibited by STF Precedent 279.

It is important to point out that the central object of evaluation, the STF refuted the argument that the increase in the Siscomex tax was unconstitutional based on Court precedents: RE 226.461, reported by Justice Marco Aurélio, Second Panel, DJ 13-11-1998; RE 224.861, reported by Justice Octavio Gallotti, First Panel, DJ 06-11-1998; and RE-RG 570.680, reported by Justice Ricardo Lewandowski, Full Court, DJe 04-12-2009.

At this point, considering the purposes of this work, it is important to highlight the central argument of the of the STF's decision in the first judgments on the increase in the Siscomex fee: the existence of precedents supposedly analyzing similar matters, with an analysis of the constitutionality of increasing taxes by an ordinary rule act, especially in the delegation of tax powers.

It is therefore necessary to compare the precedents on which the STF's first decisions were based, in order to identify the mistake in using precedents that do not fit the discussion and are therefore inapplicable to validate unconstitutional tax increases:

RE/226461—Rapporteur MIN. Marco aurélio—DJ No. 218 of November 13, 1998. Importation-Used Tires-Prohibition-Principle of legality. The principle of constitutional reasonableness is conducive to holding that the prohibition is validly governed by an Ordinance, which does not require a law, in the formal and material sense, specifying, in an exhaustive manner, the goods that may or may not be imported.

RE/224861—Rapporteur MIN. Octavio Gallotti—DJ No. 213 of November 6, 1998. EMENTA: Used vehicles. Prohibition on their import (DECEX Ordinance No. 08/91). The restriction imposed on the import of used consumer goods by the Executive Branch, which was clearly given the power to control foreign trade by the Constitution in art. 237, is legitimate, and the discriminatory treatment it institutes is perfectly logical and rational. Extraordinary appeal known and upheld.

RE/570680—Rapporteur MIN. Ricardo Lewandowski—DJ Nr. 228 of 04/12/2009. Ementa: tax. export tax. rate change. art. 153, § 1, of the federal constitution. private competence of the president (SIC) of the republic NOT configured. Assignment granted to camex. constitutionality. Discretionary power whose limits are established by law. Extraordinary appeal dismissed. I—The infra-constitutional rule that gives a body within the Executive Branch of the Union the power to set the rates of Export Tax is compatible with the Constitution. II—Competence that is not exclusive to the President of the Republic. III—No offense against arts. 84, caput, IV and sole paragraph, and 153, § 1, of the Federal Constitution or the principle of legal reserve. Precedents. IV—Discretionary power attributed to the Chamber of Foreign Trade—CAMEX, which is limited to the provisions of Decree-Law 1578/1977 and other regulations. V—Extraordinary appeal known and

dismissed.

Having identified the judgments taken as precedents to support the STF's first decisions on the increase in the Siscomex fee, we will now demonstrate the arguments for which these decisions were removed from the precedent characteristic, because they were unserviceable or *per incuriam*.

2.2. The Unserviceabrle Precedent—*Per Incuriam*

With Constitutional Amendment no. 45 and the 2015 Code of Civil Procedure, Brazil is entering a new phase in the formation and valorization of judicial precedents, with the construction of its own system of jurisprudential law, derived from constitutional and legal legislative changes.

It should be noted that the system of judicial precedents has the primary purpose of providing an answer to a legal question that is relevant to society, bringing stability and security, as well as indirectly discouraging "the filing of new lawsuits by those who relied on lottery jurisprudence. By reducing the number of new lawsuits on the same subject, the channels of access to justice will be unclogged, allowing other cases to be examined more slowly and in a shorter time.". (Lima, 2013)

Despite the introduction of a new system, it is imperative to understand the maintenance of the guarantee plexus, whereby that "there ought always to be a constitutional method of giving efficacy to constitutional provisions." (Hamilton, 1788)

Within the system of precedents, with binding effects, it is relevant to detail the legal institute known as precedent *per incuriam*.

This institute, according to Renato Lopes Becho, can be understood as "the hypothesis that the previous decision (precedent) is considered to have been taken carelessly (*per incuriam*). In more direct terms, a *per incuriam* decision is a wrong decision" (Becho, 2021).

In other words, the decision was made without observing the law or even in breach of the law itself within the civil law system. An example of a situation in which this defect occurs is the application of a repealed law or a law that is inapplicable to the specific case.

Also, for common law countries or those that have a system of precedents, a *per incuriam* decision is formed when there is application of an inapplicable precedent, or non-compliance with the applicable precedent, causing a breakdown in the security and uniformity of jurisprudence, without overruling or distinguishing precedents, but by pure mistake on the part of the judge. An example of this is a judgment that does not take into account the existence of a precedent on the matter, or the existence of a binding precedent such as general repercussion in the opposite direction to that decided.

David M. Walker summarizes this problematic: "*Per incuriam* (by carelessness). A decision rendered *per incuriam*, in ignorance of a relevant statute or precedent, is not a precedent which need be followed" (Walker, 1980).

Also, according to an important doctrine called Halsbury's laws of England, in English law a *per incuriam* decision has the following contours:

"A decision is given *per incuriam* when the Court has acted in ignorance of a previous decision of its own or of a Court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lord's decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force. A decision should not be treated as given *per incuriam*, however, simply because of a deficiency of the parties, or because the Court had not the benefit of the best argument and, as a general rule, the only cases in which decisions should be held to be given *per incuriam* are those given in ignorance of some inconsistent statute or binding authority" (Abbas, 2009).

Based on the assertions outlined above, it is necessary to explain the reason for claiming that the rulings on the Siscomex fee, produced in RE n. 919.668 and 919.752, fall under the institute or incuriam qualification.

In order to resolve the issue, it is understood that these decisions are characterized as *per incuriam* precedents because they were handed down by incorrectly applying the text of the 1988 Federal Constitution, departing from its essential final interpretation, as well as deriving from the use of precedents that are foreign to the factual and legal context of the case on trial.

In fact, the error of the first Siscomex fee precedents is unquestionable, given that it validated the increase in the tax by an act of the Executive Branch, in the form of an Ordinance, when the only exceptions to the principle of strict legality are listed in articles 153, § 1 and 177, § 4 of the 1988 Federal Constitution, which deal with import tax, export tax, tax on industrialized products, IOF and CIDE, which do not cover fees.

In other words, there has been an inadmissible expansion of the exception rule, which is manifestly forbidden by the rules of legal hermeneutics. This misunderstanding has produced a judicial understanding that is in direct contradiction to the Federal Constitution, causing serious damage to the rights being protected.

In this sense, we agree with the statement that, "While, interpreting the law the court has to observe many legal and technical formalities for the smooth, transparent and consistent functioning of the judicial system. The judge is supposed to keep balance between his subjective sense of justice and objectivity of law and, his personal view should not outwit the established norms of justice, in a given society." (Abbas, 2009)

In addition, the judgments in RE n. 919.668 and 919.752 were based on precedents that analyzed different issues, i.e., different matters, demonstrating that not even the ratio decidendi could be applicable to the discussion on the unconstitutionality of the fee increase.

At this point, it was necessary to distinguish in order to identify that the judgments listed as grounds for the decision to validate the increase in the Siscomex

fee would not be applicable to the factual and legal situation under consideration, given that those judgments analyzed different cases, without identifying the factual or legal context that could direct the result.

In appeal to the Federal Supreme Court RE No. 226461 analyzed the constitutionality of the Ordinance that prevented/prohibited the importation of used tires, based on the principle of legality, but without involving taxation or an increase in taxation. Consequently, it is not related to the subject matter and grounds of the request for recognition of the unconstitutionality of the increase in the Siscomex fee.

In other hand, the appeal to the Federal Supreme Court RE No. 224861 analyzed the constitutionality of importing used vehicles, based on an ordinance issued by DECEX—the Brazilian Federal Revenue Service's Foreign Trade Inspection Department, but without any relation to the tax increase or the constitutional tax principles that deal with restrictions on the power to tax.

Only with regard to appeal to the Federal Supreme Court RE No. 570.680 would it be possible to point out a point of contact with the issue of restricting the power to tax, since it deals with export tax, whose rate change is provided for in article 153, §1 of the Federal Constitution.

However, this is only an apparent identity, since the supposed paradigm deals with a tax in the strict sense of the word and the hypothesis being overcome deals with fees in the strict sense of the word, which are not excepted by the principle of strict legality.

Thus, it was essential to distinguish between the judgments as grounds for carrying out a second analytical comparison of the problem, analyzing the legislation, identifying other precedents or even creating a new precedent, as was done in the case involving the increase in the Siscomex fee.

Eugênio Facchini Neto presents the operationalization of the distinguish:

After a complete analysis of the facts, we move on to examine the legal issues, discussing the applicable legal principle, examining its origin, its evolution, the changes it has undergone, the laws that embrace it, its application in state and federal courts. It is at this point that the art of distinguishing is also exercised, distinguishing between precedents where the same principle was at stake, but where the relevant facts present marked differences to the point of justifying non-compliance with the precedent. Not only legal arguments are invoked, but also extra-legal grounds, including social, philosophical and justice reasons, in order to interpret the scope of the principle and reach a decision on whether or not to apply it (Facchini Neto, 2014).

It can be seen that, either by misapplying the 1988 Federal Constitution or by applying the wrong precedents, the judgments in Extraordinary Appeals Nos. 919.6687 and 919.752 formed *per incuriam* precedents, which were corrected in the judgment in RE 959.274, with an unequivocal overruling of those judgments, ushering in a new era for the matter, preserving the limitations on the power to tax established by the 1988 Federal Constitution.

3. Overruling—The Revival of Limitations on the Power to Tax—The Judgment of the Interlocutory Appeal in Extraordinary Appeal No. 959.274

Initially, the institutes of distinguishing and overruling indicate the existence of a change in the social or legal context, as justification for overruling or distinguishing a precedent. But in the case of the Siscomex Tax, the trigger that justified the exercise of distinguishing and overruling was the recognition of an error on the part of the judges, based on a precedent that was inapplicable to the case.

These institutes are not intended to perpetuate the discussion and review decisions indefinitely, but to identify the need for correction by removing decisions from the character of precedent, as L. R. Otago warns: "the powers of distinguishing and overruling mean that the last word has never been said" (Thomas, 2005).

Thus, overruling is conceptualized as the overcoming of past precedent, which will no longer be applied as a binding understanding to new similar cases that succeed it. In other words overruling means "change in the understanding of a certain court on a previously pacified, by alteration in the legal system or by historical factual evolution" (Becho & Gutierres, 2023).

It should be noted that in the current procedural codification, the rules ensure the perpetuation of proceedings in order to guarantee stability and security in the legal relationships regulated.

This gives rise to the exceptional nature of the occurrence of overruling, the unusual nature of which is presented by Caio Malpighi.

With regard to overruling, this is the overcoming of the understanding established in the previous case, at which point it loses its binding force, since the court adopts a new orientation, abandoning the old one. There is, however, an important caveat to be made with regard to the method of overruling, as Ana Carolina de Sá Dantas points out: "its unusual nature is justified by the need to maintain legal certainty. In other words, it is unreasonable for the same Court to constantly change its position on a given issue, which causes legal uncertainty and violates the guiding values of the doctrine of stare decisis (Malpighi, 2022).

That said, overruling a precedent requires rational arguments to legitimize a new position, under the terms of § 4 of art. 927 of the Code of Civil Procedure.

The reason for this requirement lies in the principle of unity and stability contained in Article 926 of the Code of Civil Procedure.

Art. 926: The courts must standardize their jurisprudence and keep it stable, intact and coherent.

It can be concluded that the case analyzed in this study—i.e. the increase in the Siscomex fee—meets the legal requirements for overruling precedent *per incuriam*.

This is because the overcoming of previous "precedents" on the matter is identified by the express provision of the winning vote in the judgment of the Interlocutory Appeal in Extraordinary Appeal No. 959.274, which recognizes the error in the formation of previous precedents, so that the understanding must be

changed.

In view of this, there is effectively a case of overruling, in the terms set out by Michael J. Gerhardt: "Overrulings are easy to spot because the justices use such telling terms as "overrule," and they feature either sharp conflict or consensus among the justices over the authority of particular" (Gerhardt, 2008).

The judgment handed down in the interlocutory appeal in Extraordinary Appeal No. 959.274 provides for an analysis of the factual legal context, as can be seen in the transcript below:

Ementa: Tax law. Interlocutory appeal in extraordinary appeal. Siscomex user fee. Increase by ordinance of the ministry of finance. Affront to tax legality. Interim appeal provided.

1) An increase in the rate of the Siscomex User Fee by an infralegal normative act is unconstitutional. Although the law that instituted the tax allowed the Executive Branch to readjust the amounts, the Legislative Branch did not set minimum and maximum limits for any tax delegation. 2) As provided for in art. 150, I, of the Constitution, only a law in the strict sense of the word is a suitable instrument for creating and increasing taxes. Tax legality is, therefore, a true fundamental right of taxpayers, which cannot be relaxed in cases that are not constitutionally provided for. 3) The interlocutory appeal is granted only to allow the extraordinary appeal to be processed.

The vote of Justice Luís Roberto Barroso, who became the rapporteur of the case, explicitly explains the overcoming of the previous understanding:

In the case of the IPI, for example, the law does allow the Executive to increase it by decree within the permitted ranges. But IPI is a tax. And here we are dealing with a tax. So I understand Justice Rosa Weber's position, I think she has imported the case law that traditionally applies to IPI into the specific case. She didn't. Here, as it's a tax, I don't think there's any constitutional permissive for the principle of legal reserve in tax matters to be excepted. For this reason, I am diverging from Justice Rosa Weber's position. I am granting the interlocutory appeal.

In addition to this statement, the same Court Minister, in a correction to his vote, after being questioned by Justice Rosa Weber, clearly justifies that he is correcting a mistake made in a previous decision on the same matter:

Minister Luís Roberto Barroso: There are two precedents that differ from case law, and I think they are mistaken precedents. I myself am sorry, in the volume that we have judged here. I hadn't detected it before, but now I think there is a problem with a significant increase like this, by ordinance. So Your Excellency is absolutely right in your complaint that there are precedents and that you based yourself on them, there are precedents in both directions. I am rectifying my own previous position and, here, I am diverging, begging your pardon twice: firstly, for having misled you and, secondly, because I am now diverging.

The way in which Justice Luís Roberto Barroso identified the mistake and set about correcting it seems very appropriate: he realized the misinterpretation of the Federal Constitution and the use of inappropriate precedents for the situation

at hand, but without causing any affront to the system. This is a correction permitted by the legal system itself, whether it be the positivist civil law system, or the system of precedents adopted by Brazil. In this context, Michael J. Gerhardt corroborates the correction proposed by the Justice:

The limited path dependency of precedent that I describe is flatly inconsistent with a strong view of precedent. I further suggest that distinguishing, narrowing, and occasionally overruling precedent are acts which the Constitution authorizes. Moreover, these acts almost always are based on precedents and produce other precedents (Gerhardt, 2008).

Therefore, there is no doubt about the presence of overruling in the Brazilian procedural system, including in the actions of the STF, through the analysis of a specific case, to demonstrate the institutes of the system of precedents, notably precedent *per incuriam* and overruling by the same judging body.

A new analysis was made of the matter, with the formation of a precedent that was correctly followed by the STF and other Courts, at least until the judgment of the General Repercussion (Theme 1.085), which brought a new interpretation of the precedent, without perfecting it, but in order to preserve the public coffers and the collection of the Siscomex tax.

4. Mitigation of Precedent—General Repercussion Theme 1.085—The Middle Ground between Unconstitutionality and Interpretation of the Rule

With the increase in cases with the same legal discussion, the issue has gained economic significance to the point where it has been assigned to the STF under the General Repercussion system, Theme 1.085, RE n. 1.258.934, as follows:

Extraordinary appeal. Tax. Fee for use of the Integrated Foreign Trade System (SISCOMEX). Increase in the calculation basis by ministerial decree. Legislative delegation. Article 3, paragraph 2, of Law 9.716/1998. Principle of legality. Absence of minimum standards defined by law. Updating. Official indices. Possibility. Existence of general repercussion. Reaffirmation of the Court's case law on the subject.

The General Repercussion ruling ruled out the unconstitutionality initially identified in RE 959.274. In other words, the General Repercussion ruling gave an interpretation that conformed to the Federal Constitution, in order to mitigate the principle of legality with regard to the requirement for a law to increase the tax, so that the updating by an official monetary correction index does not constitute an affront to it.

There is no disputing the reasonableness of the decision proposed by the Reporting Justice, which aims to strike an economic balance between the taxpayer and the federal government, which is responsible for managing the computerized foreign trade system (Siscomex), given that there have in fact been advances in the system and, above all, under the argument of the presence of inflation eroding the currency.

The ruling did not remove the unconstitutional rule completely but allowed it to be maintained up to the limit of monetary restatement, defined by an official index. However, this decision does not completely settle the legal dispute, nor does it avoid parallel conflicts.

This is because, in addition to the unconstitutionality of the increase by Ordinance, the unconstitutionality of the setting of an index by the Judiciary was argued, given that some Federal Regional Courts were limiting the increase in the Siscomex Fee using the INPC accumulated between January 1999 and April 2011 (approximately 131%), a function that is outside their competence as defined by the Federal Constitution of 1998.

The ruling confirms the power delegated to the Executive Branch by the law establishing the Siscomex fee, which is restricted to the application of an official monetary correction index. However, it does not resolve the invasion of competence by the Federal Regional Courts, since it represents action by a Power that does not have tax competence, as well as allowing the application of different indices, causing inequality between taxpayers in the same factual situation.

The understanding established in the General Repercussion allowed for divergent interpretation and application of the precedent, leading to the emergence of decisions applying the most diverse official monetary correction indices in Brazil (INPC, IPCA, IGPM, for example), generating new litigation to define the most appropriate index, since each of them imposes a different value for the same tax, thus removing isonomy between importers.

In this case, it is understood that in order to correctly resolve the past, the STF should have validated the position taken in RE 959.274, allowing, by act of the Executive Branch, the future updating of the fee, as long as the minimum and maximum limits of the grant of legislative competence are respected, with the establishment of an official monetary correction index.

In this context, the Executive issued a new rule, with a monetary update index (IPCA), updating the Siscomex fee on June 1, 2021, in a legitimate and constitutional manner, without raising any questions as to form and content. However, the past has remained unbalanced for taxpayers, due to the different indices applied, causing different amounts, in addition to those who obtained decisions based on RE 959.247, which totally removed the increase practiced by Ordinance no. 247, fully refunding what was overpaid.

5. Conclusion

The Brazilian's Federal Supreme Court opinion has oscillated when analyzing the increase in the Siscomex Tax, even in the absence of a change in the factual situation under consideration, which was confirmed by the analysis of Extraordinary Appeals Nos. 919.668; 919.752 and 959.247, of the same factual situation, including the same taxpayer: the unconstitutional requirement of the Siscomex fee, increased by Ministry of Finance Ordinance No. 257/2011 for import operations carried out at customs clearance units located in the Brazilian states of Paraná and

Santa Catarina.

The correction of the matter was only possible through RE 959.274, in which Justice Roberto Barroso recognized that the decisions in RE 919.668 and 919.752 had been wrongly constructed, influenced by precedents that were inapplicable to the specific case, making them unavailable to consolidate the STF's position on the increase of taxes by an ordinary rule act.

This model set up by the Justice, by reviewing the grounds, declaring previous decisions to be *per incuriam*, helps to strengthen the system of precedents and legal certainty for the courts, generating confidence in the highest body of the Judiciary, especially when the STF begins to consolidate itself as a court of precedents, with the creation of the institute of general repercussion.

However, overruling precedents, without there being an effective social or legal change, destabilizes the system of precedents and confidence in the courts, especially since similar issues, arising from the complex Brazilian tax system, require the Federal Supreme Court to constantly rule on similar issues, such as the inclusion of taxes in the calculation basis of other taxes.

An example of this is the judgment of Theme 69, which dealt with the exclusion of the Tax on the Circulation of Goods and Services (ICMS) from the PIS and COFINS calculation basis, in which it was decided that the inclusion of the tax in the calculation basis of the contributions was unconstitutional, as it denatured the concept of billing, But this precedent was not observed in the judgment of Theme 1048, which upheld the inclusion of ICMS in the calculation basis of the Social Security Contribution on Gross Revenue (CPRB), surprising taxpayers by changing the understanding and not applying the precedent.

Between mistakes and successes, the Federal Supreme Court has built a system of precedents that is sometimes based on the Federal Constitution and the Law, and sometimes based on jurisprudential law, making the discussion of the increase in the Siscomex Tax an extremely relevant case to demonstrate a situation of perfect cohesion between the institutes of the system of precedents, that is, distinguish, *per incuriam* and overruling, applied perfectly to protect the Brazilian constitutional and procedural tax system.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

References

Abbas, Q. (2009). Conflicting Judgments of High Courts: The Principle of Legal Certainty and the Ends of Justice. *Pakistan Law Journal,* 253-264.

Becho, R. L. (2021). *Legal Activism in Tax Proceedings: Crisis, Theory of Precedents, and Effects of the Departure from Strict Legality*. Thomson Reuters Brazil.

Becho, R. L., & Gutierres, K. L. (2023). The Relevance of Jurisprudence in Tax Law: An Analysis from the Perspective of Brazilian System of Precedents. *Beijing Law Review, 14,* 883-894. https://doi.org/10.4236/blr.2023.142047

Facchini Neto, E. (2014). A sentença em perspectiva comparada; estilos norte-americano,

francês e italiano em confronto. *Revista de Processo, 235,* 407-434.

Gerhardt, M. J. (2008). *The Power of Precedent*. Oxford University Press.

Hamilton, A. (1788). *Federalist No. 80. The Powers of the Judiciary*. https://avalon.law.yale.edu/18th_century/fed80.asp

Lima, T. A. R. (2013). *Precedentes Judicias Civis No Brasil* (p. 158). Saraiva.

Malpighi, C. C. S. (2022). Precedentes vinculativos em matéria tributária: Como identificar a ratio decidendi de um paradigma. *Revista Direito Tributário Atual, 51,* 104-129. https://doi.org/10.46801/2595-6280.51.4.2022.1303

Thomas, E. W. (2005). *The Judicial Process. Realism, Pragmatism, Practical Reasoning and Principles*. Cambridge University Press. https://doi.org/10.1017/cbo9780511493768

Walker, D. (1980). *The Oxford Companion to Law*. Clarendon Press.