

The Influence of Fiscal Consequences on the Brazilian Supreme Court's *Ratio decidendi* in Tax Matters

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Abstract

This paper examines the extent to which economic consequences—particularly aggregate fiscal impact—enter the Brazilian Supreme Court's (Supremo Tribunal Federal, STF) *ratio decidendi* in tax cases. The article advances the hypothesis on tax cases after the recent legislation that incorporates the consequentialist arguments in Brazil. We hypothesize that consequentialist arguments have been used by STF to decide tax matters in Brazil not only as time-management techniques, such as modulation, but also regarding the merit. The Case selection followed: (i) judgments with general repercussion; (ii) references to fiscal or macroeconomic effects; and (iii) the discussions of modulation of effects. Using a hypothetico-deductive method and STF landmark cases, we offer an analytical grid to conclude that consequentialism has gained relevance in recent years due to the Supreme Federal Court comparing with taxpayers' constitutional tax principles.

Keywords

Consequentialism, Fiscal Impact, *Ratio decidendi*, Legal Certainty, Modulation, Brazilian Supreme Court, Tax Law

1. Introduction

The general rules of Brazilian Tax Law are set forth in the Federal Constitution, which provides the framework for the establishment of taxing powers, limitations on the power to tax, the allocation of revenues among federative entities, and the definition of general tax principles.

According to Professor Luís Eduardo Schoueri, the Federal Constitution supplies the legal foundation for the creation of taxes and for the enactment of other

instruments that introduce tax norms (Schoueri, 2024). Professor Roque Antonio Carrazza likewise notes that the Federal Constitution contains many provisions that deal, directly or indirectly, with tax matters (Carrazza, 2015).

As Paulo de Barros Carvalho teaches, from the enunciations of positive law within the Brazilian legal order, the interpreter derives meanings in the logical form of conditional judgments that associate two or more prescriptive propositions (Carvalho, 2021). However, Law is not limited to the mechanical application of statutes; even in the production of legal norms, values are introduced by the legislator (Carvalho, 2021). A value element is present throughout the legal configuration and wherever there is law, there will certainly be an axiological element (Carvalho, 2021).

Following Paulo de Barros Carvalho's lessons, every legal norm contains an expression of value that manifests itself in interpretation. It is not enough, therefore, to analyze prescriptive propositions to reach an interpretative conclusion, because the Law encompasses values that are reconstructed by judges. It is precisely considering this axiological premise that we perceive, in the Brazilian Supreme Court ("STF"), an intensification of arguments about the economic consequences of decisions which, in certain cases, influence the *ratio decidendi* in tax matters.

In Brazil, the use of consequentialist arguments was introduced in Brazilian Law under the Law of Introduction to the Rules of Brazilian Law (Lei de Introdução às Normas do Direito Brasileiro—"LINDB"), which seeks to avoid decisions rendered without an assessment of their practical consequences. Based on this statute, Law 9868/1999 introduced the technique of modulation of effects for decisions of the higher courts, which is frequently applied in tax cases. An example discussed later in this article is the Extraordinary Appeal No. 574,706/PR ("RE 574,706/PR"), in which the STF decided in favor of taxpayers to exclude the Tax on the Circulation of Goods and on Interstate and Intermunicipal Transportation and Communication Services ("ICMS") from the calculation base of the Profit Participation Program Contribution ("PIS") and the Social Security Financing Contribution ("COFINS"), but decided to modulate the effects of the decision.

The central question is: to what extent do economic impacts enter the STF's core decision-making (*ratio decidendi*) in tax cases, to the point of outweighing principles and statutory guarantees protecting taxpayers' rights?

This article qualitatively analyzes recent STF cases to show the growing tendency to use consequentialist arguments as *ratio decidendi* for solving tax controversies in Brazil.

2. Consequentialist Reasons and Tax Principles

The growing importance of precedents has become increasingly relevant in the Brazilian legal order. Brazil has historically adopted the civil law tradition, in which the primary source of law is written text (Constitution, statutes, and codes). Civil law has origin in Roman Law and favors systematic codification and deduction from general texts. In common law, adopted in Anglo-Saxon countries, the

law develops case by case, through judicial decisions that generate predictability, and legal actors argue by applying precedent or distinguishing it in the concrete case. Oliver Wendell Holmes Jr. captures this feature by describing law as “the prophecies of what the courts will do in fact,” highlighting the importance of case law in common law (Holmes Jr., 1897).

According to Blackstone, precedents establish a strong presumption that judges, in order to promote stability in the law, would adhere to previous precedents when the same points are repeated in litigation. Therefore, “precedents and rules must be followed, unless absurd or unjust.” (Blackstone, 1975, 1723-1780). In other words, adherence to precedent result predictability and legal certainty, and only in extreme cases may it be displaced.

Although Brazil is a civil law country, recent legislative changes indicate an approximation to a precedent-oriented culture. As Minister Teori Zavascki from the STF observed, Brazilian Law is moving toward valuing precedents from the higher courts, which increasingly exert persuasive and expansive force over analogous cases—part of a broader movement in civil-law jurisdictions toward a culture resembling *stare decisis*¹.

This culture of precedent intensifies with the creation of binding summaries and, especially, with the general repercussion mechanism and repetitive appeals under the Code of Civil Procedure (“CPC/2015”)². According to Renato Lopes Becho, “Brazil is approaching the common law in at least one key respect (the doctrine of precedent), marking a pivotal moment in Brazilian legal history” (Becho, 2020).

The CPC/2015 introduced important changes in Brazilian procedural law, enhancing the role of qualified precedents. This partial convergence with common law entails significant implications for how higher courts interpretation in Brazil, which often coexists with consequentialist arguments. In this sense, Holmes emphasizes that judges should weigh considerations of social advantage in their decision-making (Holmes Jr., 1897).

This axiological strand in Brazilian judicial decisions finds a normative basis in

¹STF, RCL 4335/AC, Ministro Teori Zavascki, Dje 20/03/2014.

²Art. 1.035. The Supreme Federal Court, in an unappealable decision, will not hear the extraordinary appeal when the constitutional issue raised therein does not have general repercussion, under the terms of this article.

§ 1 For the purpose of general repercussion, the existence or not of relevant issues from an economic, political, social or legal point of view that transcend the subjective interests of the process will be considered.

§ 5 Once general repercussion is recognized, the rapporteur of the Supreme Federal Court will order the suspension of the processing of all pending individual or collective proceedings that deal with the issue and are being processed in the national territory.

Article 1036. Whenever there are multiple extraordinary or special appeals based on the same legal issue, they will be assigned for judgment in accordance with the provisions of this Subsection, observing the provisions of the Internal Regulations of the Supreme Federal Court and the Superior Court of Justice.

Article 1039. Once the assigned appeals have been decided, the collegiate bodies will declare the other appeals dealing with the same controversy inadmissible or will decide them by applying the established thesis.”

Article 20 of the LINDB³, which requires decisions to consider their practical consequences. Relying on this provision, Law 9868/1999⁴ authorizes the modulation of effects, whose purpose is to ensure prospective effects for certain constitutional decisions on grounds of legal certainty or exceptional social interest.

In practice, modulation is a technique of temporal accommodation—balancing corrective justice with the avoidance of disruptive economic impacts and the preservation of stability. The STF may therefore assign prospective (*ex nunc*) effect to its decisions of unconstitutionality where the statutory conditions are met.

Thus, the legislator entrusted the STF with assessing the externalities of its rulings and, upon identifying a risk of systemic disruption, applying modulation to calibrate the decision's reach. In tax law, judicial shifts—especially those reversing a binding precedent—may undermine taxpayers' reliance interests and expose them to risk (Barreni, 2024).

Indeed, abrupt jurisprudential shifts, particularly where a binding precedent exists, violate legal certainty by allowing the Judiciary to frustrate justified expectations built upon prior case law (Carrazza, 2015). Tercio Sampaio Ferraz Jr. stresses that security depends on norms capable of ensuring a stable currency of expectations, enabling citizens to know—or to be able to know in advance—the legal consequences of their actions (Ferraz Jr., 1981).

A recent example is Theme 985 (2020), in which the STF upheld the constitutionality of employer social-security contributions on the one-third vacation bonus⁵, notwithstanding that higher courts had, since at least 2007, pacifically treated the bonus as indemnifying (and thus not subject to the contribution)⁶.

In Extraordinary Appeal 1,072,485 (“RE 1,072,485”), which embodies Theme 985, the STF, when judging the motion for clarification, recognized the abrupt jurisprudential change and modulated the decision's effects prospectively to avoid surprising the taxpayers with retroactive collections. As Minister Luís Roberto Barroso noted, the shift from the dominant case law demanded action by the Court “to ensure that legal certainty and confidence in the integrated precedent system suffer the least negative impact possible.” In the same way, Teresa Arruda Alvim (Alvim, 2021)⁷ and Roque Antonio Carrazza (Carrazza, 2019) argue that when a new position harms private parties, there should be modulation; other-

³Article 20. In the administrative, regulatory, and judicial levels, decisions shall not be made based on abstract legal values without considering the practical consequences of the decision.

⁴Article 27. When declaring a law or normative act unconstitutional, and considering reasons of legal certainty or exceptional social interest, the Supreme Federal Court, by a two-thirds majority of its members, may restrict the effects of that declaration or decide that it will only be effective from the date of its final judgment or from another moment that may be determined.

⁵STF, Pleno, RE 1072485, Rel. Min. Marco Aurélio, DJe 02/10/2020.

⁶Supremo Tribunal Federal, Segunda Turma, Agravo de Instrumento n° 603.537, Rel. Ministro Eros Grau, DJU de 30.03.07; Supremo Tribunal Federal, Primeira Turma, Agravo de Instrumento n° 712.881, Relator Ministro Ricardo Lewandowski, DJ de 11.09.2009; Superior Tribunal de Justiça, Primeira Seção, Embargos de Divergência no Recurso Especial n° 956.289/RS, Relatora Ministra Eliana Calmon, DJ de 09.11.2009.

⁷ALVIM, Teresa Arruda. Modulação na alteração da jurisprudência firme ou de precedentes vinculantes. 2.ed. rev., atual. e ampl. São Paulo: Thomson Reuters Brasil, 2021, p. 23.

wise, legal certainty would be compromised and public confidence in the Judiciary would also be destroyed.

Although modulation aims to stabilize adjudication—especially where sudden shifts could affect taxpayers’ business planning consistent with then-dominant case law—the technique can also generate distortions.

Consider tax controversies in which the Judiciary declares a tax unconstitutional. This means that tax authorities collected unlawful amounts for years. If the decision is modulated, taxpayers may be prevented from recovering amounts unduly paid to the public treasury.

Therefore, if used inappropriately, this mechanism can generate undesirable behavior: given the time it takes for the STF to finally decide major cases, public authorities might rationally persist in levying unconstitutional exactions that, because of modulation, will generate revenues that will not need to be returned to taxpayers (Carvalho, 2018).

The point is more evident when the STF changes case law to protect legal certainty. On the other hand, the concept of “exceptional social interest” foreseen in the norm gives the Judiciary the possibility of a more subjective analysis of the specific case. It is at this point that we will demonstrate that tax discussions have been analyzed by the STF from the perspective of consequentialist arguments, that is, arguments concerned with the social and economic impact of the decision, sometimes in conflict with taxpayer rights.

3. Economic Impact as Part of the *Ratio decidendi* in Tax Cases

As noted, recent legislative reforms in Brazil formalize a shift toward valuing precedents. Describing the role of precedents in English common law, William Blackstone characterizes precedent as a permanent rule not subject to alteration by the private views of a later judge⁸. Suri Ratnapala also points out that common-law courts avoid radical shifts in case law because decisions generally have retroactive effects (Ratnapala, 2017).

Although the Brazilian legal system has advanced toward greater legal certainty regarding the maintenance of precedents, this is not yet fully realized, as seen in Theme 985, which reversed more than a decade of settled higher-court case law. As Professor Renato Lopes Becho observes, “*there remains a cultural barrier: judges, across levels, are not sufficiently concerned with inconsistencies in their own decision-making and that of their peers*” (Becho, 2020).

This evolution regarding the value placed on precedent in Brazil is also related to interpretation of tax law. Social evolution and the changes in the composition of the STF ministers imply changes in the interpretation of Tax Law in Brazil. Richard Posner, in *How Judges Think*, describes the American judge as a pragmatist under constraints, required to be impartial but attentive to policy effects. A pragmatic judge evaluates the consequences of judicial decisions regarding their

⁸BLACKSTONE, William. *Commentaries on the Laws of England*. 1975. 69-70.

impact on sound public policies, according to their conceptions (Posner, 2008).

As Holmes also highlights, we understand that Law is constantly evolving, reflecting society's shifting interests. Given the recent changes to Brazil's precedent system, this article examines the relevance of consequentialist arguments to the interpretation of tax disputes by the STF and the limits of such arguments where taxpayers' constitutional rights are at stake (Holmes Jr., 2009).

Regarding cases involving abrupt changes in jurisprudence, the STF has been adopting the modulation to preserve legal certainty. The analysis becomes more subjective when invoking "exceptional social interest," because the statute does not, in our view, qualify, for example, revenue loss as a protected interest. In this regard, Humberto Ávila teaches that the foundation for modulation is legal certainty, not budgetary certainty—otherwise "the more onerous the law, and the greater the resulting revenue, the greater the chance it would be maintained." (Ávila, 2015).

Furthermore, the STF has held that loss of revenue alone is not sufficient to demonstrate exceptional social interest to justify modulation⁹. However, we will demonstrate that the STF's position is not unanimous. On the contrary, we will show below a concrete case in which the STF's decision used these arguments to refute the right claimed by taxpayers.

We begin with RE 574,706 analysis, in which, after long litigation, the STF excluded the ICMS from the PIS/COFINS calculation basis. Immediately after the merit's decision, the National Treasury filed motion for clarification, seeking not only reversal but also modulation of effects. For the purposes of this article, the most relevant point for analysis is the motion for clarification, since the request for modulation was grounded in the argument that the ruling would amount to a "retroactive tax reform," posing a risk to budgetary balance and the State's financial structure.

The Minister Edson Fachin's vote rejected the request for modulation, understanding there was no change in case law that would justify it in the name of legal certainty. In his view, "*admitting modulation in this case would allow legal consequences to be subordinated to financial ones, which contradicts the very idea of a democratic rule of law.*"

According to Minister Rosa Weber, who also refuted the possibility of modulating the effects in this case, stating that "budgetary impact is not by itself sufficient to characterize exceptional social interest." Minister Marco Aurélio's vote also criticized the request for modulation of effects, stating that "*if there is a tax madhouse, it is due to the State's voracity to in collecting taxes, in creating legal situations to further increase revenue.*"

Even so, the vote of Minister Cármen Lúcia prevailed in recognizing modulation. Her vote did not rely on economic aspects; rather, it assumed a jurisprudential shift at the STF that allowed modulation to protect legal certainty. The premise

⁹STF, Pleno, RE 559937 ED, Relator Min. Dias Toffoli, Dje 14/10/2014; STF, Primeira Turma, RE 772765 AgR, Rel. Min. Rosa Weber, DJe 05/09/2014.

was that, although the STF had decided similarly in 2014 in RE 240,785, that judgment produced only *inter partes* effects and thus did not settle the matter.

More recently, the STF faced the analysis of Extraordinary Appeal 928.943/SP (“RE 928.943”) regarding the constitutionality of the Contribution for Intervention in the Economic Domain (“CIDE”). The Federal Constitution¹⁰ grants the Federal Government authority to institute contributions for intervention in the economic domain and in the interest of professional or economic categories to finance the State’s actions in the respective areas. Consequently, Law 10,168/2000 was enacted to institute the CIDE to finance the program to stimulate university-business interaction for innovation and technological development.

Taxpayers challenged the CIDE’s constitutionality, arguing: (i) it was created with a fiscal aim to finance public services (education), not tied to specific interventionist actions; (ii) referability between the contribution and the payers was required.

In 2016, the STF recognized general repercussion (Theme 914). On August 13, 2025, STF fixed the thesis that “the Contribution for Intervention in the Economic Domain (CIDE) intended to finance the Program to Stimulate University-Enterprise Interaction for Innovation is constitutional; revenue must be fully allocated to Science and Technology.”

The divergent vote by Justice Flávio Dino prevailed, recognizing broad CIDE incidence, including on remittances for technical services, administrative assistance, and royalties of any kind, provided statutory allocation of funds is preserved. He held that the State intervention embedded in the contribution integrates the teleological aspect of the tax, making a direct benefit to the payer unnecessary.

“What befits us, in my view, is to judge cases ad hoc in light of two main parameters. The first is fiscal responsibility—not only an economic consensus but a constitutional-review parameter long established in our case law. Fiscal responsibility is not only about expenditure; it is the revenue-expenditure equation.”

“The revenue-expenditure equation is currently delicate in Brazil. That is why fiscal responsibility is more than an ideology or economic consensus; it is a parameter of constitutional review. It is difficult to depart from legal certainty and predictability, the second parameter I present. Whenever we make a very deep intervention, it generates economic consequences.”

“In deciding this and other cases, I believe that absent clear unconstitutionality—and we are 25 years into this law—I tend to favor legal certainty and predictability and to avoid ad hoc interventions, because they undermine fiscal responsibility and legal certainty. As an old adage goes, ‘a good law is an old law.’ This law has been here for 25 years.”

¹⁰Article 149. It is the exclusive responsibility of the Union to establish social contributions, contributions for intervention in the economic domain, and contributions in the interest of professional or economic categories, as an instrument of its action in the respective areas, observing the provisions of Articles 146, III, and 150, I and III, and without prejudice to the provisions of Article 195, § 6, regarding the contributions referred to in that article.

In our view, these passages leave little doubt that, for Justice Dino, the economic impacts of the Court's decisions must be prioritized. He goes further, affirming that the age of a statute in the legal order implies that declaring it unconstitutional would produce instability. Thus, in addition to technical arguments, he emphasizes (i) procedural delay and accumulated fiscal/sectoral effects (from the 2016 recognition of general repercussion to the 2025 merits decision) and (ii) macroeconomic and budgetary consequences of restricting the levy, given its role in funding science and technology (FNDCT). These reasons supported constitutionality, not merely modulation.

In our reading, the vote leverages the stability of public financing and innovation to sustain revenue while interpreting the norm. It is common in Brazil for tax disputes to take many years—even decades—to be resolved, as in RE 574,706, which took over twenty years. But does judicial delay legitimize constitutionality? We do not think this premise aligns with taxpayers' constitutional guarantees, especially celerity¹¹.

Beyond these cases, the STF has invoked fiscal-impact reasons to calibrate the scope and the timing of its tax decisions. In ADC 49¹² (ICMS on transfers between establishments of the same owner), the Court held no incidence in the merits and modulated effects *pro futuro* for reasons of legal certainty and systemic impact¹³.

Another useful case is Theme 490 (RE 628,075/RS), which addressed whether the destination State may reverse (*estornar*) the ICMS credit taken by the purchaser when the origin State grants a presumed credit without CONFAZ agreement. The STF held that such reversal by the destination State is constitutional and does not violate non-cumulativity. When discussing modulation, Justice Gilmar Mendes highlighted the economic importance of the ruling for both taxpayers and the Treasury. In his view, assessing consequences is intertwined with the tax system and with the STF's institutional role¹⁴.

4. Conclusion

This article has shown that Brazilian law has evolved toward greater valorization of precedents, in partial convergence with the common law. Recent legislative changes and higher-court precedents indicate a shift toward consolidating a binding precedent system.

¹¹Article 5. All are equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property, under the following terms:

(...)

LXXVIII—to all, in the judicial and administrative spheres, are guaranteed the reasonable duration of the process and the means that guarantee the speed of its processing.”

¹²STF, Plenário, ADC 49/RN, Rel. Min. Edson Fachin, DJe 19/04/2023.

¹³The STF deemed it necessary to modulate the effects of the decision in order to protect legal certainty and the exceptional social interest, which would be evident in the modification of the ICMS (Tax on Circulation of Goods and Services) calculation system, so as to increase the tax burden owed by taxpayers and reduce the revenue of some states.

¹⁴STF, Plenário, RE 628.075/RS, Rel. Min. Edson Fachin, DJe 18/08/2020.

Nevertheless, Brazil has not migrated to common law. Implementing a binding-precedent regime remains challenging, given the number of tax issues revisited by the higher courts. To mitigate the resulting legal-certainty concerns, the legislator provided the tool of modulation to avoid retroactive effects in the face of abrupt jurisprudential change.

We also examined cases falling under “exceptional social interest”: may revenue loss be a valid argument for modulation? Further, can consequentialist arguments serve as the *ratio decidendi* in tax matters?

Our qualitative analysis suggests a pattern of consequentialism: as a rule, the ratio remains principle-driven and economic consequences are used to adjust the timing and intensity of jurisprudential turns. However, in structural tax matters, economic impact reasoning is used as a necessary argument, entering the *ratio decidendi*. As an example, this article analyzed Theme 914 (CIDE-Technology) and RE 574,706, in which the considerations of institutional and fiscal stability weighed decisively in the outcome, revealing economics-centered decisions.

In conclusion, consequentialist arguments have gained prominence in STF tax cases of general repercussion, signaling a trend to interpret the Brazilian Tax Law through the lens of economic impacts. The cases discussed qualitatively suggest that economic considerations increasingly matter.

The rise of judicial consequentialism in tax matters represents systemic effects. At first, we understand that whether economic reasoning is core (*ratio decidendi*) or temporal (modulation) for the STF’s decision on tax matters threatens legal certainty, since even if tax authorities unduly charge taxes, there is a risk that STF applies economic reasons to avoid the economic consequences of decreased revenue for the public treasury. Second, to the taxpayers, it can represent, as tax planning, an increase in lawsuits filed against tax authorities to secure refunds of undue charges and prevent the modulation of effects.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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