



THE TAXATION ON THE CIRCULATION OF GOODS AND SERVICES (ICMS (Tax on the Circulation of Goods and Services)) ON TRANSFERS OF GOODS BETWEEN SUBSIDIARIES OF THE SAME

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ABSTRACT

The aim of this article is to analyze the impact of Declaratory Action for Constitutionality (ADC) 49 on corporate groups in the Brazilian legal system. To this end, a qualitative study was carried out, using bibliographical research in books, theses, dissertations and scientific articles. The first hypothesis raised in this research was not rejected, because taxpayers will not be entitled to ICMS (Tax on the Circulation of Goods and Services) credits from the operation prior to the transfer, i.e. credits generated at the beginning of the tax chain, given that the transfer operation will not generate a debit when the goods leave for another state. Therefore, the credit generated at the beginning of the tax chain will not be used by the taxpayer. It was then observed that the second hypothesis was not rejected, since the continuation of the decision mentioned above has widened the existing "fiscal war" between the states, since the states from which the goods will be transferred will not receive any of the "slice" of the tax generated due to the non-assessment of ICMS (Tax on the Circulation of Goods and Services) on the exit of the goods. To sum up, this study confirms the importance of states presenting a new ICMS (Tax on the Circulation of Goods and Services) tax system for this type of operation, otherwise they will increase the tax war and be impacted by the loss of tax revenue.

Keywords: ADC 49, ICMS (Tax on the Circulation of Goods and Services), Transfer of goods, "Fiscal War"

1 INTRODUCTION

The issue discussed below has been debated since 1970, even before the



enactment of Complementary Law 87/1996 (Kandir Law), when, at the time, the tax was called the Tax on the Circulation of Goods (ICM). Since then, the levying of the Tax on the Circulation of Goods and Services (ICMS (Tax on the Circulation of Goods and Services)) on the transfer of goods and merchandise between establishments of the same owner in different states has been discussed (SINTAFCE, 2022). Despite the fact that the Federal Supreme Court (STF) has already ruled in favor of taxpayers, tax authorities in all states continue to charge ICMS (Tax on the Circulation of Goods and Services) on this type of operation (SINTAFCE, 2022).

Although this subject is extremely relevant to tax law, very little research has been found on the subject. Therefore, this study seeks to understand the divergence in Brazilian legislation through the following research problem: is it unconstitutional to levy the Tax on Circulation of Goods and Services (ICMS (Tax on the Circulation of Goods and Services)) on transfers of goods between subsidiaries of the same company?

There are some legal arguments that support the unconstitutionality of the ICMS (Tax on the Circulation of Goods and Services) tax on transfers of goods between subsidiaries of the same company. One of the arguments is that these transactions do not constitute a movement of goods, but a mere transfer of goods between establishments. Thus, there would be no taxable event (BRASIL, 2021).

In addition, there is the argument that the levying of ICMS (Tax on the Circulation of Goods and Services) on transfers would violate the principle of the non-cumulative nature of the tax, laid down in art. 155, §2, I, of the Federal Constitution. This is because, by levying ICMS (Tax on the Circulation of Goods and Services) on these operations, it would be being charged in a situation where there would be no real increase in value to the product, which goes against the objective of non-cumulative taxation (BRASIL, 1988).

With the above as a reference, the main objective of this study is to analyze the impact of Declaratory Action for Constitutionality (ADC) 49 on corporate groups in the Brazilian legal system.

The study is justified by the relevance of the transfer operation between subsidiaries for companies in general and how favorable ADC 49 would be important

to reduce the heavy tax burden that plagues the business system¹. It is common for a corporate group to have several transfers of goods from one company to another, and often these companies are located in a different state from where the company that originated the transfer of goods is located. Every time a company in the corporate group transfers goods to another company, ICMS (Tax on the Circulation of Goods and Services) is levied and, consequently, the tax previously paid is deducted, following the debit and credit system.

Therefore, this research seeks to analyze the following hypotheses:

H1: The companies set up in partnership will not be entitled to the ICMS (Tax on the Circulation of Goods and Services) credit generated at the beginning of the tax chain in interstate transactions, which will imply non-compliance with the principle of non-cumulative taxation that governs ICMS (Tax on the Circulation of Goods and Services).

H2: According to the economic impacts presented, ADC 49 could increase the “fiscal war” between the states.

2 ICMS (Tax on the Circulation of Goods and Services) UNDER THE CONSTITUTIONAL AEGIS AND THE KANDIR LAW

Article 155, II of the Brazilian Federal Constitution states that the states and the Federal District have the power to levy a tax on transactions relating to the circulation of goods and on the provision of interstate and intercity transportation and communication services, even if the transactions and services begin abroad (BRASIL, 1988).

In addition, Article 146, III of the same Constitution establishes that a Complementary Law must be enacted to establish general rules on the Tax on the circulation of Goods and Services (ICMS (Tax on the Circulation of Goods and

¹ According to Varsano *et al*, the Brazilian tax burden has grown and since 1994 has remained at around 29% of GDP. However, Carvalho Junior (2022) points out that “The average tax burden of the 17 advanced economies of the OECD (35%) was higher than that of the five Latin American countries (24%), but similar to the Brazilian tax burden (33%), which indicates concern about the composition of Brazil’s tax burden and not its value in itself.”

Services)), and so Complementary Law 87 of September 13, 1996 (Kandir Law) was enacted (BRASIL, 1996).

This legal provision includes article 11, paragraph 3, II; article 12, I; and article 13, paragraph 4, which establish the place of the transaction or provision for the collection of tax as being the autonomous establishment, private or public, built or not, own or of third parties, where natural or legal persons carry out their activities on a temporary or permanent basis or where the stored goods are found (BRASIL, 1996).

The law also states that the taxable event occurs when the goods leave the taxpayer's establishment, even if they go to another establishment owned by the same person (BRASIL, 1996). As a result, the Kandir Law defines that the ICMS (Tax on the Circulation of Goods and Services) calculation basis for goods leaving an establishment located in another state, belonging to the same owner, will be the value corresponding to the most recent entry of the goods or the cost of the goods produced, being the raw material directly used in the manufacture of the goods, direct labor and other indirect costs or the current wholesale market price of the sending establishment, if the goods are not industrialized (BRASIL, 1996).

From a tax perspective, the provisions highlighted above clearly regulate the levying of ICMS (Tax on the Circulation of Goods and Services) on transfers of goods between subsidiaries of the same corporate group. It follows that ICMS (Tax on the Circulation of Goods and Services) is levied on any and all transfers of goods that take place between companies in the group located in the same and/or another Brazilian state.

This understanding is corroborated by Meneses (2021), who concludes that the term "circulation" is synonymous with "exit", leading to the understanding that the movement of goods between establishments of the same owner is linked to the term "circulation".

However, according to Alexandre (2013, p. 609), there is controversy regarding the taxable event of the movement of goods between establishments of the same taxpayer or owner, since the ICMS (Tax on the Circulation of Goods and Services) and Industrialized Products Tax (IPI) legislation adopts the rule of establishment autonomy, while some of the doctrine and jurisprudence manifest otherwise.

Roque Antônio Carrazza (2007, p. 38) highlights this divergence:

[...] We should make it clear from the outset that such circulation can only be legal (and not merely physical). Legal circulation presupposes the transfer (from one person to another) of possession or ownership of the goods. Without a change of ownership, there is no question of ICMS (Tax on the Circulation of Goods and Services) taxation.

José Eduardo Soares de Melo (2002, p. 13) agrees:

ICMS (Tax on the Circulation of Goods and Services) is levied on operations related to the circulation of goods" (art. 155, II, of CF-88), involving legal commercial business and not on simple goods or any kind of circulation; (...) Operations are the true meaning of the legalized fact, the performance of a legal act such as the transfer of a right (possession or ownership).

Sabbag (2022, p. 285) emphasizes that ICMS (Tax on the Circulation of Goods and Services) is not levied on the simple transfer of goods from one establishment to another between companies in the same corporate group. According to Quintanilha (2022, p. 488), the ICMS (Tax on the Circulation of Goods and Services) taxable event only occurs with the legal exit of goods from the taxpayer's establishment and not with the mere physical exit, i.e. if the operation is carried out between the head office and branch of the same company located in different states, the taxable event will not occur, as there has been no exchange of ownership, only a physical exchange of goods between the establishments.

3 ICMS (Tax on the Circulation of Goods and Services) IN THE LIGHT OF CASE LAW

The issue of the unconstitutionality of charging ICMS (Tax on the Circulation of Goods and Services) on transfers of goods has already been the subject of several court decisions. In 2017, the Federal Supreme Court (STF) decided, in Extraordinary Appeal No. 574.706, that ICMS (Tax on the Circulation of Goods and Services) should not be included in the PIS and COFINS calculation basis, as it is not part of companies' turnover or gross revenue. This decision opened the way for other discussions on the unconstitutionality of ICMS (Tax on the Circulation of Goods and Services) in other situations (BRASIL, 2017).

In 1995, the Superior Court of Justice (STJ) ruled in Special Appeal No. 32.203 that ICMS (Tax on the Circulation of Goods and Services) could not be levied on

transactions involving the transfer of goods between establishments of the same taxpayer. The STJ held that, in these operations, there is no movement of goods, but rather a mere internal transfer of goods, which rules out the ICMS (Tax on the Circulation of Goods and Services) taxable event (BRASIL, 1995).

According to Meneses (2021), the Superior Court of Justice (STJ) issued Precedent No. 166 in 1996, emphasizing that *“the mere movement of goods from one establishment to another of the same taxpayer does not constitute an ICMS (Tax on the Circulation of Goods and Services) taxable event.”*

Also, according to Meneses (2021), in 2010 the STJ judged Special Appeal No. 1.125.133/SP. The ruling was submitted to the regime of article 543-C of the Code of Civil Procedure of 1973 (Theme No. 259), to analyze whether the transfer of goods between establishments of the same corporate group would be a triggering event for ICMS (Tax on the Circulation of Goods and Services) (Meneses, 2021). The sentence of the judgment read:

CIVIL PROCEDURE. TAXATION. SPECIAL APPEAL REPRESENTATIVE OF DISPUTE. ART. 543-C OF THE CPC (Code of Civil Procedure). ICMS (Tax on the Circulation of Goods and Services). TRANSFER OF GOODS BETWEEN ESTABLISHMENTS OF THE SAME COMPANY. NON-OCCURRENCE OF THE TAXABLE EVENT DUE TO THE ABSENCE OF AN ACT OF COMMERCE. PRECEDENT 166/STJ. DISPLACEMENT OF FIXED ASSETS. UBI EADEM RATIO, IBI EADEM LEGIS DISPOSITIO. VIOLATION OF ART. 535 CPC (CODE OF CIVIL PROCEDURE) NOT CONFIGURED. 1. **The movement of goods or merchandise between establishments of the same company, in itself, does not fall under the ICMS (Tax on the Circulation of Goods and Services) taxable event**, since, for the taxable event to occur, **the legal movement of goods with the transfer of ownership** is essential. (STF Precedents: AI 618947 AgR, Rapporteur: Min. CELSO DE MELLO, Second Chamber, judged on 02/03/2010, DJe-055 DIVULG 25-03-2010 PUBLIC 26-03-2010 EMENT VOL-02395-07 PP-01589; AI 693714 AgR, Rapporteur(a): Min. RICARDO LEWANDOWSKI, First Panel, judged on June 30, 2009, DJe-157 DIVULG 20-08-2009 PUBLIC 21-08-2009 EMENT VOL-02370-13 PP-02783. STJ Precedents: AgRg in EDcl in REsp 1127106/RJ, Rap. Justice HUMBERTO MARTINS, SECOND PANEL, judged on 06/05/2010, DJe 17/05/2010; AgRg in Ag 1068651/SC, Rap. Justice ELIANA CALMON, SECOND COURT, judged on 03/05/2009, DJe 04/02/2009; AgRg in AgRg in Ag 992.603/RJ, Rap. Justice BENEDITO GONÇALVES, FIRST PANEL, judged on 02/17/2009, DJe 04/03/2009; AgRg in REsp 809.752/RJ, Rap. Justice MAURO CAMPBELL MARQUES, SECOND COURT, judged on 04/09/2008, DJe 06/10/2008; REsp 919.363/DF, Rap. Justice LUIZ FUX, PRIMEIRA TURMA, judged on 19/06/2008, DJe 07/08/2008) 2. “No The mere movement of goods from one establishment to another of the same taxpayer is a triggering event for ICMS (Tax on the Circulation of Goods and Services).” (STJ Precedent 166). 3.

The ICMS (Tax on the Circulation of Goods and Services) matrix rule on commercial transactions is enshrined in the 1988 Federal Constitution, in verbis: “Art. 155. States and the Federal District are responsible for imposing taxes on: (...)II - transactions relating to the movement of goods and the provision of interstate and intercity transportation and communication services, even if the transactions and services begin abroad; 4. **The circulation of goods referred to in the constitutional provision refers to legal circulation, which presupposes an effective act of commerce, to which the purpose of obtaining profit and the transfer of ownership concur.** 5. “This tax, as we can see, is levied on transactions relating to the movement of goods. The law that sets out its hypothesis of incidence will only be valid if it describes a transaction relating to the movement of goods. We should make it clear from the outset that such circulation can only be legal (and not merely physical). Legal circulation presupposes the transfer (from one person to another) of possession or ownership of the goods. Without a change of ownership of the goods, there is no question of ICMS (Tax on the Circulation of Goods and Services) taxation. (...) The ICMS (Tax on the Circulation of Goods and Services) can only be levied on operations that transport goods, through successive commercial contracts, from the original producers to the final consumers.” (Roque Antonio Carrazza, in ICMS (Tax on the Circulation of Goods and Services), 10th ed. Malheiros, p.36/37). 6. *In casu*, as stated in the lead vote of the judgment under appeal, there was a shipment of fixed asset goods from the appellant’s factory in Sumaré to another of its establishments located in a different state, and the same legal regime should apply to the transfer of goods between establishments of the same owner, since *ubi eadem ratio, ibi eadem legis dispositio*. (Precedents: Resp 77048/SP, Rap. Justice MILTON LUIZ PEREIRA, FIRST PANEL, judged on 04/12/1995, DJ 11/03/1996; REsp 43057/SP, Rap. Justice DEMÓCRITO REINALDO, PRIMEIRA TURMA, judged on 06/08/1994, DJ 27/06/1994). 7. Art. 535 of the CPC (Code of Civil Procedure) remains unscathed if the court of origin, albeit briefly, pronounces itself clearly and sufficiently on the issue raised in the case file. Furthermore, the judge is not obliged to rebut, one by one, the arguments put forward by the party, as long as the grounds used were sufficient to support the decision. 8. Special appeal granted. Judgment submitted to the regime of article 543-C of the CPC (Code of Civil Procedure) and STJ Resolution 08/2008.” (STJ, Special Appeal No. 1.125.133/SP, Reporting Justice Luiz Fux, FIRST SECTION, J. 25.08.2010, g.n.).

According to the excerpt from the ruling, ICMS (Tax on the Circulation of Goods and Services) is not levied on the transfer of goods between establishments of the same taxpayer, as the transfer of ownership in this operation does not qualify (Meneses, 2021).

However, Aguiar (2021) explains that the author of ADC 49 sought the constitutionality of the articles of Complementary Law 87/1996 from the STF to justify the occurrence of taxes in this type of operation, however, as Quintanilha (2022, 488) points out, ADC 49 was dismissed, declaring articles 11, §3, II, 12, I and 13, §4 of the Kandir Law unconstitutional.

4 THE ICMS (Tax on the Circulation of Goods and Services) NON-CUMULATIVE CREDIT

It is not the purpose of this study to analyze in depth all the discussions surrounding the ICMS (Tax on the Circulation of Goods and Services), nor to exhaust the complex issues surrounding the ICMS (Tax on the Circulation of Goods and Services) non-cumulative credit. However, it is necessary to explain the principle of non-cumulativeness, provided for indirect taxes, in this case, the ICMS (Tax on the Circulation of Goods and Services), which is set out in art. 155, §2, I and II, of the Federal Constitution (Oliveira Junior, Carvalho, 2022).²

It should be noted that the terminology to be used in the explanation is legal and not accounting, given that assets and rights in accounting are recorded as “debits” and obligations as “credits”, which differs completely from what is being adopted here (Alexandre, 2013).

According to Alexandre (2013), the non-cumulative system uses the debit and credit mechanism, in which each purchase of taxed goods, the purchaser records the amount incurred in the operation as a credit, becoming a “right” of the taxpayer and this amount can be deducted from the amount incurred in subsequent operations, allowing the ICMS (Tax on the Circulation of Goods and Services) to be recovered. Also, according to Alexandre (2013), with each sale of taxed goods, the seller records the amount incurred in the transaction as a debit, making it an “obligation” of the taxpayer and this amount must be paid into the state (or district) public coffers or offset against credits obtained in previous transactions.

In general, once a month, a comparison is made between debits and credits, entitled “Apuração do ICMS (Tax on the Circulation of Goods and Services)”, and if the debits are greater than the credits, the taxpayer must pay the difference to the public coffers (Alexandre, 2013). If the credits are greater than the debits, the taxpayer can

² Art. 155. States and the Federal District are responsible for imposing taxes on: [...]

II - transactions relating to the movement of goods and the provision of interstate and intercity transportation and communication services, even if the transactions and services begin abroad; [...]

§ 2 The tax provided for in item II shall comply with the following:

I - shall be non-cumulative, offsetting what is due in each operation relating to the circulation of goods or provision of services against the amount charged in previous operations by the same or another state or by the Federal District;

II - exemption or non-levy, unless otherwise determined by law:

a) will not entail a credit for offsetting against the amount due in subsequent transactions or services;
b) will result in the cancellation of the credit relating to previous operations;

offset these credits in future assessments or even request reimbursement of these amounts, depending on the legislation of each state (Alexandre, 2013).

Adapting the concepts set out above to the case in question, the taxpayers holding the ICMS (Tax on the Circulation of Goods and Services) credits transferred the goods to their own establishments, located in another state, with the ICMS (Tax on the Circulation of Goods and Services) required in the transaction (4%, 7% or 12%) paid to the state of destination (Oliveira Junior, Carvalho, 2022).

In the state of destination of the goods, the amount paid in the previous stage was entered as a credit and deducted from future internal exits in the state of destination, where the ICMS (Tax on the Circulation of Goods and Services) was highlighted according to each state's internal rate (17%, 17.5%, 18%, 19%, 20%, 21% or 22%) (Oliveira Junior, Carvalho, 2022). As a result, all the states involved in this operation received a "slice" of the tax, which in the end is borne by the actual taxpayer.

According to Aguiar (2021), the application of ADC 49 without the approval of a Complementary Law regulating the system for collecting the tax would be unfeasible due to the organization of the tax in the Brazilian scenario. Also, according to Aguiar (2021), the pre-ADC 49 scenario and the one currently practiced by the tax authorities are arranged as follows:

RS	SP	RJ	MG
Supplier → Sale = R\$ 100.00. ICMS (Tax on the Circulation of Goods and Services) = (R\$ 12.00).	Matrix → ICMS (Tax on the Circulation of Goods and Services) credit = R\$12.00. Transfer = R\$ 200.00. ICMS (Tax on the Circulation of Goods and Services) debit = (R\$ 24.00). ICMS (Tax on the Circulation of Goods and Services) balance = (R\$ 12.00).	Branch → ICMS (Tax on the Circulation of Goods and Services) credit = R\$ 24.00. Sale = R\$ 400.00. ICMS (Tax on the Circulation of Goods and Services) debit = (R\$ 48.00). ICMS (Tax on the Circulation of Goods and Services) balance = (R\$ 24.00).	Client →

Source: Adapted from Aguiar, (2021, p.6).

However, according to ADC 49, there are two theses that could govern the modulation of effects:

Thesis 1: The states will have until 2023 to regulate the transfer of credits;

Thesis 2: A Complementary Law needs to be passed to regulate the matter.

In view of the problems caused by this legal uncertainty, the post ADC 49 scenario would look like this (Aguiar, 2021):

Adaptando os conceitos acima expostos ao caso em questão, os contribuintes, detentores dos créditos de ICMS, transferiam as mercadorias para estabelecimentos próprios, localizados em outra unidade da federação, com os devidos destaques do ICMS exigidos na operação (4%, 7% ou 12%), recolhidos para o estado de destino (Oliveira Junior, Carvalho, 2022).

No estado destinatário da mercadoria, o valor recolhido na etapa anterior era escriturado a crédito e deduzido nas futuras saídas internas no estado de destino, em que se promovia o destaque do ICMS de acordo com a alíquota interna de cada estado (17%, 17,5%, 18%, 19%, 20%, 21% ou 22%) (Oliveira Junior, Carvalho, 2022). Sendo assim, todos os estados compreendidos nessa operação recebiam uma “fatia” do imposto que ao final é custeado pelo contribuinte de fato.

Segundo Aguilar (2021), a aplicação da ADC 49 sem a aprovação de uma Lei Complementar regulando a sistemática da cobrança do imposto seria inviável mediante a organização do imposto no cenário brasileiro. Ainda, de acordo com Aguilar (2021), o cenário pré ADC 49 e o praticado pelo fisco atualmente está disposto da seguinte forma:

RS	SP	RJ	MG
Fornecedor ➡ Venda = R\$ 100,00. ICMS = (R\$ 12,00).	Matriz ➡ Crédito ICMS = R\$ 12,00. Transferência = R\$ 200,00. Débito ICMS = (R\$ 24,00). Saldo ICMS = (R\$ 12,00).	Filial ➡ Crédito ICMS = R\$ 24,00. Venda = R\$ 400,00. Débito ICMS = (R\$ 48,00). Saldo ICMS = (R\$ 24,00).	Cliente

Source: Adapted from Aguilar, (2021, p.6).

No entanto, de acordo com a ADC 49, há duas teses que poderão disciplinar a modulação dos efeitos:

Tese 1: Os estados terão até 2023 para regulamentar a transferência dos créditos;

Tese 2: É necessária a aprovação de uma Lei Complementar para regulamentar a matéria.

Diante da problemática causada por essa insegurança jurídica, o cenário pós ADC 49 estaria assim disposto (Aguiar, 2021):

RS Supplier ➡ Sale = R\$ 100.00. ICMS (Tax on the Circulation of Goods and Services) = (R\$ 12.00).	SP Matrix ➡ ICMS (Tax on the Circulation of Goods and Services) credit = R\$12.00. Transfer = R\$ 200.00. ICMS (Tax on the Circulation of Goods and Services) debit = (R\$ 0.00). Credit balance = (R\$ 12.00).	RJ Branch ➡ ICMS (Tax on the Circulation of Goods and Services) credit = R\$ 0.00. Sale = R\$ 400.00. ICMS (Tax on the Circulation of Goods and Services) debit = (R\$ 48.00). Balance owed = (R\$ 48.00).	MG Client ➡
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Source: Adapted from Aguilar, (2021, p.6).

It should be noted that the subsidiary located in Minas Gerais will not be credited with ICMS (Tax on the Circulation of Goods and Services) from the beginning of the tax chain, as so far there is no legal provision regulating these credits.

If the first thesis prevails, the states will have to regulate this operation, increasing the “fiscal war” that already exists, as we can see the following scenario below:

RS Supplier ➡ Sale = R\$ 100.00. ICMS (Tax on the Circulation of Goods and Services) = (R\$ 12.00).	SP Matrix ➡ ICMS (Tax on the Circulation of Goods and Services) credit = R\$12.00. Transfer = R\$ 200.00. ICMS (Tax on the Circulation of Goods and Services) debit = (R\$ 0.00). Credit balance = (R\$ 12.00).	RJ Branch ➡ ICMS (Tax on the Circulation of Goods and Services) credit = R\$12.00. Sale = R\$ 400.00. ICMS (Tax on the Circulation of Goods and Services) debit = (R\$ 48.00). Balance owed = (R\$ 36.00).	MG Client ➡
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Source: Adapted from Aguilar, (2021, p.6).

Considering that the parent company’s credit can be used in the subsidiary, following the current tax system and avoiding the accumulation of credit that will be generated, the state in which the parent company is domiciled will be visibly affected in terms of tax collection, intensifying the tax dispute between the federal entities, unless the state of São

Paulo, in the example, has the right to charge the taxpayer for the amount of the transferred credit.

Faced with this insecure and uncontroversial scenario, there is still the Proposed Amendment to the Constitution (PEC) 45-A of 2019, which is still being voted on and most of its articles depend on a complementary law.

According to PEC 45-A/2019, the Goods and Services Tax (IBS) will be levied on all transactions involving goods and services, following the same debit and credit system that already exists. Even after the tax reform, ADC 49 will continue to be a “problem” for taxpayers, because complying with it has in some cases become unfeasible.

5 MAIN RESULTS

According to the adjusted vote in ADC 49, Justice Fachin highlighted the seriousness of the consequences of the above scenario, establishing that the states, through the National Congress and the National Council for Finance Policy (CONFAZ), should institute the modulation of the temporal effects of the decision (Jota, 2022).

According to the unanimity of the votes cast in the latest ADC 49 judgment, the first hypothesis raised in this research was not rejected, because taxpayers will not be entitled to ICMS (Tax on the Circulation of Goods and Services) credits from the operation prior to the transfer, i.e. credits generated at the beginning of the tax chain, given that the transfer operation will not generate a debit when the goods leave for another state, so the credit generated at the beginning of the tax chain will not be used by the taxpayer.

This highlights other problems: what fiscal use will be made of these credits, which cannot be used to transfer goods? Will the states allow taxpayers to use these credits in other tax transactions?

With regard to the first hypothesis, the decision in ADC 49 dismisses the application of the principle of non-cumulative taxation set out in art. 155, §2, I, of the Federal Constitution, which governs the ICMS (Tax on the Circulation of Goods and Services), since the credit generated at the beginning of the tax chain cannot be used by the taxpayer in subsequent transactions.

With regard to the second hypothesis presented in this study, it was not rejected,

because, according to the data shown in the scenario above, the permanence of the aforementioned decision expanded the existing “fiscal war” between the states, since the states from which the goods will be transferred will not receive any of the “slice” of the tax generated due to the non-assessment of ICMS (Tax on the Circulation of Goods and Services) on the exit of the goods.

6 METHODOLOGY

With regard to the research method, a qualitative approach was used in which the aim is to establish the meaning of a phenomenon from the point of view of the participants, observing the legislation and the definitions of the authors in their activities (Creswell, 2007).

In addition, the deductive research method was used, which, according to its classical meaning, is a method that starts from the general and descends to the particular, and starts from true and indisputable principles and makes it possible to conclude in a formal way, that is, by virtue of its logic (Gil, 2008).

6 CONCLUSION

Based on the above results, Aguiar (2021) corroborates the results presented above, pointing out that the legal entity will not be able to use the ICMS (Tax on the Circulation of Goods and Services) credit in compensations due in other states, as there is no legal provision authorizing this. According to Meneses (2021), the Supreme Court’s interpretation has an effect on the federal distribution of ICMS (Tax on the Circulation of Goods and Services) tax collection, since the debit relating to the portion of the tax paid to the state of destination will no longer be applied.

Section VI of the Federal Constitution (1988) provides for the Distribution of Tax Revenues. Article 158, IV states that the states receive 75% of the ICMS (Tax on the Circulation of Goods and Services) revenue collected by each state, the other 25% being sent to the municipalities. Therefore, the reduction in ICMS (Tax on the Circulation of Goods and Services) tax collection caused by ADC 49 will impact both states and municipalities in economic terms and this will lead to an increase in the “fiscal war” between the states.

In a current decision, the STF, by way of an appeal, modulated the effects of this operation, giving taxpayers the right to transfer tax credits if the states do not regulate the transfer of ICMS (Tax on the Circulation of Goods and Services) credits between the establishments of the same owner. In summary, this study confirms the importance of states presenting a new ICMS (Tax on the Circulation of Goods and Services) tax system for this type of operation, otherwise they will increase the tax war and be impacted by the loss of tax revenue.

REFERÊNCIAS

AGUIAR, Bruno Henrique Coutinho de. **Os efeitos do julgamento da ADC 49 sobre os créditos da não-cumulatividade do ICMS: direito ao crédito ou estorno?** FGV Direito SP Research Paper Series, São Paulo, p. 1-15, jun. 2021. Disponível em: <https://ssrn.com/abstract=3876647>. Acesso em: 29 abr. 2022.

ALEXANDRE, Ricardo. **Direito tributário esquematizado**. 7. ed. rev. e atual. São Paulo: Método, 2013. 722 p.

BRASIL. **Lei Complementar Nº 87, de 13 de setembro de 1996**. Dispõe sobre o imposto dos Estados e do Distrito Federal sobre operações relativas à circulação de mercadorias e sobre prestações de serviços de transporte interestadual e intermunicipal e de comunicação, e dá outras providências (Lei Kandir). Diário Oficial da União, Brasília, DF: Congresso Nacional, 1996.

BRASIL. **Ação Direta de Constitucionalidade nº 49/RN, Ministro Relator Edson Fachin**. Acórdão publicado no Diário de Justiça Eletrônico nº 84, 4 maio 2021.

BRASIL. **Recurso Extraordinário nº 574.706/PR, Ministra Relatora Cármen Lúcia**. Publicado no Diário de Justiça Eletrônico, 15 mar. 2017.

BRASIL. **Lei nº 9.868, de 10 de novembro de 1999**. Dispõe sobre o processo e julgamento da ação direta de inconstitucionalidade e da ação declaratória de constitucionalidade perante o Supremo Tribunal Federal. Diário Oficial da União, Brasília, DF: Congresso Nacional, 1999.

BRASIL. **Constituição (1988)**. Constituição da República Federativa do Brasil. Brasília, DF: Senado Federal: Centro Gráfico, 1988.

BRASIL. **Recurso Especial nº 32.203/RJ, Ministro Relator Milton Luiz Pereira**. Publicado no Diário de Justiça, 23 mar. 1995, p. 7138.

CARRAZZA, Roque Antonio. **ICMS**. 12. ed. São Paulo: Malheiros, 2007. 38 p.

CARVALHO JUNIOR, Pedro Humberto Bruno de. **O sistema tributário dos países da OCDE e as principais recomendações da entidade: fornecendo parâmetros para a reforma tributária no Brasil**. Disponível em: <chrome-extension://efaidnbnmnibpcajpcgicfindmkaj/https://portalantigo.ipea.gov.br/portal/i>

images/stories/PDFs/pubpreliminar/220310_publicacao_preliminar_o_sistema_tributario_dos_paises_da_ocde.pdf. Acesso em: 27 ago. 2023.

CRESWELL, J. W. **Projeto de pesquisa:** métodos qualitativo, quantitativo e misto. 2. ed. Porto Alegre: Artmed, 2007.

GIL, A. C. **Métodos e técnicas de pesquisa social.** 6. ed. São Paulo: Atlas, 2008.

JOTA. **ADC 49: Fachin propõe que estados regulamentem transferência de créditos de ICMS.** Disponível em: <https://www.jota.info/tributos-e-empresas/tributario/adc-49-fachin-propoe-que-estados-regulamentem-transferencia-de-creditos-de-icms-02052022>. Acesso em: 23 dez. 2022.

MELO, José Eduardo Soares de. **ICMS:** teoria e prática. 5. ed. São Paulo: Editora Revista Dialética, 2002.

MENESES, César Chinaglia. O entendimento firmado pelo STF na ação declaratória de constitucionalidade nº 49 e os efeitos práticos dessa decisão. **FGV Direito SP Research Paper Series**, São Paulo, p. 1-15, jun. 2021. Disponível em: <https://ssrn.com/abstract=3876655>. Acesso em: 29 abr. 2022.

OLIVEIRA JUNIOR, José Mauro de; CARVALHO, Osvaldo Santos de. **As consequências da ADC 49 para o ICMS: a (in)decisão do “asno de Buridan.”** São Paulo, p. 1217-1246, jun. 2022. Disponível em: <https://www.ibet.com.br/as-consequencias-da-adc-49-para-o-icms-a-indecisao-do-asno-de-buridan-por-osvaldo-santos-de-carvalho-e-jose-mauro-de-oliveira-junior/>. Acesso em: 27 jul. 2023.

QUINTANILHA, Gabriel Sant'Anna. **Manual de direito tributário:** volume único. 2. ed. Rio de Janeiro: Método, 2022.

SABBAG, Eduardo. **Direito tributário essencial.** 8. ed. Rio de Janeiro: Editora Método, 2021.

SINTAFCE. **A novela da incidência do ICMS na transferência de bens e mercadorias.** Disponível em: <https://www.sintafce.org.br/a-novela-da-incidencia-do-icms-na-transferencia-de-bens-e-mercadorias/>. Acesso em: 23 dez. 2022.

VARSANO, Ricardo et al. **Uma análise da carga tributária do Brasil.** Disponível em: chrome-extension://efaidnbmnnnibpcajpcgiclfindmkaj/https://repositorio.ipea.gov.br/bitstream/11058/2439/1/td_0583.pdf. Acesso em: 27 ago. 2023.