FISCAL JUSTICE, FEDERATION AND INTERPRETATION: ICMS ON FREIGHT IN PRODUCTS INTENDED FOR THE MANAUS FREE ZONE

JUSTIÇA FISCAL, FEDERAÇÃO E INTERPRETAÇÃO: ICMS SOBRE FRETE EM PRODUTOS DESTINADOS A ZONA FRANCA DE MANAUS

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ABSTRACT

The study in relief deals with the problems of the Manaus Free Zone, especially the question of the interpretation of the legal system in force, to determine the type of tax incentives granted to companies that settle in the region. From the interpretation techniques, verifying the most correct understanding on the subject, one can classify such incentives as immunities or tax exemptions. Also regarding the type of interpretation, restrictive or extensive, depending on the classification of tax benefits of the aforementioned free trade area. Once these controversies have been delimited, the ICMS tax on freight will be examined, when the final destination of the goods is the Free Zone of Manaus.

Keywords: Free Trade Zone of Manaus, Interpretation Techniques, Tax Incentives, ICMS, Freight

RESUMO

O estudo em relevo trata da problemática da Zona Franca de Manaus, especialmente a questão da interpretação do ordenamento jurídico em vigor, para determinar qual o tipo de incentivos fiscais concedidos às empresas que se instalam na região. A partir das técnicas de interpretação, verificando qual o entendimento mais acertado sobre o tema, pode-se classificar tais incentivos como imunidades ou isenções tributárias. Ainda quanto ao tipo de interpretação, restritiva ou extensiva, a depender da classificação dos benefícios fiscais da citada área de livre comércio. Depois de delimitadas tais controvérsias, passa-se ao exame do ICMS incidente sobre o frete, quando o destino final das mercadorias for a Zona Franca de Manaus.

Palavras-chave: *Zona Franca de Manaus, Técnicas de Interpretação, Incentivos Fiscais, ICMS, Frete*

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How to quote this article:/*Como citar esse artigo:*
SIQUEIRA, Natércia Sampaio; SILVA, Ivson Coêlho. Justiça fiscal, Federação e interpretação: ICMS sobre frete em produtos destinados a Zona Franca de Manaus. **Revista Meritum**, Belo Horizonte, vol. 16, n. 1, p. 164, 2021. DOI: https://doi.org/ 10.46560/meritum.v16i1.8179.

MERITUM LAW JOURNAL • v.16 • n.1 • p. 164-179 • Jan. - Apr. 2021

1. INTRODUCTION

Manaus Free Trade Zone implies a regime of tax benefits based on relevant principles and objectives of the Brazilian Federation, among which are socio-economic development, reduction of social inequalities and national sovereignty. Due to the peculiarities of the northern region, an adequate tax regime was structured in order to achieve these objectives.

Consequently, the problem arises regarding the delimitation of the tax benefits. This article specifically seeks to address the problem of the scope of the ICMS exclusion on the activity of freight sent to the ZFM. This is because, in cases where the final destination is abroad, the higher courts have understood the state tax under comment does not apply. As, therefore, operations for the Manaus Free Trade Zone are equivalent to an operation abroad, it is necessary to ascertain whether they would be subject to the same treatment.

Proposed to address the issue in two aspects: the nature of the ZFM, whether it is immunity or exemption; methods of interpretation that are proper to immunity and exemption. Such approaches, in turn, demand a bibliographic analysis and documents on the peculiarities of the North Region, the process of creation and extension of the Manaus Free Trade Zone, in order to delimit its nature and verify which interpretative method is most appropriate to it.

In this process, without giving up bibliographic research, the characteristics of a fair and equitable federative system are identified, characterized by cooperation. From this axiological basis, interpretation techniques and concepts of Tax Law are approached, in order to understand the difference between exemption and immunity through the hermeneutic bias: while one has a restrictive interpretation as appropriate, the other is possible to apply a systemic interpretation.

At the end, having gathered the conclusions about the nature of the ZFM and the method of interpretation that is appropriate to it, the question raised in this article is answered, about the exclusion of the ICMS on freight in the operations of sending goods to the Manaus Free Trade Zone.

2. THE RULES ON THE MANAUS FREE TRADE ZONE

The continental character of Brazil implies different cultures and realities, resulting from history, climate, geographical position, communicability, occupation. There is a large part of the South with marked European characteristics, due to the immigration of Germans, Italians, Poles, Lithuanians and many others. The amenity of the climate, the wide and green lands, the communicability with the other countries and peoples of the south, mark a culture and an economy completely different from the northeastern hinterland, punished by the heat and drought. Without communication with the coast, the northeastern hinterland, until the beginning of the century. XX, it showed little institutionalized, still wearing a culture with strongly colonialist traits, whose honor was fueled by a virility that was built in the intimate coexistence with blood and violence. Nothing similar, in turn, to the wealthier regions of the Southeast, which, with mineral extraction, coffee farming and occupation by the Court, had, since the time of colonization, economic

resources and urban equipment that provided the basis for the strong industrialization that followed during the century. XX.

In this diversity scenario, the North is quite rich. First, the vegetation and geography, which make it difficult to connect, via transport routes, with the rest of the country. Vast isolated areas, subject to strong humidity, taken over by a closed forest and by wild animals, hinder the construction of modern and interconnected urban centers. Because of the natural wealth, northern cities are devoted to isolation, despite the formation of urban niches that, cyclically fed by crops and plant extractions, developed in a social dynamic of strong socioeconomic inequality.

In addition, the geographic singularity of the North weakens its borders with countries in Latin America, notably Venezuela, Colombia, Bolivia and Peru. Communication with Amazon Latin America and Central America promises to be easier and more intense than with the rest of the country. This characteristic has been problematic since the middle of the 20th century until today, due to the planting and trafficking of drugs and the development of criminal extractive activities.

The need to ensure adequate infrastructure for an efficient institutionalization of the public machinery, to occupy spaces, to interconnect cities and towns, to improve communications, to mitigate isolation and to hinder the escalation of criminal activities, motivated the development of public policies strategic areas, especially aimed at the North Region, among which the Manaus Free Zone stands out. Despite the large territory and the wealth raised by rubber at specific periods in its history, Manaus was unable to evolve in the most varied aspects, namely, the economic.

Professor André Elali (MARTINS; ELALI; PEIXOTO, 2008, p. 470-471) shares the same understanding, according to which the ZFM was created to develop an industrial pole in the region, trying to reduce regional inequalities between it and the rest. Its implementation led to a significant increase in the number of inhabitants, going from 1970 to 1985, from three hundred thousand to eight hundred thousand inhabitants. For the author, the economic activities of the region were changed, with a promotion in those that previously did not have importance, such as, for example, fishing and extractivism. The legislation related to the ZFM brought several tax benefits, such as exemption from II and IPI in relation to the import of inputs destined for export and production for local consumption, reduction of the Import Tax on inputs needed in certain industrialization processes, equivalence, for all tax purposes, to an export regarding the sale of goods from the rest of Brazil with exemption from IPI and ICMS. There is still exemption from IPI and ICMS on sales abroad, reduction from 25% to 100% of the IOF on foreign exchange operations with regard to imports, refund of ICMS, at the state level, from 45% to 100%, depending of the activity involved exemption, for some services, of ISS, exemption for ten years, extendable, from the IRPJ of companies installed in the region and special IRPJ regime for companies that meet certain requirements.

Because of this, according to the aforementioned jurist, there was considerable growth in the local industrial sector, increasing the supply of jobs, with the consequent reduction of social and regional inequalities, given the better economic development of the Manaus Free Trade Zone, compared to previous periods.

Decree-Law Nº. 288, of February 28, 1967, sought to strengthen the economic bases of the region established by it, starting to treat the Manaus Free Trade Zone as a free trade area,

and giving it tax incentives, for promotion of its economy, making it attractive for companies to go out and explore their activities, with the exemption from the tax burden on their products.

Geraldo Ataliba and Cléber Giardino (1987, p. 206), when examining the matter, noted that, back in 1967, there was great expectation about the creation of the ZFM, with the scope of fixing population in the region, as well as attracting capital, increasing the consumption of the raw material produced there and create a regional industrial center, since, in addition to all the advantages mentioned, national security was consequently taken care of as a result of the occupation of a vast border area with other countries. the authors concluded, in the aforementioned studies, that the tax benefits granted to that region were agreed upon, above all by the "national interest" of the listed designs.

Art. 1, of Decree-Law nº 288/67, states that "the Manaus Free Trade Zone is an area of free import and export trade and special tax incentives, established with the purpose of creating an industrial, commercial center in the Amazon and agribusiness endowed with economic conditions that allow its development, in view of the local factors and the great distance that the consuming centers of its products are ".

Art. 4, of Decree-Law 288/67, provides that "*the export of goods of national origin for consumption or industrialization in the Manaus Free Trade Zone, or re-export abroad, will be for all tax purposes, contained in the current legislation, equivalent to a Brazilian export abroad ".*

To reinforce, the National Constituent Assembly, when drafting the 1988 Federal Constitution, inserted the matter in its text. In the Transitional Constitutional Provisions Act, in its art. 40, disciplined that the Manaus Free Zone *is maintained, with its characteristics of a free trade, export and import area, and of tax incentives, for a period of twenty-five years, from the promulgation of the Constitution.*

Subsequently, the Derivative Constituent Power, through Constitutional Amendment Nº. 42, of December 19, 2003, extended the Manaus Free Trade Zone for another ten years, contact art. 92, in the Transitional Constitutional Provisions Act. In 2014, through Constitutional Amendment 83, 50 (fifty) years were added to the term corrected by art. 92 of this Transitional Constitutional Provisions Act.

On the subject, the Federal Supreme Court (STF), when analyzing the constitutionality of the IPI credit on products purchased in the Manaus Free Trade Zone, in the absence of a legal provision, manifested itself in the sense that "the non-cumulative rule gives space for the realization of equality, of the federative pact, of the fundamental objectives of the Federative Republic of Brazil ". (Newsletter 938, RE 596614-SP). Since the Manaus Free Trade Zone is justified "for reasons of national sovereignty, insertion in global consumption and production chains, regional economic integration and reduction of regional and social inequalities at the federative level" (Informativo 938, RE 596614-SP) , the Federal Supreme Court considered that, in this case, a systematic analysis of the constitutional principles and interests should be used, which would justify the exception to non-cumulativity. Due to the peculiarities of the region, it was considered difficult to attract the exploitation of economic activity, which is why the interpretation of the devices that grant tax benefits should take place in the broadest way, in order to enable the effective development of the region.

On the occasion, it was also considered that the successive extensions of the normative framework that creates the Manaus Free Zone imply the maintenance of a strategic development

policy, fundamental, also in this case, to national sovereignty. Necessary is to occupy the North. There is still a relevant argument in the newsletter for the treatment of the matter: the necessary legality of the exemption - alleged IPI´s credit- is necessary when the rule is the tax incidence. But once the rule is that of non-incidence, the need for legality would occur for the creation and collection of the tax, since, then, the current state would be exempted: non-incidence.

The Manaus Free Trade Zone is, therefore, a constitutional and infra-constitutional strategic program for socioeconomic development, with the purpose of occupying the northern region and reducing regional inequalities. This principle framework justifies a broad interpretation of the tax benefits, so that the Manaus Free Zone will effectively achieve its purpose.

3. DISTINCTION BETWEEN IMMUNITY AND EXEMPTION

One cannot lose sight of the data discussed above: the Manaus Free Trade Zone is a constitutional regime of "taxability". Consequently, the ZFM has the character of immunity, whose first basic distinction in relation to the exemption is the normative provision. While the former is embedded in the constitutional text, it falls within the laws. Professor Paulo de Barros Carvalho (1999, p. 178) teaches about immunities as being a finite and determinable class of constitutional norms, which remove from the powers of the entities the power to tax on certain facts, issuing rules instituting taxes that shelter situations specific and sufficiently configured.

In the same pitch, Gilberto Ulhoa Canto (1958, p. 34), defends the impossibility of treatment that results from an immanent prohibition, for being in the constitution, of an entity with imposing power, of exercising it, in relation to facts and people. Thus, according to him, it is a limitation to the tax competence that the federal entities receive from the constitutional text, since the sectors reserved to them in the sharing of the tax competence, are already entrusted to them to the exclusion of certain people or facts. It follows the same line of ideas, among others, Walter Barbosa Correa (2011, p. 811)[3].

Without losing sight of the constitutional origin of immunity, it also exists in the implicit modality: the example is that of the vital minimum. The constitutional origin of immunity does not imply the necessary linguistic provision in the form of a tax exclusion rule. It is sufficient to identify an area of non-taxation, which can occur either because of an explicit constitutional rule, or because of a constitutional regime or institute, such as the vital minimum: income, wealth and consumption that are in a reasonable way geared to satisfying basic needs do not reveal a contributory capacity to defray public spending. Consequently, the cause of the taxes is not fulfilled, according to art. 145, Paragraph One, of the Federal Constitution, which excludes the possibility of incidence of this tax type. It is the systemic analysis of the Constitution that leads to the delimitation of an area that, ontologically, excludes the possibility of exaction, regardless of an explicit manifestation of the constitutional text.

Immunity can occur not only in the implicit modality, but also when the constitutional legislator explicitly stipulates an area of non-incidence, through the use of mistaken nomenclature,

3 For him, immunity can be characterized by three relevant issues. First, because it comes from the Constitution. Second, because it has a permanent character, while the constitutional statute remains in force. Third, for having an abstract essence, existing in function of the constitutional norm.

as an exemption. In such cases, a lack of technique of the Constituent Power is characterized: the "exemption", as it is provided for in the Constitution, is an immunity, since it implies impediment to taxation by the federated entity. See, for example, art. 195, §7º, of the CF / 88, which says that *social assistance charities that meet the requirements established by law are* ***exempt*** *from social security contributions*.

Aliomar Baleeiro (1960, p. 308) conceptualizes immunity as the "case in which the ordinary legislator cannot tax a person, thing or activity, because he defends him to do so expressly or implicitly in the Constitution". Even the text treating it as if it were an exemption, because it is in the Constitutional Text, it is said that it is an immunity, including several times already said by the Supreme Federal Court, guardian of the Constitution. See, as an example, the following excerpt:

> SECURITY COMMAND. SOCIAL SECURITY CONTRIBUTION. PATRONAL SHARE. ENTITY FOR ASSISTANCE, PHILANTROPIC AND EDUCATIONAL PURPOSES. IMMUNITY (CF, ART. 195, § 7). KNOWN AND PROVIDED RESOURCE.
>
> (...)
>
> The clause included in art. 195, §7, of the Political Charter - despite referring improperly to the Social Security contribution exemption - contemplated the social assistance beneficiary entities with the constitutional favor of tax immunity, provided that they meet the requirements established by law.
>
> The constitutional jurisprudence of the Federal Supreme Court has already identified, in the clause included in art. 195, §7, of the Constitution of the Republic, the existence of a typical guarantee of immunity (and not of simple exemption) established in favor of the social assistance beneficiaries. Previous: RTJ 137/965 (...) (BRASIL, 1996).

Immunity, therefore, is a constitutional regime that prevents federated entities from being competent to tax people, situations and objects. Even if there is a doctrinal discussion about whether immunity negatively participates in the delimitation of jurisdiction or reduces it, the important thing is the understanding that, in view of immunity, there is no tax jurisdiction. On the other hand, one cannot lose sight of the fact that immunity is an exception to the fundamental duty to pay tax, so that it must be justified in principles, policies and constitutional interests: this is how the Supreme Court on the Manaus Free Zone manifested itself. Overcoming regional inequalities, socio-economic development and national sovereignty are constitutional principles and objectives that serve as the foundation for the Manaus Free Trade Zone. Consequently, the benefits of the Free Trade Zone must be interpreted in a way that makes its foundations feasible. The analysis is systemic, as the STF has well defined.

The exemption, as outlined elsewhere, is provided for in the infraconstitutional rules. Professor Rui Barbosa Nogueira (1999), took care of the matter, very lucidly, stating that the "exemption is the exemption from paying due tax, made by express provision of the law and therefore even exempt from taxation".

Following the same path, Bernardo Ribeiro de Moraes (1982, p. 180-181), states that the exemption is configured as a tax favor, conferred by law, to exempt the taxpayer from paying the tax. There is consolidation of the taxable event, which is due, but the law waives its payment. It has to be said that the exemption is a tax favor resulting from the law, although it may have as a starting point constitutional recommendation, as was the case of art. 15, paragraph 1, of the previous Constitution, which declared exempt from consumption tax the articles classified by law, as minimum indispensable for housing, clothing, food, and medical treatment for people of

restricted economic capacity. As can be seen, the Constitution did not exempt any article from consumption tax, but recommended that the law classify articles it considered to constitute the minimum for the cases indicated, and, therefore, exempt them from the aforementioned exception. The ordinary law that excluded from the incidence, by way of exemption, the articles that it considered to constitute the minimum indispensable for the purposes determined by the Constitution. There is only an exemption after the incidence has arisen, having an exceptional and provisional aspect, depending on the will of the ordinary legislator and it comes up with the law establishing the tax or later, in separate law.

Non-incidence, on the other hand, is taken care of when the fact practiced by the taxpayer ***does not conform*** to the typical tax fact, or ***taxable fact***. Professor Rui Barbosa Nogueira (1999) defines it as the situation that is outside the limits of the tax field, or rather, the non-occurrence of the taxable event, because the standard does not describe the incidence hypothesis.

What is of interest, however, are the rules for exclusion from taxation: immunity, which operates within the scope of the Federal Constitution, excludes or negatively delimits tax jurisdiction, due to constitutional interests and principles. The exemption, which implies the exercise of tax jurisdiction by the federated entity, is a law that reduces the scope of tax incidence or the liability for its payment. According to some indoctrinators, such as Sacha Calmon in his book "General theory of norm, interpretation and tax exemption", the exemption law is part of the norm that creates the tax: it joins the law that creates it, because it derives from it person, situation or object of the incident radius, delimiting it. CTN, on the other hand, qualifies the exemption as a mere exclusion from the tax: the law removes the duty to pay the tax.

In any case, the exemption is part of the law that defines the incidence of the tax, so that it is subject to its interpretation regime. Exemption, then, is a rule of exception: its creation implies the discretion that is characteristic of the tax jurisdiction of federated entities. For such reasons, the National Tax Code provides that it must be interpreted restrictively:

> Art. 111. Tax legislation that provides for:
>
> I - suspension or exclusion of the tax credit;
>
> II - grant of exemption; (emphasis added)
>
> III - exemption from complying with accessory tax obligations.

On the other hand, when dealing with tax immunity, the form of interpretation is different. The negative delimitation of tax jurisdiction stems from principles, interests, objectives, policies and constitutional rights that demand an integrated and coherent interpretation. The exemption rule is exceptional, and should be interpreted literally, and does not include interpretation by analogy, since its scope cannot extend the assumptions in which the law granted the tax favor. Unlike immunity, which may have extended the concept, to satisfy the constitutional purpose listed. The supremacy of the Constitution must be sought in this. (MACHADO, 2011, P. 552).

Speaking, precisely, of fundamental rights, Ingo Wolfgang Sarlet (2017, p. 35) points out that, in principle, there are not only the fundamental rights provided for in Title II of the Constitution, but other rights dispersed in the Constitutional Text. Following the same path, Helenilson Cunha Pontes (2004, p. 82) points out that due to the "dramatic" character of the relationship between the individual and the State, as a taxing entity, the application of fundamental rights is extremely important, maximum due to the invasion of the State on the sphere of individual

freedoms, in search of cash. For this reason, it is essential to recognize fundamental rights as a necessary protection against attacks on individual freedoms.

The close relationship between fundamental rights and the possibilities and limits of taxation grant the taxpayer the status of freedom or elementary guarantee of the person in the Democratic Rule of Law. The Federal Supreme Court has already pacified its understanding, according to which the *Taxpayer's Statute* (limitations on the power to tax, which include some explicit and other implicit immunities) are fundamental rights, and, therefore, must be interpreted as such. A classic example occurred in the judgment of Direct Action of Unconstitutionality nº 712 / DF. At that time, Minister Celso de Mello affirmed that tax principles are a political-legal achievement for taxpayers, and are configured as an expression of the individual rights granted to private individuals by law. Since they exist to impose limitations on the State's power to tax, these postulates are exclusively addressed to the government, which submits to the imperativeness of its restrictions.

The question that cannot be overlooked is that immunity, as an area of "taxability", often arises from the joint analysis of the rules that make up the tax regime: principles and / or rules, some of which are fundamental in character, which together define the area enforcement of immunity and exclusion from jurisdiction. The activity is complex: a) to identify the norms involved; b) verify that the instrument (non-taxation) is adequate, sufficient and not more than sufficient to achieve its constitutional foundation; c) identify possible principles, interests, objectives and rules that can be negatively affected by the instrument of non-taxation; d) delimit the optimum point at which immunity, whether explicit or implicit, achieves its objectives without impairing, in an elementary way, other constitutional rules and principles.

Therefore, it is imperative to check the interpretation techniques or methods, and then to analyze how to read the tax incentives that characterize the Manaus Free Trade Zone legal system: it must be compatible with the anatomy and functionality not only the tax regime, as well as the constitution, in its entirety.

4. INTERPRETATIVE TECHNIQUES AND FRAMEWORK OF ZFM INCENTIVES: IMMUNITIES OR EXEMPTIONS?

According to Tércio Sampaio Ferraz Júnior, the main objective of the Science of Law is to interpret the normative texts and their intentions. For him, *this practical purpose dominates the interpretive task. For this reason it is distinguished from similar activities of the other human sciences.* (FERRAZ JR, 2012, p. 73).

There are, in Law, several interpretation techniques, namely: grammatical, logical, systematic, teleological, evolutionary history.

Thus, the first aspect to address the interpreter, is the grammatical, to investigate the concepts listed in the normative text. With this interpretation technique, the jurist analyzes an interpretation of the words contained in that standard, aiming to extract his command to the jurisdictional. According to Tércio Sampaio Ferraz Júnior (2012, p. 75), it is up to the interpreter, first, to establish a definition. Legal varies between the current use of the word for the designa-

tion of the fact, and its normative designation. The two aspects may or may not coincide. The appearance of the text, with this semantic narrowness, is the interpreter's first contact with the message made by the legislator and marks the beginning of the exegetical adventure. (CARVALHO, 2008, p. 182).

Not only, in law, there are several words with more than one possible definition, but other considerations, in addition to semantics, are necessary, such as systematicity, coherence, historicity and efficiency. This time, in addition to literality, other interpretive techniques should be used, especially logic and systematics.

The point is that because it is a whole that is intended to be coherent and integrated, the literal interpretation is not always enough: a) first because, by using it, a topical right is built; b) for this reason, literal interpretation does not avoid conflicts between different laws. Tércio Sampaio Ferraz Júnior (2012, p. 76), facing this problem, deals with the logical method, or logical technique of interpretation. Incompatibility is distinguished from contradictory (two texts are contradictory cannot be affirmed, in any situation, at the same time). Contradictory is an analytical problem in the sense of formal logic, requiring the constitution of a formal system, rigorously constructed. Incompatibility is an analytical and empirical problem. The opposition between two incompatible texts is not just a result of their formal opposition, but requires a reference to a situation.

For this reason, the reading of the law cannot neglect its systemic character. It is the technique that allows the interpreter, in a definitive way, to extract the correct sense of the normative text, since it observes the ethical and epistemological character of coherence.

There will always be an obligation for the interpreter to seek the meaning of the text, comparing it with the Constitution, since, without it, the norm has no meaning. (GRAU, 2003, p. 40).

When this technique is applied, the ends for which the standard is built must be captured, as explained by Tércio Sampaio Ferraz Júnior (2012, p. 79). For him, the perception of the ends is not immanent to each norm taken in isolation, but requires an expanded view of the norm within the order. The aforementioned author states that the systematic interpretation culminates in a procedure of participation of the interpreter, in the creation of the law, whereas in the historical-evolutionary one seeks the objectives of the legislator, examining the historical situations of the time, demanding a new valuation of values, comparing them with those of the current reality. (FERRAZ JR, 2012, p. 79).

Juarez Freitas (1995, p. 15) argues that this method of interpretation aims to analyze a set of norms, so that the broader sense of what is positively stated in the norms can be extracted, literally. For him, systematic interpretation seeks the legal system in its axiological totality, also remembering that even in the Roman-German tradition, Law is greater than the set of norms. Systematic interpretation will always be contemporary with law, neither preceding nor succeeding. It gives it life and dynamism, making the legal content transcend the mere and sparingly positive.

In the same way, Carlos Maximiliano (2011, p. 100) defends that one should compare the positive prescription with the one that came from it, looking for the connection between rule and exception, general and particular. With this submission, the precept acquires greater, perhaps unexpected, emphasis. This work of synthesis is better understood.

Systemic interpretation, which integrates rules and principles from the elementary axiology of the Federal Constitution, has become the hermeneutics that has been carried out preferentially

in Brazilian legal practice. The 1988 Constitution, made up of rules and principles, and received from the perspective of post-constitutionalism, came to be understood as a set that lends equal normativity to rules and principles, which demands a systemic reading. nevertheless, tax and criminal matters, since they are parental rights par excellence - the first of freedom and other fundamental rights and the second of property - take place under the canopy of legal certainty. Therefore, his legal practice tends to be carried out by concepts, that is what Misabel Abreu Machado Derzi teaches in his book "Tax Law, penal district and type", with regard to the imposition of tax lien: taxation, equality is necessary between the normative fact and the real fact, so that the consequent normative applies, in the exact literality in which it was legally established.

In spite of this, the practice of legal syllogism has been limited to the norm that regulates the exaction, in order to enable the taxpayer to predictability. In other situations, in which it is not within the scope of delimiting the tax incidence and paying the tax, the systemic reading of the constitutional tax regime has not been impeded, especially when the power to tax is intertwined with fundamental rights, such as expression , religion, profession, locomotion, vital minimum, and with the constitutional objectives, namely: overcoming regional inequalities, socio-economic development and sovereignty. In such cases, the systemic reading, based on these basic normative elements of the constitution, is fundamental for the compatibility of the power of taxation with the constitutional principle.

In view of these premises, it is necessary to return to the theme itself and investigate the question of the position of the Manaus Free Trade Zone and its incentives. Above, it referred to the understanding, by the STF, that the ZFM is a strategic constitutional policy of economic development supported by constitutional objectives of the greatest relevance. Better search and explore the issue, since the ZFM implies a normative set that goes from the constitution to infraconstitutional norms. This time, it is necessary to remove any doubts: it is about immunity, due to its provision in the Transitional Constitutional Provisions Act (constitutional limitations on the power to tax) or an exemption, as there is provision in Decree-Law No. 288 / 67?

Starting with the terms, in a grammatical interpretation, it is clear that *free trade areas* (or free trade zones) are a genus, of which free zones are species. According to Adilson Rodrigues Pires (2008, p. 487), "Free Trade Zones comprise export processing zones, duty-free stores and duty-free zones, in addition to others". And the aforementioned author continues, stating that the free zone must be understood as an extension of the territory of a State and has no incidence of taxes inherent to imports. They cannot be imposed restrictions, economic or otherwise, with regard to the entry of goods, if the condition of such products being consumed in the defined area is fulfilled, and for the purposes it was created, having as an example of this, art . 132, of the Mercosur Customs Code Protocol.

Thus, it is seen, by the grammatical interpretation of the term provided for in art. 40, of the Transitional Constitutional Provisions Act, namely, a free trade area, which the constituent, in addition to raising the region to constitutional status, left closely linked to the granting of tax incentives to companies that set up there, so that the region could prosper and be inhabited. Especially because, as previously seen, it was a matter of national interest.

Based on the lessons of Celso Ribeiro Bastos (1998, p. 183), free zones result from a "normative bundle" that confers benefits, above all fiscal, noting that it would be a contradiction to maintain, in the ADCT, the Manaus Free Zone, and , on the other hand, to interpret that the tax incentives previously granted, under the aegis of the previous constitution, were not covered

by the new constitutional order. What the original constituent of 1988 sought was to maintain a differentiated regime in the aforementioned area, for a period of twenty-five years. Even for a literal interpretation of the ADCT provision, when it alludes to "its characteristics as an export and import free trade area, and tax incentives".

It shares the same understanding Guilherme A. dos Santos Mendes (1995, p. 90), for whom a free zone or free trade area is a specific location, geographically and legally delimited, in which products circulate freely, without tax incidence or control, only the inspection of incoming and outgoing goods destined for import and export is in charge.

Ives Gandra da Silva Martins (BASTOS, DA SILVA MARTINS, 1988, p. 366-367) states that art. 40, of the Transitional Constitutional Provisions Act, was mandated by Deputy Bernardo Cabral, rapporteur of the National Constituent Assembly, becoming immutable until maturity, initially scheduled for 2013, even if there are changes in federal legislation. For him, if there was a change in the rules of conduct, it would affect only new ventures, including saying that Decree 205/91 was unconstitutional, when the regime was changed. Especially because, even if admitted, it could only be conveyed by law in a formal sense. Said author, in comments to art. 40, of the ADCT, dealt with the issue in a specific article on the topic, claiming that the tax benefits established by Decree-Law Nº. 288/67, supported by art. 40 of the ADCT. (MARTINS, 2011, p. 230).

Celso Ribeiro Bastos (1988) has also positioned himself, stating that the aim was to foster the region, through the granting of tax incentives and that free zones are found in less developed areas of a given country, mainly due to the inherent geographical difficulties. For this reason, when benefits are granted, they cannot be withdrawn before the end of their term. Especially because, it must be granted legal certainty to the ventures that settle in those areas and make investments for that, and, only with the counterpart of the tax benefits ensured for a certain period, they are able to make their businesses viable. Therefore, these tax incentives are not graceful, given that in order to invest in an unfavorable region, there must be a consideration, by the government, and it must be previously disciplined by law, especially regarding the maintenance of the concession term, amortization of the investments made there.

Fábio Pereira Garcia dos Santos (2008, p. 133) dealt with the matter, in a specific study on incentives in the Manaus Free Trade Zone, arguing that art. 4, of Decree-Law No. 288/67 is now constitutionally enforceable, as it was part of the package of incentives granted to the Manaus Free Trade Zone. Add to this the fact that, because it is inserted in the ADCT, and not in the main part of the Constitution, it could be argued that it would not be about immunity, but an exemption. Such an argument does not deserve to prosper, given that the transitional rules of the constitution have the same status as the others, provided for in its body itself. Celso Ribeiro Bastos (1998, p. 183), even categorically affirms that it is "a stone clause, beyond the scope of the constitutional amendment itself, maximum when it comes to law or a mere provisional measure.

In the same vein, Nelson Monteiro Neto (2002, p. 91-96), affirming the immutability of the incentives granted to the Manaus Free Trade Zone, even the rules provided for in Decree-Law nº 288/67, since the mentioned regulation was raised to the constitutional status, with CF / 88.

Thus, the rules that reduce the effectiveness, restrict or exclude benefits previously granted, are tainted by material unconstitutionality, by direct violation of art. 40, of the Transitional Constitutional Provisions Act.

Thus, in the present study, the same understanding of the aforementioned authors is shared, stating that the tax incentives granted to companies based in the Manaus Free Trade Zone have art. 40, of the Transitional Constitutional Provisions Act - ADCT, and not just Decree-Law nº 288/67.

Now, to have immunity, it does not mean that there can be no infraconstitutional norm dealing with the topic. What matters is whether there is a prediction of that benefit in the constitutional text. It is even salutary that there are rules lower than the Constitution dealing with the matter. Especially because the benefit also requires the fulfillment of some criteria or conditions.

therefore, the existence of a provision, whether in a Decree-Law or in another normative diploma, does not detract from immunity. In reverse, it causes certain conditions, which would not need to be dealt with in the constitution, to be detailed. Note, for example, art. 14, of the National Tax Code, which deals with the conditions for an entity to be considered non-profit. While CF/88 grants, for example, immunity to non-profit educational institutions (art. 150, VI, "c", of CF / 88), complying with the requirements of the law, the infraconstitutional norm disciplines more minutely the enjoyment of immunity.

The aforementioned infraconstitutional diploma was only accepted by the constitution, and, as such, the standard incentives for its enjoyment are independent, given that the aforementioned diploma was received by the new constitutional order.

Roque Antônio Carrazza (2004) teaches the issue of tax incentives and clarifies possible confusions between them and exemptions:

> We should not confuse tax incentives (also called tax benefits or tax incentives) with tax exemptions. These are just one way of granting them. Tax incentives are in the field of extrafiscality, which, as Geraldo Ataliba teaches, is the use of tax instruments for non-fiscal but ordinary purposes (that is, to condition behaviors of virtual taxpayers, and not exactly to supply money public coffers). Through tax incentives, the taxing political person encourages taxpayers to do something that the legal system considers convenient, interesting or opportune (eg, installing industries in a poor region of the country). This objective is achieved by reducing or even eliminating the tax burden. Tax incentives are manifested either in the form of immunity (eg, immunity from ICMS on exports of industrialized products) or tax exemptions (eg, exemption from IPI on sales of eyeglasses). (CARRAZZA, 2004, p. 783).

In fact, for most authors, especially Professor Ives Gandra da Silva Martins, who was responsible for informal assistance to the Constitution's rapporteur, the entire system of rules that benefited the Manaus Free Trade Zone was raised to a constitutional status, not even being able to undergo constitutional amendments, given that, since they are immunities, they are considered fundamental rights of the taxpayer, and, pursuant to art. 60, §4, IV, of CF / 88, cannot be abolished.

5. INTERPRETATION ABOUT ICMS ON FREIGHT IN EXPORTS.

Above, the following premises were established: a) the Manaus Free Trade Zone is constitutional in nature; b) it reveals itself as an area of "intributability", which is characteristic of immunity; c) therefore, it is subject to a systemic interpretation, which takes into account integrated the constitutional principles, rules and objectives, which are its foundation to define the scope of application; d) the scope of application must be limited to sufficient for the constitutional foundation to be realized. With these bases, sufficient elements are gathered to adequately address the problem of this article: if the freight price is excluded from taxation when shipping goods to the Manaus Free Trade Zone.

The Superior Court of Justice consolidated the understanding that there is no ICMS, when the final destination of the goods is abroad. Art. 3, II, of Complementary Law No. 87/96, prescribes the following:

> Art. 3º The tax does not apply to:
>
> (...)
>
> II – operations and services that send goods abroad, including primary products and semi-finished industrialized products, or services;
>
> (...)

Analyzing the device in question, it appears that, in addition to the goods, the item refers to services (which, in the case in relief, is freight). Because freight is part of the price of the product, being its accessory, and if the product is immune in the sale, it would not be reasonable to tax the accessories, under penalty of including part of the sale.

The Superior Court of Justice ruled that if *the transport paid by the exporter is included in the price of the exported good, taxing transport in the national territory is equivalent to taxing the export operation itself, which goes against the spirit of LC 87/96 and the Federal Constitution itself* (EREsp 710.260/RO, Primeira Seção, Rel. Min. Eliana Calmon, DJe de 14.4.2008).

Following the same path:

> TAX. CIVIL PROCEDURE. REGIONAL APPEAL ON SPECIAL APPEAL. ICMS. EXPORTS THAT DESTROY GOODS ABROAD. NO TAX INCIDENCE IN THE PROVISION OF INTERESTADUAL SERVICE. PLEASE NOT PROVIDED. 1. "The precedents of jurisprudence of this Superior Court affirm that the ICMS is not levied on interstate transportation services for goods destined abroad, since article 3, II, of LC No. 87/96 has the purpose of exempting foreign trade as presupposition for national development with the reduction of regional inequalities due to the primacy of work "(AgRg in REsp 1,301,482/MS, Min. HUMBERTO MARTINS, Second Class, DJe 16/5/13). 2. Regulatory appeal not provided. (**AgRg no REsp 1292197/SC**, Rel. Ministro ARNALDO ESTEVES LIMA, PRIMEIRA TURMA, julgado em 03/09/2013, DJe 10/09/2013)

In the same way:

> CIVIL AND TAX PROCEDURE. ICMS. TRANSPORT OF GOODS INTENDED ABROAD. EXEMPTION. 1. The orientation of the First Section of the STJ was pacified in the sense that "Article 3, II of LC 87/96 provided that ICMS is not

> levied on operations and services that send goods abroad, so that it is covered by the exemption interstate transportation of these goods "," under the teleological aspect, the purpose of the tax exemption is to make the Brazilian product more competitive in the international market ". Thus, "if the transport paid by the exporter is included in the price of the exported good, taxing transport in the national territory is equivalent to taxing the export operation itself, which goes against the spirit of LC 87/96 and the Federal Constitution" (EREsp 710.260 /RO, First Section, Min. Report Eliana Calmon, DJe of 4.14.2008). 2. Regulatory Appeal not provided. (**AgRg no REsp 1379148/SC**, Rel. Ministro HERMAN BENJAMIN, SEGUNDA TURMA, julgado em 15/08/2013, DJe 16/09/2013)

In this scenario, according to the Superior Court of Justice, when the operations are destined abroad, there is no need to talk about the incidence of ICMS on freight.

Returning to the specific theme, if, when goods are exported "abroad", ICMS does not apply to freight, as the Manaus Free Trade Zone is equated, for all tax purposes, to an export, there would also be no reason for its charge. In this case, the basis of the tax benefit of the Manaus Free Trade Zone coincides, in part, with the tax exemption of exports: making the national product attractive abroad, in order to develop domestic production.

At ZFM, the benefits are aimed at fostering productive activity in the region, in order to ensure socioeconomic development. In the specific situation, socioeconomic development is linked to two essential objectives for the Brazilian federation: reduction of regional inequalities and national sovereignty. The occupation of the region, by the State and by society, the creation of jobs, the insertion of the region in the international and national consumption route, the improvement of the quality of life and the expansion of urban equipment resulting from territorial occupation and economic development fundamental to cooperative federalism, which is intended to be egalitarian. Cooperation between federated entities implies the distribution of wealth so that fundamental rights can be guaranteed to Brazilians from any location and region.

As a result, even if the infraconstitutional norm did not expressly exempt services, in which freight is included, because it is dealing with immunity, with broader interpretation, it would be up to the interpreter, analyzing the normative framework of the constitution, to extract the interpretation in the sense that the incidence was undue. The constituent's objective, when raising the Manaus Free Trade Zone to constitutional status, was to foster it, through tax incentives, so that there was greater development, occupation and guarantee of national sovereignty, through the protection of borders.

It should be noted that the rule in question, which removes the incidence of freight, arises from the constitutional command itself, which exempts exports, with respect to the ICMS. If the operations involving the Manaus Free Trade Zone are equivalent, for all tax purposes, to an export, it should also not suffer such incidence.

This time, in the manner in which the STF has already decided, the tax benefits that constitute the Manaus Free Trade Zone must be interpreted as widely as possible, in order to attract the factors of production and consumption to the region and enable the its human, social and economic development. Therefore, it must be considered that freight is also free of taxation, as it occurs in export operations: the reasons for the non-imposition of ICMS in the ZFM are stronger and more complex than in real export operations, as they involve crucial objectives to the equanimity justice characteristic of the federative dynamic.

6. CONCLUSION

The Manaus Free Trade Zone has constitutional rules, more specifically in art. 40, of the Transitional Constitutional Provisions Act. Even though expressly provided for in Decree-Law Nº. 288/67, where operations for ZFM are equated with export, for all tax purposes, the basis today arises from the Constitution, and not the other way around.

This stems from a systematic interpretation of the legal system in force, that is to say, joining the normative contents spread throughout the legal system dealing with the Manaus Free Trade Zone, namely its tax incentives, to investigate the basis for including the tax favors granted to the companies that settled there.

As it is extracted from the own teachings of Ives Gandra da Silva Martins, quite mentioned in the present work, for having been a collaborator of the rapporteur of the National Constituent Assembly, the incentives given to companies in the Manaus Free Trade Zone have constitutional status, and, therefore, must be treated as immunities, not exemptions.

The distinguishing feature between immunities and exemptions, mainly, is the normative vehicle in which the tax benefit is provided. When it comes to the Constitution, we talk about immunity, when taking care of the infraconstitutional rule, we conclude that there is an exemption institute.

In addition, the second striking feature, and perhaps as important as the previous one, is the way in which each of the two fiscal favors is interpreted. As seen, immunity, as it deals with the fundamental right of the taxpayer, must be interpreted as such, that is to say, in an expansive way, to give maximum effectiveness to such rights, whereas the exemption, by express determination of the National Tax Code, must be interpreted restrictively.

In this scenario, as the interpretation methodology was used here, it was concluded that, through a systematic interpretation, the Manaus Free Zone deals with tax immunities, with regard to its incentives, and, for all tax purposes, equating such operations with exports.

When it comes to the ICMS levied on freight, the national courts have understood that there can be no collection, when the final destination of the goods is abroad (export). If the operation for the Manaus Free Trade Zone is to be equated with an export, there is no mention of the ICMS levy on freight, when goods are shipped to the Manaus Free Trade Zone.

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