

Tax Reform in Brazil: Taxation on Activities Harmful to the Environment

Abstract

The purpose of this article is to present an important point of the tax reform approved by the National Congress in December 2024: the introduction of a selective tax that aims to tax goods that are harmful to health or the environment.

The theory used to justify extra-fiscal taxation is initially presented, involving the discussion on the intervention of the state in the economic domain and the compatibility of the extra-fiscal tax rule with the principle of taxable capacity.

The main characteristics of the new tax are then presented, and it is important to emphasize that the rates will still be defined in an ordinary law that should be discussed throughout the year 2025.

1. Introduction

Brazil's current tax system is characterized by a complex division of tax powers, excessive bureaucracy, a high number of types of taxes and high consumption taxation. Among other characteristics, this makes Brazil's tax system one of the most complicated in the world.

In order to improve the Brazilian tax system, a reform is being carried out with the following objectives: a) simplification – reducing the number of types of taxes and unifying taxes with the same tax base; b) Transparency – making the tax system clearer and easier to understand for the population; c) Stimulating the economy – a simpler and more efficient tax system should attract more investment and boost economic growth.

1 PhD in Tax Law from the University of São Paulo (USP) and Master in Tax Administration from UNED and the Instituto de Estudios Fiscales – IEF/SPAIN. Specialist in State Law from the School of the Attorney General's Office of the State of São Paulo. Specialist in Tax Law, Bachelor of Laws and Electrical Engineering from USP. Tax Auditor at the Tax Administration of the State of São Paulo – Brasil.

With the publication of the constitutional complementary law nº 132/23, the constitutional text changes in several aspects related to the tax field: the abolition of ISS, ICMS, PIS and COFINS² (Consumption taxation in Brazil) and the introduction of a tax on transactions in goods and services (IBS) and a new contribution on goods and services (CBS) are the most important changes.

The focus of the reform is on consumption taxes: at federal level, the federal social contributions (PIS and COFINS) are replaced by a new contribution (CBS – Contribuição sobre bens e serviços – Contribution on goods and services) applied to goods and services. The IPI (tax on industrial products) is maintained only for the benefit of the Manaus Free Trade Zone.

At the state level, the ICMS (which is levied on the movement of goods, interstate and interurban transport services and on telecommunications services) and at the municipal level, the ISS (tax on services in general) is replaced by the IBS (IBS – Imposto sobre bens e serviços – tax on goods and services).

The reform includes a new selective tax (IS) to be applied to the production, extraction, marketing or import of goods and services that are harmful to health or that are harmful to the environment.

The idea of the constitutional amendment was to create a model similar to the European Value Added Tax (VAT), but in a dual model, that is to say with shared competence between municipalities, states and the Federal District (with IBS) and the Union (with CBS and IS).

Although a large part of Constitutional Amendment No. 132 has already come into force, the complementary law that deals with the selective tax was approved by the National Congress in December 2024 and sanctioned by the President of the Republic on January 16, 2025. However, the rates that will be applied by the Selective Tax have yet to be published, so the law will not yet come into force at the moment.

OECD consider that consumption taxes such as VAT, sales taxes and excise duties are often categorised as indirect taxes. They are generally levied on transactions, products or events and collected from businesses in the production and distribution chain, before being passed on to final consumers as part of the purchase price of a good or service. They are not directly imposed on

2 ISS – Imposto Sobre Serviços – Municipal tax on the provision of services ICMS – Imposto sobre a Circulação de Mercadorias, sobre a prestação de serviços de Comunicação e sobre a prestação de serviços de transporte intermunicipal e interestadual – State tax levied on the provision of communication services, the provision of interstate and intermunicipal transport services and the circulation of goods PIS and COFINS – Contribuições Sociais Federais – Federal Social Contributions.

income or wealth but rather on the expenditure that income and wealth finance. VAT tax is a broad-based tax on final consumption by households collected – but not borne – by businesses through a staged process and Excise tax is levied on a limited range of defined goods assessed as a specific charge per unit based on characteristics of the product and imposed at a specific stage of production or distribution.³

2. Selective tax – main characteristics and possibility of state intervention in the economic domain and its justification

I consider the Brazilian selective tax a kind of excise tax. A number of general characteristics differentiate excise duties from value added taxes: a) They are levied on a limited range of products; b) They are not normally due until the goods enter free circulation, at a single stage in the supply chain; c) Excise charges are generally assessed by reference to the weight, volume, strength or quantity of the product (specific or “*ad quantum excise*”), combined in some cases, with its value (*ad valorem excise*); d) Consequently, and unlike VAT, the excise system is characterised by a small number of taxpayers at the manufacturing or wholesale stage (although, in some cases they can also be levied at the retail stage).

2.1 Use of tax as a vehicle to promote taxpayer behavior and stimulate economic development

I understand that most countries considered developed today have, at some point, used excise tax as inductive tax rules. We have the example of the taxation of oleomargarine in the United States. This product was developed during the time of Napoleon III to serve as food in times of war. Since the product was similar to butter, it became a competitor at a much lower price. The United States industry pressured the president to sanction the law that created a tax on oleomargarine and, in doing so, protect the local industry from competition.⁴

I understand that the most appropriate form of State intervention in the economy is through excise tax because it allows the jurisdictional entity an

3 OECD (2024), *Consumption Tax Trends 2024: VAT/GST and Excise, Core Design Features and Trends*, OECD Publishing, Paris, <https://doi.org/10.1787/dcd4dd36-en>.

4 SCHOUERI, Luis Eduardo. *Normas Tributárias Indutoras e Intervenção Econômica*. Rio de Janeiro: Forense, 2005, p. 118.

option, a choice of behavior to be followed. Therefore, when the State uses taxes as vehicles for inducing tax rules, it is seeking to implement, in a non-authoritarian manner, the objectives of a modern State, that is, the implementation of equality among its members through the promotion of economic development.

2.2 *The economic domain*

The economic domain refers to the market, that is, the sector of the economy in which economic agents operate. This sector is subject to State rules and regulations. Direct State action is permitted in exceptional cases. In these cases, it is necessary to ensure that there are no privileges for the State in order to preserve the principle of free initiative and free competition.⁵

The inductive function, an effective function that is not normally present in the text of the rule, is what characterizes what we call inductive tax rules. This function is the one that can induce a certain behavior of the taxpayer, through the granting of an advantage or through the imposition of a higher tax, based on certain behavioral choices of the same taxpayer.

The word option is important because it characterizes a non-imposition, characteristic of a modern State that seeks only to regulate the behavior of taxpayers and not to direct them compulsorily.

There is the option of the rule having the effect of inducing the taxpayer to adopt a behavior, such as, for example, the greater production of a certain product, in view of an exemption that allows a more attractive price for the consumer with the consequent increase in consumption. On the other hand, the rule may create obstacles to the consumption of a certain product, by means of a high tax, which would induce a reduction in consumption.

In terms of tax regulations, we have those that are justified by the financial needs of the State and their legitimacy is immediately recognized based on the State's financial needs. On the other hand, we have tax regulations that are justified by the State's intervention in the economic domain, the justification for which must be sought in each act of intervention carried out.

There are occasions when the opposite of what is expected happens, that is, the inducing effect is contrary to what the legislator intended. As an example, we have the case of the regulation that increased the ISS (Tax on Services, a Municipal Tax in Brazil) in the city of São Paulo. Instead of obtaining an

5 SCHOUEIRI, Luis Eduardo. *Normas Tributárias Indutoras e Intervenção Econômica*. Rio de Janeiro: Forense, 2005, p. 43.

increase in revenue, as desired by the legislator, this increase caused the headquarters of service providers to flee to cities around the capital of São Paulo, since they offered a lower ISS rate as an incentive. This led to a decrease in the collection of this tax in the city of São Paulo.

The inclusion of inductive tax rules as a measure of indirect State intervention in the economic domain requires verification that both the principles of economic law and the principles classically identified with tax rules are applied synergistically to limit State intervention and adapt the objective of the rule to its expected effect.⁶

Liberals in particular understand that the market would be a perfect model both for promoting economic efficiency and optimizing production factors and for regulating social relations.

We understand that every model is a theoretical abstraction of reality and works well in theory, since all the assumptions taken into account for developing the model are related and act exactly as expected. Markets, when presented in a model, are perfect. Their invisible hand would make all economic agents act in pursuit of their personal interests in such a way that they would end up indirectly benefiting the whole of society, which would benefit from an environment of perfect competition, stable prices, economic development on the edge of the production possibility frontier, accelerated growth in well-being and distribution of wealth.⁷

2.2.1 Imperfections of the market mechanism

However, we understand that the market mechanism model has imperfections that justify state intervention in the economic domain.

The first imperfection can be called **factor mobility**,⁸ that is, in the capitalist system there is not always a balance between supply and demand, since producers and consumers do not act “rationally” as predicted by the system. There is a need for state intervention to correct possible supply deficits (in this case the state can act as a producer or importer of products) or demand deficits (in this case the state can act as a buyer) to reduce producers’ losses and avoid long-term damage to a given sector of the economy.

6 SCHOUERI, Luis Eduardo. *Normas Tributárias Indutoras e Intervenção Econômica*. Rio de Janeiro: Forense, 2005, p. 37.

7 MASTRODI NETO, Josué. Pressupostos da intervenção do estado na economia. *Revista Tributária e de Finanças Públicas*, São Paulo, vol. 12, nº 54, p. 148–173, jan./fev, 2004.

8 SCHOUERI, Luis Eduardo. *Normas Tributárias Indutoras e Intervenção Econômica*. Rio de Janeiro: Forense, 2005, p. 74.

The second imperfection can be called **access to information**.⁹ It is a prerequisite for the perfect functioning of the market that economic agents and consumers enjoy full access to information about products traded and their characteristics, including trading conditions.

When this does not occur, we have misinformation that can generate several distortions. This is why State intervention is justified, which usually takes place in the regulatory sphere, when it imposes on agents the obedience of certain rules (weights and measures, consumer protection, capital market legislation, etc.). Alternatively, the State can also induce the behavior of economic agents, for example, by making the granting of tax incentives conditional on companies adopting the form of corporations, thus subjecting themselves to requirements concerning the publication of their financial statements.

The third imperfection can be called **economic concentration**.¹⁰ The market mechanism presupposes a large number of producers and consumers, so that the price, which is the result of the meeting of supply and demand curves, is set based on countless independent transactions.

However, in the search for survival, companies are also forced to become increasingly stronger, thus obeying a principle that says that one must grow, or one will be doomed to perish, that is, either the company will become dominant or it will end up being dominated.¹¹

As a company grows, the likelihood increases that it will be able to influence price formation itself, giving rise to monopolies or oligopolies. The Federal Constitution seeks, in paragraph nº 4, of article 173, to repress arbitrary increases in profits and abuse of economic power aimed at dominating markets and eliminating competition. Antitrust rules also combat concentration in the economy.

It is also possible to use an inductive tax rule, such as, for example, the case of excluding the option for taxation based on presumed profit for companies whose revenue exceeds the limit imposed by law.

It is also worth remembering that our Constitution seeks to promote small and medium-sized companies, in order to protect them from the phenomenon of concentration. Brazil had the enactment of an inductive tax rule

9 SCHOUEIRI, Luis Eduardo. *Normas Tributárias Indutoras e Intervenção Econômica*. Rio de Janeiro: Forense, 2005, p. 74.

10 SCHOUEIRI, Luis Eduardo. *Normas Tributárias Indutoras e Intervenção Econômica*. Rio de Janeiro: Forense, 2005, p. 75.

11 SOUZA, Washington Peluso Albino de. *Direito Econômico*. 1.ed. São Paulo: Saraiva, 1980, p. 424.

called “Simples Nacional” that seeks to bring numerous small and medium-sized companies into legality.

The fourth imperfection is called **externalities**.¹² According to the normal rules of the market mechanism, the cost or profit of a private activity must be borne by the one who generates it. We have an externality when the cost or profit is borne by the community. The externality can be positive or negative. An example of a positive externality is when a company sets up in a certain region, attracting other businesses and, therefore, improving the general income level of the locality. An example of a negative externality is when we have a polluting company that causes environmental damage that is not borne by its perpetrators but rather by the entire community.

The argument of the so-called theory of externalities can be summarized in the fact that there are two types of costs in the production of consumer goods: a) private costs, those that are borne directly by the seller of a good and b) social costs, those that are borne by other agents in society. The natural tendency is for the seller of a good, through the selling price, to cover the private costs and the difference between the selling price and the private costs results in the private benefit of the operation (profit).

However, the consumption of certain goods entails costs that will be borne by other agents in society, for example, the consumption of a product that is harmful to the environment causes a worsening of people’s quality of life and the deterioration of natural resources. The resulting damage is not only related to the seller’s property, but also extends to broad social groups. This damage is considered to be social costs, which means that social costs and private costs must be treated differently.

Producers of goods must take into account not only private costs, but also social costs, because otherwise they will have an advantage over those producers who do not cause social costs, which implies unfair competition.

This argument has justified the establishment of the so-called sin tax (a type of excise tax) on the consumption of alcoholic beverages and tobacco. The cost of producing these goods takes into account the products used (raw materials, transport, machinery, labor, etc.), but does not take into account the social costs arising from the consumption of these goods: health costs, road accidents caused by excessive alcohol consumption, decreased productivity at work, social problems, etc.

The use of taxes on these goods would have the purpose of internalizing the social costs caused by the consumption of these goods so that producers would be charged for the losses caused.

12 SCHOUERI, Luis Eduardo. *Normas Tributárias Indutoras e Intervenção Econômica*. Rio de Janeiro: Forense, 2005, p. 76.

This form of fiscal solution to the problem of social costs, also called external costs or externalities, has its origin in the ideas formulated by Cecil Pigou in his book “The Economics of Welfare” (1920).¹³ From this author’s work it follows that through taxes (external costs) and subsidies (external benefits) these costs or benefits can be internalized by consumers.

The clearest example to illustrate these ideas is that of atmospheric pollution: in the fuel market, the immediate result will be that the price will be determined as the result of the negotiation between buyers and sellers of said fuels. The limits of this negotiation will be marked by the costs incurred in the extraction, transport and refining of raw materials, as well as by the utility derived by the consumers of said fuels, without any participation of third parties. However, there are also third parties who are forced to bear the external costs of said transaction, in the form of pollution. Through a Pigouvian tax, this external cost can be internalized, so that it is taken into account when setting the price of these fuels.

The fifth imperfection is called **collective goods**,¹⁴ which means that goods are offered in a non-individualized way. An individual can enjoy a good without preventing others from enjoying the same good. The action of inductive tax rules can also be effective in this social context. We can exemplify this through tax incentives granted to cultural activities or the preservation of historical heritage. In most cases, the State itself offers these collective goods and uses tax rules with the primary purpose of collecting taxes to preserve these collective goods.

In addition to the problems of the imperfection of the market model, we could also justify State intervention in the economic domain through the implementation of the so-called positive objectives of the State. We believe that the current State is not the same as the one of the 19th century, which considered society divided into two groups: the weak and the strong. In this conception, the State should be concerned with the weakest. However, in a modern view, we can conceive of him as concerned with the economy, correcting distortions and also acting to conduct, coordinate and streamline the economy.¹⁵

13 PIGOU, Arthur Cecil. Available: https://edisciplinas.usp.br/pluginfile.php/4154221/mod_resource/content/0/Pigou-The_Economic_of_Welfare_1920.pdf.

14 SCHOUERI, Luis Eduardo. *Normas Tributárias Indutoras e Intervenção Econômica*. Rio de Janeiro: Forense, 2005, p. 78.

15 SCHOUERI, Luis Eduardo. *Normas Tributárias Indutoras e Intervenção Econômica*. Rio de Janeiro: Forense, 2005, p. 79.

2.2.2 Types of intervention

The State can intervene in the economic domain (in which case the intervention will be by absorption or participation) or on the economic domain (in which case the intervention will be by direction or by induction). Let us look at each case below.

2.2.2.1 Intervention by absorption or participation

We can call it State intervention in the economic domain when this intervention is made directly in the field of economic activity in the strict sense. In this case, the State acts as an economic agent. It can intervene by absorption or participation.¹⁶ When it does so by absorption, the State assumes full control of the means of production and/or exchange in a given sector of economic activity in the strict sense; it acts under a monopoly regime. The 1988 Brazilian Federal Constitution establishes in its article 177 the cases of monopoly of State action. The monopoly should be restricted to cases in which the private sector has no interest or does not have available capital to carry out the economic activity or in which this sector is strategic for the development of the State. The latter case is becoming increasingly rare today. In the case of intervention by participation, the State assumes control of part of the means of production and/or exchange in a given sector of economic activity in the strict sense; it acts in competition with private companies that continue to carry out their activities in this same sector. In this case, it must submit to the same rules as competing companies so that there are no privileges and the principle of free competition is not harmed.

2.2.2.2 Intervention by direction

In this case, the State intervenes in the economic domain, that is, in the field of economic activity in the strict sense. We could say that it is an intense intervention, since the State exerts pressure on the economy, on the subjects of economic activity in the strict sense, establishing mechanisms and norms of behavior that do not allow choices for the economic agent subject to them.¹⁷

16 Grau, Eros Roberto, *A Ordem Econômica na Constituição de 1988*: (interpretação e crítica). 11.ed. São Paulo: Malheiros, 2006, p. 148.

17 Grau, Eros Roberto, *A Ordem Econômica na Constituição de 1988*: (interpretação e crítica). 11.ed. São Paulo: Malheiros, 2006, p. 148.

2.2.2.3 Intervention by induction

In this case, the State intervenes in the economic domain, that is, in the field of economic activity in the strict sense, but not as intensely as in other forms. It intervenes in a softer way, as it manipulates the instruments of intervention in accordance with and in compliance with the laws that govern the functioning of the markets. This mechanism is closer to the concept of a regulatory State that seeks, through regulatory agencies, to intervene in a less intrusive way in the economy.¹⁸

2.3 Compatibility of the use of extrataxation with the principle of tax capacity

Based on the premise that, in the case of intervention in the economic domain, in the form of induction, there would be a purpose legitimized by the legal system, in the form of internalization of social costs, in order to repair society for the damage caused by activities that are harmful to the environment, taxes with an extra-fiscal purpose would thus be justified.

However, there are scholars who are against the use of extrafiscal taxation because they believe that there is a violation of the principle of tax capacity. Bujanda¹⁹ describes the problem as terrible because these interventions in the economic domain (usually exemptions) largely cause a radical change in the criteria for tax distribution. Taxes or tax exemptions are often intended to fulfill regulatory functions, and the consideration of the taxable capacity of individuals is subordinated, or at least coordinated, to the need to achieve certain specific purposes of public entities, to maintain the economic system in balance, and to ensure a certain pace of development. Due to exemptions for extrafiscal purposes, it may therefore occur that precisely those manifestations and signs of wealth that from the strict point of view of tax justice are exempted from taxation. In other words: it may happen that tax burdens are exempted from what, while it is fair to pay the tax, is considered useful not to pay it, on the understanding that the fraction of wealth that was not handed over to the tax authorities can provide a greater service to the community by ensuring that it has a different destination, which the legislator himself is responsible for establishing as a prerequisite for the exemption. When this is

18 Grau, Eros Roberto, *A Ordem Econômica na Constituição de 1988*: (interpretação e crítica). 11.ed. São Paulo: Malheiros, 2006, p. 149.

19 SAINZ DE BUJANDA, Fernando. *Hacienda y derecho*: introducción al derecho financiero de nuestro tiempo. 6v. 3ª vol. Madrid: Instituto de Estudios Políticos, 1973, p. 418.

based on an extrafiscal purpose, it causes, in short, a profound change in the system of political valuations that governs tax distribution.

We can see daily in the print and television media that the power over government bodies of certain influential minorities has grown, increasingly organized and seeking to obtain favoritism from the State for their interests.

That is why the development of complex political, social and economic plans requires, due to their complexity, that they end up being drawn up by a restricted group of high-ranking government authorities who are also subject to pressures, including electoral pressures, tending to favor with particular intensity the economic or ideological interests of the groups to which they belong.

From these considerations, we can conclude that Bujanda does not generally agree with the intervention of the State in the economic domain through extrafiscal tax rules. Along the same line of reasoning, we have Perfecto Yebra Martul-Ortega²⁰ when he says that the first function of every tax is to obtain an inflow of money in favor of the State. Most taxes were established for this purpose. Even if a tax (in an exceptional case) does not have as its main purpose the collection but rather the obtaining of economic-social results, it must comply with “*postulates of tax justice, because this is what must be a necessary condition of the tax. It will be possible to achieve other political-social goals of the State, but at the same time, it is necessary to take the tax into account: to be fair.*”

Klaus Tipke is of the opinion that the inducing tax rule should be subject to the principle of the social state and not to the principle of the capacity to contribute, since the issue of economic development is more related to tax incentives and extrattribution than to the principle of the capacity to contribute.

Tipke believes that “*subsidies are measured according to need or special merit. That is why we speak of the principle of need and the principle of merit. It is widely recognized that Tax Law should be guided by the principle of tax capacity. However, this does not apply to extrafiscal rules.*”²¹ Tipke believes that tax capacity is not a fair parameter for extrafiscal taxes.²²

20 YEBRA MARTUL-ORTEGA, Perfecto. *La justicia fiscal y el impuesto sobre la renta*. Santiago de Compostela (La Coruña): Universidad [Departamento de Economía Política, Hacienda Pública y Derecho Fiscal], 1973, p. 40.

21 TIPKE, Klaus; YAMASHITA, Douglas. *Justiça Fiscal e Princípio da Capacidade Contributiva*. 1.ed. São Paulo: Malheiros, 2002, p. 21.

22 TIPKE, Klaus, “*Sobre a Unidade da Ordem Jurídica Tributária*”, *Direito Tributário, Estudos em Homenagem a Brandão Machado*, Luis Eduardo Schoueri e Fernando Aurélio Zilvetti (coord.). São Paulo: Dialética, 1998, p. 60–70.

Klaus Tipke classifies three groups of standards, based on the recognition of the principles that support tax laws, taking into account that the tax laws contained in the standards are of diverse motivation.²³

A distinction must be made between rules for tax purposes, rules for social purposes and rules for simplification purposes. There is no talk of a dual or plural system. Rules for tax purposes and rules for social purposes do not actually belong to the same system. The rule of “unity of order in law” (“Einheit der Rechtsordnung”) must also be observed when enacting rules for social purposes. Simplification rules do not constitute an independent subsystem, but merely have an auxiliary function within the subsystem of rules for tax purposes and the subsystem of rules for social purposes.

Within the scope of exemption orders, a distinction must also be made between exemptions for tax purposes, which are simply oriented towards the taxable capacity of the refined or limited taxable event, exemptions for social purposes and exemptions for simplification purposes; correspondingly, a distinction must be made between exemptions for tax purposes, exemptions for social purposes and exemptions for simplification purposes.

Fiscal norms (Fiskalzwecknormen).²⁴ Fiscal norms predominate in tax laws. They serve to satisfy the financial needs of the state by distributing the total amount of tax collected from the taxpayer. This is why the common good is financed.

Socially-oriented regulations (Sozialzwecknormen):²⁵ Tax laws are not widely disseminated by means of regulations with a socially-oriented objective in the broad sense. These are directive regulations (regulatory, interventionist, instrumentalist), economic policy (also agrarian policy, energy policy, development policy), social policy in the strict sense (especially redistributive), cultural policy, research policy, environmental policy, health policy, etc., which are not fiscally motivated. These can be called extrafiscal regulations.

Regulations with a socially-oriented objective may contain tax exemptions, but they may also contain higher tax burdens, compensation for losses and limits on deductions for losses or create autonomous taxes. Those who behave in accordance with the state directive will be exempted from taxes, while those who behave in a way that is contrary to that desired by the state directives will have their tax burden increased.

Simplifying rules (Vereinfachungszwecknormen):²⁶ for technical and economic reasons, they are intended to facilitate, simplify, make taxation

23 TIPKE, Klaus. *Die Steuerrechtsordnung*. 3 vols. Köln: Otto Schmidt, 1993, p. 121.

24 TIPKE, Klaus. *Die Steuerrechtsordnung*. 3 vols. Köln: Otto Schmidt, 1993, p. 122.

25 TIPKE, Klaus. *Die Steuerrechtsordnung*. 3 vols. Köln: Otto Schmidt, 1993, p. 122.

26 TIPKE, Klaus. *Die Steuerrechtsordnung*. 3 vols. Köln: Otto Schmidt, 1993, p. 124.

more practical and better managed. They are intended above all to avoid over-complicating and difficult implementation of the law. Simplifying rules are also intended to simplify both tax and social rules by means of typicality, deductions, etc. Seen in this light, they are not a group of independent rules alongside social rules or tax rules.

Based on the premise that discrimination based on marital status, race, or nationality is not appropriate, according to Brazilian constitutional rules, we can consider that the taxable capacity is the fundamental criterion for distributing taxes. Therefore, the taxable capacity requires that the differentiating criteria be objective and are in the very essence of the thing to be discriminated.

The ability to contribute can be based on the theory of sacrifice, according to which those who have greater wealth and assets suffer a much smaller sacrifice than those who have less income or assets.²⁷

The extrafiscal use of the tax must, however, observe certain limits, as explained by Moschetti:²⁸ a) the existence of an economic capacity is necessary; b) compliance of the fiscal intervention with the collective interest expressed in the constitutional norm; c) clarity of legislative purpose; d) respect for the constitutional principle of indirect interest (participant, involved), in particular, the relationship between tax payment and protection of property rights.

The use of taxes for social purposes cannot have their purpose distorted to the point of creating economic imbalance or violating legal principles. Naturally, the legislator does not have unlimited power to allow facilitation, advantage or disadvantage of formally equal economic capacity, in the name of the collective interest. On the contrary, the legislator needs to observe two requirements: economic capacity and collective demand.

These measures can only be taken in the presence of an effective economic capacity, which is always a necessary condition for the taxable capacity. However, it makes no sense to speak of the solidarity requirement when there is no economic capacity. The collective interest cannot be determined by the legislator's discretion, but is expressed in several constitutional norms of principle.

Moschetti cites several articles of the Italian Constitution that limit the discretion of the tax legislator, since these articles specify the collective inter-

27 GODOI, Marciano Seabra de. *Justiça, Igualdade e Direito Tributário*. São Paulo: Dialética, 1999, p. 190.

28 MOSCHETTI, Francesco. *Principio della capacità contributiva*. Padova: CEDAM, 1973, p. 217.

ests that the legislator must observe in order not to violate the principle of the taxable capacity.²⁹

The tax exemption instrument can be used for development purposes with the intention of favoring a region, in order to free it from a situation of economic backwardness. It cannot be said that there is a situation of strong balance between developed areas, with low illiteracy rates, high average incomes, widespread public services, high levels of industrial production and employment on the one hand, and underdeveloped areas with exactly the opposite characteristics on the other.

Anticyclical fiscal measures aim to remove a serious economic obstacle that prevents the full development of the human person: inflation and/or depression, with the heavy social and moral consequences that they always bring with them. Fiscal measures aimed at development and economic stabilization, always in a way that favors employment, are justified as a necessary means of promoting the condition that makes the right to work effective.

Through them, exemption does not constitute the prevalence of another constitutional principle over the principle of tax capacity, but, on the contrary, the implementation of the latter; it cannot be said that there is tax capacity when there is formally economic capacity, but its taxation will not be suitable for implementing the collective interest; when the economic capacity is not qualifiable in the joint and several sense.

Whenever we use an inductive tax rule, we must ask ourselves whether the means are adequate for the end. In Brazil, the 1988 Constitution determines in its article 145, paragraph one, the graduation of taxes according to the economic capacity of the taxpayer. We believe that we could interpret, in this case, the economic capacity as being the taxpayer's tax capacity. Therefore, we understand that this constitutional guideline also limits the extrafiscal use of the tax.

In view of the above, we have demonstrated that there is no unanimous position in the doctrine on the conformity of the principle of tax capacity in relation to the application of inducing tax rules (excise tax). Inducing tax rules can be excellent and effective vehicles for State intervention in the economic domain. They must, however, be subject to the limitations on the power to tax like all tax rules and also conform to the principles of the Economic Constitution outlined in the Federal Constitution of 1988.

We understand that inducing tax rules do not lose their tax nature and therefore continue to be subject to tax canons, and it is therefore up to the jurist to study their compatibility with both tax law and economic law.

29 MOSCHETTI, Francesco. *Principio della capacita contributiva*. Padova: CEDAM, 1973, p. 250.

From the above, we argue that the analysis of the principle of equality for the tax rule in question must also be accompanied by the analysis of the tax capacity (which is a corollary of the principle of equality).

3. Main characteristics of the selective tax introduced by the recent Tax Reform

The environmental degradation that is currently present in the country does not allow human beings to fully enjoy the fundamental rights that are guaranteed by the constitution of the federative republic of Brazil in its article 225, which are an ecologically balanced environment and, consequently, a healthy quality of life. so that sustainability can be implemented, reconciling economic development and the preservation of natural resources for the present and future generations. In this sense, the introduction of the selective tax is welcome, which will help in the graduation of the tax burden in order to lead society to adopt environmental protection as a priority.

The Selective Tax, dealt with in section VIII of article 153 of the Federal Constitution, is levied on the production, extraction, marketing or import of goods and services that are harmful to health or the environment.

For the purposes of the incidence of the selective tax, the following goods are considered harmful to health or the environment:

Product	Rate
Vehicles (except trucks)	The rate will be defined according to: • energy efficiency • recyclability of materials • gas emissions zero rate for • vehicles intended for taxi drivers • vehicles intended for people with disabilities • sustainable light vehicles
Vessels and aircraft	rate set based on environmental sustainability criteria
cigarettes and smoking products	• staggered rates between 2029 and 2033 • progressive reduction of ICMS will be incorporated during this period
Alcoholic beverages	rate set according to the alcohol content
sugary drinks	rate will be defined according to specific regulations
lotteries, betting and fantasy sports games	rate will be set according to specific legislation
minerals (except for export)	maximum rate of 0.25 %

The inclusion of sugary drinks in the list of products subject to the selective tax is good news because these products often contain high levels of sugar in their composition, and the main problems associated with the consumption of these drinks are related to weight gain, which can lead to obesity and, consequently, chronic diseases such as diabetes.³⁰ It is important to highlight that, in addition to increasing the tax, it would be important to adopt measures such as, for example, front-of-package labeling, which indicates on a label on the front of the packaging which substances are present in excess in the goods, such as saturated fats, sugar and sodium, so that all consumers are aware of the nutritional quality of what they are purchasing.

I agree with the Consumer Protection Institute (IDEC)³¹ in that ultra-processed foods should also be included in the list of products subject to selective taxation because these foods (stuffed cookies, snacks and instant noodles) cause chronic diseases due to their high levels of sodium, sugar and saturated fat. However, this has not happened. The resources collected through taxation should be invested in public policies that promote the health of the population, such as healthy eating programs and incentives for physical activity and improvements to the health system. However, unfortunately, the legislation approved does not guarantee that the resources will be used for these purposes.

Trucks were excluded from the selective tax because the National Congress understood that, if they were included, there would be a major impact on the prices of goods because freight would be increased and, considering that, unlike European countries that transport most goods by train, in Brazil trucks transport goods by highways, the economy would be greatly impacted as a whole.

Electric cars were included in the selective tax because the national congress understood that the impact of pollution from battery disposal will be high.

Fuels, unlike many countries, were excluded from the selective tax. I believe that Brazil missed a great opportunity to align itself with the most advanced policies regarding the promotion of alternatives for the use of renewable energy.

30 Study finds link between consumption of sugary drinks and increase in type 2 diabetes. For more information look at: <https://www.cfn.org.br/index.php/noticias/estudo-aponta-ligacao-entre-consumo-de-bebidas-adocadas-e-aumento-de-casos-de-diabetes-tipo-2/#:~:text=Um%20estudo%20publicado%20recentemente%20na,refrigerantes%2C%20sucos%20industrializados%20e%20energ%C3%A9ticos.>

31 For more information look at: <https://idec.org.br/reforma-tributaria>.

Representatives of companies responsible for the production of mineral goods argued that the consumption and production of mineral goods should not be discouraged, since the sector produces high income, jobs and attracts investment to the country. Therefore, burdening it with the selective tax would promote what is called “investor flight”. The representatives also argued that the incidence of the new tax would make operations extremely expensive, which would have an impact on the entire production chain and would even affect the end consumer, since the extra cost would naturally be passed on. However, these arguments did not convince the National Congress, which decided to tax mineral assets because the extraction of these assets causes negative impacts on the environment.

The Selective Tax will be levied only once on the good or service, and any type of use of tax credits from previous transactions or generation of credits for subsequent transactions is prohibited. The Federal Tax Administration is responsible for administering and monitoring the Selective Tax.

The event giving rise to the Selective Tax is considered to have occurred at the time of:

- I – the first supply of the good for any reason, including those arising from the legal transactions mentioned below:
 - I – purchase and sale, exchange or barter, payment in kind and other types of alienation;
 - II – lease;
 - III – licensing, concession, assignment;
 - IV – onerous loan;
 - V – donation with consideration for the benefit of the donor;
 - VI – onerous institution of real rights;
 - VII – lease, including commercial lease;
 - and VIII – provision of services.
- II – the purchase at public auction;
- III – the non-onerous transfer of the good produced;
- IV – the incorporation of the good into the fixed assets by the manufacturer;
- V – the extraction of a mineral good;
- VI – the consumption of the good by the manufacturer;
- VII – the supply or payment for the service, whichever occurs first;
- VIII – the import of goods and services.

The Selective Tax does not apply to:

- I – exports abroad of the following goods: coal, vehicles, vessels and aircraft, smoking products, alcoholic beverages, sugary beverages, mineral goods, prediction contests and fantasy sports.
- II – transactions involving electric energy and telecommunications; and
- III – goods and services whose rates are reduced in IBS/CBS, i.e.:
 - a) – education services;
 - b) – health services;
 - c) – medical devices;
 - d) – accessibility devices for people with disabilities;
 - e) – medicines;
 - f) – basic menstrual health care products;
 - g) – urban, semi-urban and metropolitan public transport services for road and subway passengers;
 - h) – food for human consumption;
 - i) – agricultural, aquaculture, fishing, forestry and extractive plant products *in natura*;
 - j) – agricultural and aquaculture inputs;
 - k) – national artistic, cultural, event, journalistic and audiovisual productions, sports activities and institutional communication;
 - l) – goods and services related to national sovereignty and security, information security and cybersecurity.

The calculation basis for the Selective Tax is:

- I – the sales value in the commercialization;
- II – the auction value in the auction;
- III – the reference value in:
 - a) non-onerous transaction or consumption of the good;
 - b) extraction of minerals; or
 - c) sale of tobacco products;
- IV – the accounting value of incorporation of the produced good into fixed assets.

In the sale of goods subject to the *ad valorem* tax rate, the calculation basis is the full amount charged in the transaction for any reason, including the amount corresponding to:

- I – increases resulting from adjustments to the transaction value;
- II – interest, fines, increases and charges;
- III – discounts granted under conditions;

- IV – transportation value charged as part of the transaction value, whether the transportation is carried out by the supplier itself or on its behalf and order;
- V – taxes and public prices, including tariffs, levied on the transaction or borne by the supplier;
- and VI – other amounts charged or received as part of the transaction value, including insurance and fees.

In the case of sales between related parties, in the event of incidence subject to the *ad valorem* rate and in the absence of the reference value, the calculation basis must not be lower than the market value of the goods, understood as the value charged in comparable transactions between unrelated parties.

Related parties are considered when at least one of them is subject to influence, exercised directly or indirectly by another party, which may lead to the establishment of terms and conditions in their transactions that differ from those that would be established between unrelated parties in comparable transactions.

The following are considered related parties:

- I – the controlling company and its subsidiaries;
- II – affiliates;
- III – entities included in the consolidated financial statements or that would be included if the ultimate controlling company of the multinational group of which they are part prepared such statements if its capital were traded on the securities markets of its jurisdiction of residence;
- IV – entities, when one of them has the right to receive, directly or indirectly, at least 25 % (twenty-five percent) of the profits of the other or its assets in the event of liquidation;
- V – entities that are, directly or indirectly, under common control or in which the same partner, shareholder or owner holds 20 % (twenty percent) or more of the share capital of each;
- VI – entities in which the same partners or shareholders, or their spouses, partners, relatives, by blood or by marriage, up to the third degree, hold at least 20 % (twenty percent) of the share capital of each;
- and VII – the entity and the individual who is the spouse, partner or relative, by blood or by marriage, up to the third degree, of a board member, director or controller of that entity.

The rates of the Selective Tax applicable to vehicles will be established by ordinary law. The rates on vehicles will be graduated in relation to each vehicle

according to its classification in the following criteria, according to ordinary law:

- I – vehicle power;
- II – energy efficiency;
- III – structural performance and assistive driving technologies;
- IV – recyclability of materials;
- V – carbon footprint;
- VI – technological density;
- VII – carbon dioxide emissions (energy-environmental efficiency), considering the well-to-wheel cycle;
- VIII – vehicle recyclability;
- IX – completion of manufacturing stages in the country;
- and X – vehicle category.

The rates of the Selective Tax applicable to aircraft and vessels will be established by ordinary law and may be graduated according to environmental sustainability criteria under the terms of the ordinary law. The ordinary law may provide for a zero rate for vessels and aircraft with zero carbon dioxide emissions or with high energy-environmental efficiency.

The Selective Tax rates established in transactions involving extracted mineral goods shall respect the maximum percentage of 0.25% (twenty-five hundredths of a percent).

The taxpayer of the Selective Tax is:

- I – the manufacturer, in the first commercialization, in the incorporation of the good into the fixed assets, in the transfer of the good in a non-onerous transaction or in the consumption of the good;
- II – the importer in the entry of the good of foreign origin into the national territory;
- III – the successful bidder in the auction;
- IV – the extractive producer who carries out the extraction; or
- V – the service provider, even if resident or domiciled abroad.

The following are required to pay the Selective Tax as responsible parties, without prejudice to other cases provided for by law and the application of the penalty of forfeiture:

- I – the transporter, in relation to taxed products that he transports unaccompanied by tax documentation proving their origin;

- II – the possessor or holder, in relation to taxed products that he possesses or keeps for the purpose of sale or industrialization, unaccompanied by tax documentation proving their origin;
- III – the owner, possessor, transporter or any other holder of national products leaving the manufacturer with immunity for export, found in the country in a different situation, except when the products are in transit.

4. Conclusion

The initiative to tax goods that are harmful to the health of the population and goods that are harmful to the environment is very welcome. The selective tax will come into effect in 2027. By then, the rates to be used must be detailed.

The selective tax will play an important role in tax policy, not only as a source of revenue, but also as an instrument of social and economic regulation. In Brazil, the selective tax proposal aims to align the country with international taxation practices that seek to influence individual behavior in favor of public health and the environment. It is also important to note that Brazil will host COP 30 in Belém do Pará. This event will position the country as an important player in the global context on the issue of climate change, so that all measures aimed at achieving the goals that guarantee the sustainability of the planet should be applauded and supported.

