Cooperative Act in Brazil and governing tax legislation

(El acto cooperativo en Brasil y legislación tributaria aplicable)

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Abstract: The purpose of this article is to present the legal-normative regulation of the cooperative act in Brazil, with special association to the tax treatment it has been given based on the interpretations adopted by the superior courts of justice.

Keywords: cooperative activity; tax treatment; cooperative act.

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Resumen: El propósito de este artículo es presentar la regulación jurídico-normativa del acto cooperativo en Brasil, con especial asociación al tratamiento tributario que se le ha dado en base a las interpretaciones adoptadas por los tribunales superiores de justicia.

Palabras clave: actividad cooperative; tratamiento fiscal; acto cooperativo.

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I. **Introduction**

First, it is necessary to briefly comment on the Brazilian legal system. There is an extremely rigid Federal Constitution, wherein the regulations are broken down into minute details, including 245 articles and more than 1,600 provisions (items, letters, paragraphs), and it has already undergone one hundred and nine changes through constitutional amendments provided for by its original legal authority.

It also provides a detailed definition of all the hypotheses of tax incidence, granting the supplementary law (specific to constitutional matters and requiring a special quorum of 2/3 of the Congress) the exclusive jurisdiction for the tax matters that define taxable events, calculation basis, rate; Ordinary Laws and various types of administrative acts, starting with decrees. On the other hand, there are 4 (four) types of legal entities under public law in Brazil with constitutional competence to legislate on tax matters: the federal government, the states, distrito federal and the municipalities (there are more than 5,000 in Brazil), but always within the limits of the complementary law (at least that is how it should be, but later on, we will see the problems that arise).

Likewise, it is necessary to present a brief snapshot of the Brazilian judicial organization. We have a first instance with state and federal judges. A second instance is formed by State Courts in all capitals of the 27 States of the Federation, as well as Federal Courts in a smaller number, covering regions that encompass more than one federated unit. Next is the Superior Tribunal de Justiça that judges the appeals from the 2nd Instance, and, finally, the Supremo Tribunal Federal that, in theory, should only analyze and rule on constitutional matters, but which ends up receiving another series of cases of all natures, but, above all, tax proceedings.

To round out the difficulties, our Code of Civil Procedure, as well as the Internal Regulations of the Courts (all those mentioned above have them) create a limitless number of appeals, so that cases take approximately 10 (ten) years on average, often extending to more than 20 (twenty) or 30 (thirty) years to be definitively decided.

In a final attempt to photograph the tax backbone of the Brazilian System, it is necessary to talk about the administrative courts that rule on taxpayers' issues with the tax authorities. We have the Conselho Administrativo de Recursos Fiscais (CARF), which analyzes federal taxes, and the State Administrative Courts or Councils headquartered in the capitals of Brazilian States, which are responsible for "judging" issues relating to the taxes within their jurisdiction. Several Municipalities, es-

pecially larger cities, also have their own Administrative Courts that consider matters related to municipal taxes.

II. **Cooperative activity in Brazil**

Without losing sight of its origin, as a way to fight unemployment, around the 1800s in Europe, a fact of a social nature that allowed employer conglomerates to abuse the proletariat with long working hours and very low remuneration, it is possible to identify, in Brazil, something similar in the relationship between market/capital/labor and cooperative activity, but regrettably with a rigid stiffening in: a) tax legislation; b) the very fields of action of each cooperative type; and c) case law.

It was characterized as a reformist system for society, to morally improve the human being, in the ethical sense of solidarity, aiming to remove intermediaries in the exploitation of economic activities by the providers themselves (members of the cooperative).

Based on the dignity of the human person, the work, solidarity and equality of conditions, mutual support, and social development, it seeks to strengthen its members through the creation of means and conditions capable of enabling its insertion in the market. Tax legislation, however, creates limits that are questionable.

The movement grew at a frightening rate throughout the world, evolving from an organizational, structural point of view.

It developed in Brazil in parallel with the union movement. It is constitutionally guaranteed, being the associative model that received the greatest attention from the original Constituent Power[3].

The Federal Constitution outlines important guidelines for its operation, highlighting art. 174, in which paragraph 2 determines that the law must support and encourage cooperative activity, and article 5, item XVII, which forbids State interference in its establishment and operation.

The current constitutional provisions show that the cooperative movement is a valuable instrument in the pursuit of national development, focused on achieving the same social objectives advocated by our Democratic Rule-of-Law State, according to art. 3 of the Magna Carta[4].

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[3] Articles 5, XVIII, 146, III, "c", 174 paragraphs 2, 3, and 4, 187, VI, 192, VIII and 199, paragraph 1.

[4] According to articles 1, 3 and 170, IV, of the Federal Constitution, the Federative Republic of Brazil is based on the following principles: citizenship, human dignity, social value of labor, free enterprise, political pluralism; presenting as objectives: freedom, social justice, solidarity, development, reduction of inequalities, promotion of the common or collective good and non-discrimination.

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Federal law 5.764/71 defines the national policy on cooperative activity, instituting the legal regime of cooperative companies, providing strict discipline regarding the principles and relationships that must be observed in this association modality.

Addressed by the Civil Code as a model of an incorporated company, of a simple nature[5], it is legally seen as a type of corporation, a form of constitution of a legal entity.

Cooperatives are, in essence, non-profit, formed by people who undertake to contribute goods and/or services to exercise an economic activity of common benefit (articles 3 and 4 of the law).

They are incorporated to provide services to their members, and may, for such purpose, adopt any type of service, operation or activity as their corporate purpose, pursuant to the provisions of art. 5 of Law 5.764/71.

They stand apart from other companies, mainly due to their free and voluntary membership with an unlimited number of members, free and voluntary management, economic participation of their members, variability of the equity capital represented by shares (limited for each member), intercooperation, single vote per member[6], return of the net surplus for the year, in proportion to the operations conducted by the member, political, religious, racial and social neutrality[7].

Cooperatives, due to such peculiarities, based on the constitutional points highlighted, must receive unique treatment from the Public Authority, notably in the tax field. They cannot be treated like other legal entities, under penalty of making their purposes, operation, and the valorization of the movement unfeasible.

Hence the need to grant them appropriate tax treatment, based on the neutrality of tax effects with regard to the operations conducted on a daily basis. The member can never suffer a tax impact greater than that which would be imposed if he/she were acting in the market directly, without the intervention of the cooperative.

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[5] Art. 982. Salvo as exceções expressas, considera-se empresária a sociedade que tem por objeto o exercício de atividade própria de empresário sujeito a registro (art. 967); e, simples, as demais. Parágrafo único. Independentemente de seu objeto, considera-se empresária a sociedade por ações; e, simples, a cooperativa.

Vide, ainda, arts. 1093 a 1096.

[6] The capital invested by the member does not interfere in the operational conduct of the cooperative, as each member has the same decision-making power. The determination contributes to the democratization of decisions made during general meetings.

[7] Art. 4 of Law 5.764/71.

III. **Tax treatment of the cooperative act practiced by cooperatives**

Article 146, III, "c" of the Federal Constitution establishes that the cooperative act must receive appropriate tax treatment, which will occur through a supplementary law:

Art. 146. Cabe à lei complementar:

III. estabelecer normas gerais em matéria de legislação tributária, especialmente sobre:

c) adequado tratamento tributário ao ato cooperativo praticado pelas sociedades cooperativas.

Pursuant to that provision, it would be up to supplementary legislation to define, basically, the concepts of:

i. Appropriate
ii. Tax treatment
iii. Cooperative act
iv. Cooperative companies

With such a provision, would we be facing tax immunity for cooperative acts? Or a determination to grant exemption when taxes are instituted by each competent entity?

The discussion is tempestuous, since, after more than 30 years, said supplementary legislation has not been enacted, despite countless bills pending consideration by the National Congress. In light of such omission, the task of elucidating the concepts in question and their respective tax effects fell to doctrine and case law, by applying the provisions of Law 5.764/71, without prejudice to other sparse legislation.

Following Paulo de Barros Carvalho's theory (Carvalho 2008, 181 and 182) immunity is a structural legal standard, created at the constitutional level which, when discussing tax matters, defines the field of competence of taxing entities, preventing taxes from being levied on certain facts or people. Exemption is also a structural legal standard, but created at the level of infra-constitutional legislation that, when discussing tax matters, reduces the scope and/or action of the rules governing the basis of tax assessment, attacking one of their criteria or aspects, preventing the birth of the tax obligation in relation to the events related thereto.

Both immunity and exemption are based on the assumption that the event should be taxed. It is not by express legal provision (constitutional, if immunity, specific law of the entity endowed with tax jurisdiction, if exemption).

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A different situation occurs with cases of non-applicable taxation. They are not subject to taxation because they do not fall within the taxation hypotheses. There is no subsumption, classification, of the event under the standard (governing rules), a *sine qua non* condition for levying a given tax.

For Celso Ribeiro Bastos (Bastos and Martins 2000, 122) "adequado tratamento deve-se entender a outorga de isenções tributárias para os casos em que a cooperativa atua dentro de seus objetivos, levando-se em conta que é propósito constitucional o apoio ao cooperativismo. Tomando-se em consideração que na atividade especulativa (sic) não há o espírito de lucratividade, conjugado com o mandamento que ordena conferir um tratamento adequado, tributariamente falando, ao ato cooperativo, tudo isso parece conduzir à inevitável conclusão de que a outorga de isenções em beneficio destas entidades é a forma que melhor preenche o desiderato constitucional."

Roque Antônio Carrazza (Carrazza 2002, 388) teaches that "com lei complementar ou sem ela, parece-nos evidente que as pessoas políticas devem dispensar "adequado tratamento tributário ao ato cooperativo praticado pelas sociedades cooperativas". Entretanto, é a própria Constituição, sistematicamente interpretada e aplicada, que determina em que consiste tal tratamento tributário adequado. Esta lei complementar não poderá, V.g., considerar o 'ato cooperativo praticado pelas cooperativas', como sendo uma operação mercantil, de modo a permitir que sobre ela incida o ICMS (imposto incidente sobre operações relativas à circulação de mercadorias). O legislador complementar não está mais autorizado do que o legislador ordinário das várias pessoas políticas tributantes a captar, também neste passo, o desígnio constitucional."

The Supremo Tribunal Federal, in 1997, in Recurso Extraordinário (RE) 141.800/SP, through its First Panel, following the vote of the rapporteur Judge Moreira Alves, understood that article 146, III, "c", did not grant tax immunity to cooperatives, which is why, until the supplementary law to which it alludes is not enacted, cooperatives cannot be given the treatment deemed appropriate, since appropriate treatment would not necessarily mean privileged treatment. The Constitution would have assigned the supplementary legislator the task of granting appropriate treatment to the cooperative act, consistent with the peculiarities of the cooperatives.

The same understanding was established in 2004, in a plenary session, in the judgment of the Mandados de Injunção 701-2/DF, 702-1/DF and 703-9/DF, and by the Second Panel in the case files of the Agravo Regimental in Ação Cautelar 2.209/MG, in 2010, in the report of Judge Joaquim Barbosa.

In 2016, already under the general repercussion regime, in RE 599.362/RJ (item 323), the Plenary, in the context of Motions for Clarification, analyzing the PIS taxation on the activity of medical work cooperatives, expressed the following:

> "...
> 2. O art. 146, III, c, da CF/88, não confere imunidade tributária, não outorga, por si só, direito subjetivo a isenções tributárias relativamente aos atos cooperativos, nem estabelece hipótese de não incidência de tributos, mas sim pressupõe a possibilidade de tributação do ato cooperativo, dispondo que lei complementar estabelecerá a forma adequada para tanto.
> 3. O tratamento tributário adequado ao ato cooperativo é uma questão política, devendo ser resolvido na esfera adequada e competente, ou seja, no Congresso Nacional.
> ..."

It was understood that in the specific case of work cooperatives operating with third parties (supply of services or products), they act as autonomous entities, with their own legal personality, and not in the mere intermediation of their members, therefore resulting in invoicing, positive results and taxable income.

This judgement emphasized the need to establish differences between cooperatives, according to the characteristics of each segment of cooperative activity, based on the economic activity developed by each one.

The Court recognized the need to respect the peculiarities of cooperatives with respect to other companies of persons and capital. According to the honorable court, until the supplementary law supervenes to define the appropriate tax treatment, "*legislação ordinária relativa a cada espécie tributária deve, com relação a ele, garantir a neutralidade e a transparência, evitando tratamento gravoso ou prejudicial ao ato cooperativo*."

It also acknowledged that Law No. 5.764/71 was accepted by the Constitution of 1988 as an ordinary law and that its art. 79[8] only defines what is a cooperative act, without referring to the tax regime. Only the analysis of the event's subsumption in the specific taxation

[8] Art. 79. Denominam-se atos cooperativos os praticados entre as cooperativas e seus associados, entre estes e aquelas e pelas cooperativas entre si quando associados, para a consecução dos objetivos sociais.

Parágrafo único. O ato cooperativo não implica operação de mercado, nem contrato de compra e venda de produto ou mercadoria

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standard, in each concrete case, will determine whether or not this definition will have repercussions on the materiality of each tax type.

This judgment, however, failed to assess, from a constitutional standpoint, the legal nature of the amounts received by the cooperatives from third parties (non-members), those receiving services or those purchasing the goods. The constitutional concepts of cooperative act, revenue from cooperative activity and member are items that are subject to general repercussion in REs 597.315 and 672215 RG, item 536, which are still pending judgment.

However, it is incorrect to say, in the opinion of the Corte Suprema, that the cooperative act is immune, or that it receives any other type of tax benefit from the Federal Constitution, making the collection of taxes unfeasible.

With this decision, in terms of general repercussion, the STF understood that, according to the constitutional standards, the taxation of the cooperative act practiced by cooperatives is possible, and a recommended fiscal policy measure is for the taxing entities to grant appropriate treatment. Exemptions, reductions in the calculation basis, credits, among other measures capable of triggering fiscal neutrality in the daily life of cooperatives, must be governed by specific laws.

The assessment of the incidence of taxes was relegated to the jurisdiction of the STJ, upon verification of the legal framework of the activity practiced by cooperatives in the concept of cooperative act defined by law 5.764/71. In other words, it is ultimately up to this Superior Tribunal to define whether the activity conducted by a cooperative will be subject to the incidence of a certain tax.

We highlight, for this analysis, provisions contained in Law 5.764/71 that directly and indirectly govern the issue:

> Art. 3° Celebram contrato de sociedade cooperativa as pessoas que reciprocamente se obrigam a contribuir com bens ou serviços para o exercício de uma atividade econômica, de proveito comum, sem objetivo de lucro."
>
> Art. 4.º As cooperativas são sociedades de pessoas, com forma e natureza jurídica próprias, de natureza civil, não sujeitas a falência, constituídas para prestar serviços aos associados, distinguindo-se das demais sociedades pelas seguintes características:..."
>
> Art. 5.º - As sociedades cooperativas poderão adotar por objeto qualquer gênero de serviço, operação ou atividade, assegurando-selhes o direito exclusivo a obrigação do uso da expressão "cooperativa" em sua denominação.

> Art. 7.º As cooperativas singulares se caracterizam pela prestação direta de serviços aos associados".
>
> Art. 79. Denominam-se atos cooperativos os praticados entre as cooperativas e seus associados, entre estes e aquelas e pelas cooperativas entre si quando associados, para a consecução dos objetivos sociais.
> Parágrafo único. O ato cooperativo não implica operação de mercado, nem contrato de compra e venda de produto ou mercadoria.
>
> Art. 87. Os resultados das operações das cooperativas com não associados, mencionados nos arts. 85[9] e 86[10] serão levados à conta do "Fundo de Assistência Técnica, Educacional e Social" e serão contabilizados em separado, no molde a permitir cálculo para incidência de tributos.
>
> Art. 111. Serão considerados como renda tributável os resultados obtidos pelas cooperativas nas operações de que tratam os arts. 85, 86 e 88 desta Lei."

These provisions, in our opinion, prevail in the legislation for the purpose of assessing the concept of cooperative act and its consequences on the tax field.

Cooperative act, by the interpretation of the aforementioned statements, would be that practiced by the cooperatives, in accordance with their corporate purpose, enabling the interest of their members. Pursuant to art. 79, it does not imply a market transaction, nor an agreement for the purchase and sale of a product or merchandise.

Any activity, service or transaction may be used as the purpose of a cooperative, pursuant to art. 5, provided that it is focused on the interests of its members, aiming to foster the activity that led them to this type of association.

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[9] Art. 85. As cooperativas agropecuárias e de pesca poderão adquirir produto de não associados, agricultores, pecuaristas ou pescadores, para completar lotes destinados ao cumprimento de contratos ou suprir capacidade ociosa de instalações industriais das cooperativas que as possuem

[10] Art. 86. As cooperativas poderão fornecer bens e serviços a não associados, desde que tal faculdade atenda aos objetivos sociais e esteja de conformidade com a presente Lei.

Parágrafo Único. No caso de cooperativas de crédito e das seções de créditos das cooperativas agrícolas mistas, o disposto neste artigo só se aplicará com base em regras a serem estabelecidas pelo órgão normativo.

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Along this line of understanding, the STJ, in the AgRg in REsp 622.794/MG, understood that the activity practiced by cooperatives should be understood from their bylaws, a document that has the ability to outline their purposes as well as the means by which they will be achieved:

> "1. O art. 21 da Lei 5.764/71 determina que o estatuto social, o qual estabelece a relação jurídica entre a cooperativa e seus associados, deve indicar, expressamente, a área de atuação e o objeto da cooperativa, de modo a permitir o fiel cumprimento de suas finalidades.
>
> 2. O estatuto social de uma cooperativa pressupõe o preenchimento de uma série de requisitos legais, entre os quais o dever de delimitar a área de atuação e o objeto da sociedade. Ressalta-se, ainda, que o referido documento deve ser submetido à aprovação do órgão competente, no caso, da Junta Comercial do Estado de Minas Gerais.
>
> 3. Desse modo, a suposta previsão, no estatuto, de relações com terceiros não-cooperados que não ensejam a incidência do ISS, deve ser objeto de análise, caso a caso.

The corporate purpose of a cooperative, respecting the legal precepts contained in Law 5.764/71, in particular guiding principles of cooperative activity, is, therefore, the base document to be evaluated for purposes of classifying the activity to be practiced in the concept of cooperative act.

In a taxi driver cooperative, for example, it is assumed that the foundation of its creation is aimed at finding customers for its members. In consumer cooperatives, it is the search for better conditions to enable the purchase of products by their members. In credit unions, it is the provision of financial services on behalf of their members. In rural production cooperatives, it is the means and conditions for their members (rural producers) to be able to produce and, as a result, take their products to market.

An exact definition in the bylaws regarding the objectives to be fulfilled by the cooperative is therefore imperative, in order to avoid a possible distortion of its activity, or rather, a misinterpretation and qualification of the acts that may eventually be practiced. It is essential to clarify which acts the cooperative shall conduct "for" its members, "for" the achievement of its corporate objectives, in order to enable them to be classified under the concept of "cooperative act".

In other words, by the message provided for in art. 79 of the law, there is no exchange of ownership between cooperative and member. The relationship between them is intrinsic and must be considered as if

entered into between the same person. In this regard, all acts performed by the cooperative "for" the achievement of its corporate objectives must be analyzed in their entirety, within this "cooperative/member" relationship, not being considered as a market transaction, that is, a transaction with third parties. Carrazza teaches (Carrazza 2002, 388):

> "No ato cooperativo inexistem negócio mercantil e mutação de titularidade da coisa. É que a cooperativa atua em nome, por conta e em benefício do cooperado."

Within this context, from a logical-systematic analysis, it is concluded that to achieve their corporate objectives, cooperatives will not only practice internal transactions, that is, they will not maintain relationships only with their members, since their relationship with the market is essential.

Cooperatives will need to search the market for those interested in the activity performed by their members – this is their reason for being. It is at this time that the cooperative enters into agreements with individuals and/or legal entities as a representative, mandatory, of its members. This is what the doctrine calls external acts or business, intermediary acts/business.

Regarding the tax effect of these intermediary acts, the Third Panel of the Conselho Administrativo de Recursos (CARF), in Special Appeal 237.603, expressed the following:

Sociedades cooperativas. Ato cooperativo. Atomeio.interpretação. A interpretação literal não é a única que deve ser empregada quando da análise de uma norma jurídica, tendo em vista que sua adequada aplicação também deve derivar de um estudo sistemático. Ao confrontar os artigos 79, 86, 87 e 111 da Lei n.º 5.764/71 com os arts. 146, III, 'c' e 174, § 2.º da Constituição Federal, bem como com as demais disposições da Lei n.º 5.764/71, é possível concluir que os atos-meio, por serem indispensáveis à consecução dos atos-fim, também devem ser considerados como cooperativos.

Fatos geraidores até outubro de 1999. Cooperativa de produção e venda de vinho. Ato-meio. Essencial. Isenção. Numa cooperativa de produção e venda de vinho, também goza da isenção da COFINS, até os fatos geradores outubro de 1999, a receita proveniente da venda deste produto ao mercado, por ser tal operação essencial à realização do objeto social da sociedade e não se dissociar dos bens que cada associado, individualmente, produz. Embora uma interpretação literal do art. 79 da Lei n° 5.764/71 permita restringir os atos cooperativos apenas aos atos internos ou atos-fim, realizados entre a sociedade coope-

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rativa e seus associados, a isenção se estende aos atos-meio quando estes são essenciais à realização daqueles e não vão além do que cada associado, individualmente, poderia oferecer a terceiros sem a intermediação da cooperativa".

It is important to note that the cooperative law does not promote any classification of the cooperative act practiced by cooperatives, and the distinction between final and intermediary acts, internal and external business, principal and auxiliary acts, among others, arises from doctrine and jurisprudence.

According to 5.764/71, the acts performed by cooperatives will be classified as 'cooperative act' or 'non-cooperative act'. And, pursuant to art. 111, the result of non-cooperative acts will be taxable, and, therefore, must be accounted for separately.

The transactions governed by articles 85, 86 and 88 are typical non-cooperative acts, practiced with third parties (non-members), although aimed at achieving corporate objectives. This classification is focused on situations in which the cooperative provides its goods and/or services to non-members. This is the case, for example, in which a dairy cooperative purchases milk from a non-member to supply its contracting party, in order to guarantee the minimum quantity provided for in the agreement, in cases where the quantity collected from its members is insufficient. Or when a medical cooperative, health plan operator, promotes the care of a certain beneficiary/contracting party through a non-member doctor, due to lack of an associated specialist, thus ensuring the coverage provided for in the agreement.

The result of these acts performed with non-members of the cooperative would be taxed, pursuant to the provisions of law 5.764/71, as understood by the STJ in the Agravo Regimental in Recurso Especial 761.326 – DF:

> "...No campo da exação tributária com relação às cooperativas a aferição da incidência do tributo impõe distinguir os atos cooperativos através dos quais a entidade atinge os seus fins e os atos não cooperativos; estes extrapolantes das finalidades institucionais e geradores de tributação; diferentemente do que ocorre com os primeiros. Precedentes jurisprudenciais. ..."

The Second Panel of the STJ, in 2013, in the AgRg in Ag 1292438/MG, regarding *"operações realizadas com terceiros não associados (ainda que, indiretamente, em busca da consecução do objeto social da cooperativa), consubstanciam 'atos não-cooperativos', cujos resultados positivos devem integrar a base de cálculo do imposto de renda."*

It can be seen, however, that art. 111 uses the expressions "taxable income" and "positive result", which leads us to conclude that it would be referring to taxation on income and contribution on profit.

Hence the edition of precedent 262, according to which *incide o imposto de renda sobre o resultado das aplicações financeiras realizadas pelas cooperativas."*. Financial investments, except in the daily life of credit unions[11], are acts considered by the STJ classified as "non-cooperative".

Notwithstanding the alleged restriction, the First Panel of the STJ, in 2004, based on the interpretation of Law 5.764/71, recognized the exemption from taxes levied on revenue, billing and results of cooperative acts:

> ...
> 2. No campo da exação tributária com relação às cooperativas a aferição da incidência do tributo impõe distinguir os atos cooperativos através dos quais a entidade atinge os seus fins e os atos não cooperativos; estes extrapolantes das finalidades institucionais e geradores de tributação; diferentemente do que ocorre com os primeiros. Precedentes jurisprudenciais.
> 3. A cooperativa prestando serviços a seus associados, sem interesse negocial, ou fim lucrativo, goza de completa isenção, porquanto o fim da mesma não é obter lucro mas, sim, servir aos associados.
> 4. Os atos cooperativos não estão sujeitos à incidência da COFINS porquanto o art. 79 da Lei 5.764/71 (Lei das Sociedades Cooperativas) dispõe que o ato cooperativo não implica operação de mercado, nem contrato de compra e venda de produto ou mercadoria.
> 5. Se o ato cooperativo não implica operação de mercado, nem contrato de compra e venda de produto ou mercadoria, a revogação do inciso I do art. 6° da LC 70/91 em nada altera a não incidência da COFINS sobre os atos cooperativos. O parágrafo único, do art. 79, da Lei 5.764/71 não está revogado por ausência de qualquer antinomia legal.
> 6. A Lei 5.764/71, ao regular a Política Nacional do Cooperativismo e instituir o regime jurídico das sociedades cooperativas, prescreve, em seu art. 79, que constituem 'atos cooperativos os praticados entre as cooperativas e seus associados, entre estes e aquelas e pelas cooperativas entre si quando associados, para a consecução

[11] STJ, AgRg no REsp 717.126/SC:"A Primeira Seção do STJ pacificou o entendimento de que toda movimentação financeira das cooperativas de crédito – incluindo a captação de recursos, a realização de empréstimos aos cooperados, bem como a efetivação de aplicações financeiras no mercado – constitui ato cooperativo. 3. Infere-se que, se as aplicações financeiras das cooperativas de crédito, por serem atos cooperativos típicos, não geram receita, lucro ou faturamento, o resultado positivo decorrente desses negócios jurídicos não sofre a incidência do Imposto de Renda."

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> dos objetivos sociais', ressalva todavia, em seu art. 111, as operações descritas nos arts. 85, 86 e 88 do mesmo diploma, como aquelas atividades denominadas 'não cooperativas' que visam ao lucro.
>
> 7. É princípio assente na jurisprudência que: "Cuidando-se de discussão acerca dos atos cooperados, firmou-se orientação no sentido de que são isentos do pagamento de tributos, inclusive da Contribuição Social sobre o Lucro". (Min. Milton Luiz Pereira, Resp 152.546, DJU 03/09/2001, unânime)
>
> ...[12]

The understanding followed the line defended by the doctrine of Waldírio Bulgarelli (Bulgarelli 1974, 40):

"Por suas características e objetivos definidos minuciosamente pelo Direito Privado, não se ajustam às hipóteses da legislação tributária, caracterizando-se a não-incidência sobre suas operações com seus associados ."

There is no way to measure billing, revenue, positive result in favor of cooperatives, when practicing cooperative acts, since everything they receive is destined for the members of the cooperative, subsequently transferred to them in proportion to their production once all the expenses necessary for the practice of their activity are paid (rental, personnel, administrative services, etc...).

For that very reason, the Conselho Federal de Contabilidade, through its technical standards, qualifies the amounts carried over by the cash of cooperatives as mere inflow:

> NBC T 10 - dos aspectos contábeis específicos em entidades diversas.
>
> ...
>
> item 10.8.1.2 - *"Entidades Cooperativas são aquelas que exercem as atividades na forma de lei específica, por meio de atos cooperativos, que se traduz na prestação de serviços aos seus associados, sem objetivo de lucro, para obterem em comum melhor resultado para cada um deles em particular. Identificam-se de acordo com o objeto ou pela natureza das atividades desenvolvidas por elas, ou por seus associados".* (grifamos)
>
> item 10.8.1.2.1 - *"Caracterizam-se atos cooperativos as operações realizadas pela cooperativa com o mercado, atuando como mandatária do cooperado, na aquisição de insumos e colocação de produtos e serviços por eles produzidos ou prestados."* (grifamos)
>
> ...
>
> item 10.8.1.4 – "*A movimentação econômico-financeira decorrente dos atos cooperativos, na forma disposta no estatuto social,*

[12] RESP 523554/MG , Primeira Turma, Relator Min. Luiz Fux, 25/02/2004.

> *é definida contabilmente como ingressos e custeios dispêndios (conforme definido em lei).”*

Inflow is not revenue, as it is not equivalent to the concept of billing, as taught by Geraldo Ataliba (Ataliba 1978, 81):

> “O conceito de receita refere-se a uma espécie de entrada.
> Entrada é todo o dinheiro que ingressa nos cofres de determinada entidade. Nem toda entrada é receita. Receita é a entrada que passa a pertencer à entidade. Assim, só se considera receita o ingresso de dinheiro que venha a integrar o patrimônio da entidade que a recebe.”

The amounts that pass through the cash flow of cooperatives, due to the agreements they enter into on behalf of their members, as trustee, strictly complying with the provisions of the purpose of their bylaws, belong, in their entirety, to the members, classified both legally and from an accounting perspective as inflow. Revenue, billing, positive result (since they are non-profit institutions, PROFIT is not mentioned), will be calculated when non-cooperative acts are performed, the result of which, pursuant to articles 87 and 111, must be accounted for separately, enabling taxation.

In 2016, after the judgment of the STF (items 177 and 323), the First Section of the STJ, in REsp 1.141.667/RS, representative of the dispute, Judge Napoleão Nunes Maia Filho, maintaining the previous precedents, recognized that for typical cooperative acts (practiced between cooperatives and their members), the non-applicability of contributions destined to PIS and COFINS, as well as IRPJ and CSLL must be recognized.

The treatment, based on the provisions of Law 5.764/71, would be ‘non-applicability’ and not ‘exemption’ as mentioned above. The understanding, equally, would also apply to ISSQN[13] e ICMS[14].

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[13] STJ, REsp 1213479/AL: “Não é possível a tributação pelo ISS sobre a atividade prestada pela cooperativa - recebimento dos valores pagos pela prestação dos serviços, posteriormente repassados aos cooperados com as deduções das despesas operacionais - quer pela absoluta ausência de tipicidade (aspecto material), já que não há, nem nunca houve, previsão de incidência do imposto sobre essa atividade em quaisquer das listas anexas até hoje elaboradas (DL 406/68, LC 56/87 ou LC 116/03); quer pela gratuidade do serviço (aspecto dimensível), que obsta a quantificação do imposto por ausência do elemento ‘preço’.”

[14] STF, ARE 1015848/DF, 14/02/2017, Min. Edson Fachin: “5. Não pode incidir o ICMS na circulação de mercadorias entre as cooperativas ou entre a cooperativa e seus cooperados, desde que a operação esteja ligada diretamente ao seu objetivo social e

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The case is suspended until judgment of the Extraordinary Appeal in the Supremo Tribunal Federal on item 536 (RE 672.215/CE). The decision, however, has been applied in the judgment of other appeals (REsp No. 597.983/RS; REsp No. 612.201/MG ; REsp No. 635.799/SC; Ag No. 758.714/SC; and REsp No. 980.060/RJ), considering the interpretation (non-applicability) for the cooperative act performed by various branches of cooperative activity: agriculture, health, credit and labor.

It is true, therefore, that as long as there is no position on the matter, clarifying the scope of discussion about the exact extension of the concept of cooperative act, it will be at the mercy of the treatment granted by each specific legislation, as well as the understanding of the Tax Authority and Judiciary with regard to the classification of the activity practiced by a particular cooperative (if classified as a cooperative or non-cooperative act).

Supplementary Law 70/91, which instituted COFINS, for example, expressly established exemption for cooperative acts practiced by cooperatives, until revoked by art. 93 of Provisional Measure No. 2.158-35/01:

> Art. 6.º - São isentas da contribuição:
> I – as sociedades cooperativas que observarem ao disposto na legislação específica, quanto aos atos cooperativos próprios de suas finalidades;

Pursuant to art. 15 of MP 2.158-35/2001, the following may be excluded from the PIS and COFINS calculation basis:

> I - os valores repassados aos associados, decorrentes da comercialização de produto por eles entregue à cooperativa;
> II - as receitas de venda de bens e mercadorias a associados;
> III - as receitas decorrentes da prestação, aos associados, de serviços especializados, aplicáveis na atividade rural, relativos a assistência técnica, extensão rural, formação profissional e assemelhadas;
> IV - as receitas decorrentes do beneficiamento, armazenamento e industrialização de produção do associado;
> V - as receitas financeiras decorrentes de repasse de empréstimos rurais contraídos junto a instituições financeiras, até o limite dos encargos a estas devidos.

---

que esteja ausente a intenção de lucros." O processo foi remetido para o Tribunal de origem para, nos termos do art. 1036 do CPC, aguardar apreciação do tema 536 da sistemática da repercussão geral no RE-RG 672.215.

We also highlight other "benefits" granted to cooperative companies, regarding PIS/COFINS taxes: Law 10.676/03, Art. 17 of Law No. 10.684/2003, articles 30 and 30-A of Law 11.051/04.

With regard to Income Tax (IR), Decree 3.000/99 (RIR/99), in line with the provisions of article 111 of Law 5.764/71, excludes the applicability on the result of cooperative acts:

> Art. 182. As sociedades cooperativas que obedecerem ao disposto na legislação específica não terão incidência do imposto sobre suas atividades econômicas, de proveito comum, sem objetivo de lucro (Lei n.º 5.764, de 16 de dezembro de 1971, art. 3.º, e Lei n.º 9.532, de 1997, art. 69).
>
> Art. 183. As sociedades cooperativas que obedecerem ao disposto na legislação específica pagarão o imposto calculado sobre os resultados positivos das operações e atividades estranhas à sua finalidade, tais como (Lei n.º 5.764, de 1971, arts. 85, 86, 88 e 111, e Lei n.º 9.430, de 1996, arts. 1.º e 2.º):
>
> I - de comercialização ou industrialização, pelas cooperativas agropecuárias ou de pesca, de produtos adquiridos de não associados, agricultores, pecuaristas ou pescadores, para completar lotes destinados ao cumprimento de contratos ou para suprir capacidade ociosa de suas instalações industriais;
>
> II - de fornecimento de bens ou serviços a não associados, para atender aos objetivos sociais;
>
> III - de participação em sociedades não cooperativas, públicas ou privadas, para atendimento de objetivos acessórios ou complementares.

Since 2005, cooperative companies (except consumer companies) that comply with the provisions of specific legislation, in relation to cooperative acts, have been exempt from the Social Contribution on Net Profits (CSLL), pursuant to articles 39 and 48 of Law 10.865/04.

Finally, it should be clarified that there are no discussions held in our Courts about the incidence of taxes such as IPTU, ITR, IPVA, IPI, IOF, ITBI, ITCMD, as well as fees, improvement contributions, in addition to social security contributions in general, on cooperative companies.

The scope of discussion about the taxation of the cooperative act is restricted, by the application of Law 5.764/71, to IR, CSL, PIS, COFINS, ICMS and ISSQN taxes, in addition to any contributions for intervention in the economic domain.

We also highlight the necessary assessment of the effects of the cooperative act for the purpose of evaluating the alleged incidence of

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FUNRURAL (declared constitutional by the STF, in RE 718.874[15]). The issue will certainly pass through the scrutiny of the Judiciary.

IV. **Final considerations**

In the understanding of the STF, the cooperative act practiced by cooperative companies did not receive any specific tax treatment from the Federal Constitution, with that task being the responsibility of the supplementary law, as well as the taxing entities, by means of a tax policy measure, in accordance with the spirit of this legal institute (cooperatives).

The constitutional concepts of cooperative act, revenue from cooperative activity and member are items that are subject to general repercussion in RE 597.315 and 672215, item 536, which are still pending judgment.

For members of the Suprema Corte, the ordinary legislator of each political entity may guarantee benefits, specificities, tax neutrality, through exemptions, reductions in the calculation basis, among others, to cooperatives, until the supplementary law referred to in the art. 146, III, c supervenes.

It is incumbent upon the STJ, through the application of Law No. 5.764/71 and specific laws for each tax, to institute the legal regime for cooperative companies and the cooperative act, assessing their possible tax consequences.This superior court has understood that the taxation of the activity practiced by cooperatives will be linked to its classification as a "cooperative act". Only the results arising from non-cooperative acts will be taxed, which must be accounted for separately, pursuant to the provisions of art. 111 of Law 5.764/71.

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