O DIREITO CONSTITUCIONAL TRIBUTÁRIO BRASILEIRO PELAS MÃOS DE JOSÉ ROBERTO VIEIRA

THE BRAZILIAN CONSTITUTIONAL TAX LAW BY JOSÉ ROBERTO VIEIRA'S HANDS

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RESUMO
O presente artigo tem por objetivo expor o direito constitucional tributário brasileiro a partir das obras de José Roberto Vieira. No ano em que o professor da Universidade Federal do Paraná completa 65 anos, tentou-se sistematizar sua obra, composta por livros, capítulos de livros, artigos e prefácios. Depois do exame de toda a sua obra, foram selecionados os principais temas do direito constitucional tributário – tais como a interpretação do direito, a noção de sistema no direito, o poder tributário, a competência tributária e suas características, a criação constitucional do tributo, os princípios constitucionais gerais (república, federação, tripartição das funções e autonomia dos municípios), os princípios constitucionais específicos (legalidade, anterioridade, irretroatividade, igualdade, capacidade contributiva e suas relações com a extrafiscalidade e com a praticabilidade, seletividade e não-cumulatividade) e as funções da lei complementar – para, num segundo momento, descrever os posicionamentos de José Roberto Vieira acerca de cada um dos temas. Concluiu-se que José Roberto Vieira contribuiu significativamente, inovando em determinados temas, para o desenvolvimento da ciência do direito tributário brasileiro, e, especialmente, para a escola de direito tributário do Paraná, da qual ele é, sem dúvida, o grande nome.

PALAVRAS-CHAVE
Direito constitucional tributário. Competência tributária. Princípios constitucionais tributários. Funções da lei complementar.

ABSTRACT
This article aims to expose the Brazilian Tax Constitutional Law from the works of José Roberto Vieira. In the year in which the Professor of the Federal University of Paraná turns 65, an attempt was made to systematize his work, composed of books, chapters of books, articles and prefaces. After examining all of his work, the main themes of the constitutional tax law were selected – such as the interpretation of law, the notion of system in law, tax power, tax competence and its characteristics, constitutional creation of tax, the General Constitutional Principles (Republic, Federation, Tripartition of Functions and Autonomy of Municipalities), the specific constitutional principles

(Legality, Priority, Irretroactivity, Equality, Contribution Capacity and its relations with extrafiscality and with practicability, Selectivity and Non-cumulativity) and the functions of the complementary law – to, in a second moment, describe the positions of José Roberto Vieira on each of the themes. It was concluded that José Roberto Vieira contributed significantly, innovating in certain subjects, to the development of the science of Brazilian tax law, and especially to the School of Tax Law of Paraná, where he is undoubtedly the great name.

KEYWORDS
Constitutional tax law. Tax competence. Constitutional tax principles. Functions of the complementary law.

INTRODUCTION

When we come across the work of José Roberto Vieira, we find that his articles and books, when studied systematically, are, in fact, a profound course of constitutional tax law. Not only tributary, it is quite true. With the reading of his writings we learned a lot of Portuguese language, philosophy and literature. It has excellent bibliographical production from a quantitative and, mainly, qualitative point of view. In it, it performs analyzes that depart as much of theory as of practical bias. He departs from the positions of both "*inflexible theorists*" and "*extreme practitioners*", noting that "***The only truly scientific alternative lies at the confluence of both poles of knowledge.***" It starts from the premise that "***…human knowledge does not allow theory to depart from practice.***" And, for this reason, "***an object can only be known when its domain is both theoretical and practical.***" (VIEIRA, 1998, p. 535, emphasis in original).

In 2017, José Roberto Vieira, a professor who influenced generations, completes sixty-five years of life and fifteen as professor of the Post-Graduate Program in Law at the Federal University of Paraná. The purpose of this brief is to systematically describe his understanding of the main issues of constitutional tax law, such as interpretation, the notion of system in law, tax jurisdiction, constitutional principles of taxation and the functions of law complementary in tax matters.

1 ABOUT INTERPRETATION

According to José Roberto Vieira, "*The Positive Right constitutes a language that is directed to the intersubjective conduct, with prescriptive intention*". The Science of Law, on the other hand, would have "*…cognitive and descriptive nature*" (VIEIRA, 2002a, p. 90). We note, however, that the activity

of the scientist of law is not limited to the mere description of positive law. According to him, it goes further (VIEIRA, 2000, p. 60). In his words:

> It is necessary to clarify that we do not understand the typical description of legal science in a strict sense, as "to expose, to count meticulously…", from the Latin "describe", but in a broad sense, how to explain, as "to make intelligible, to interpret…" explain "(Antônio Geraldo da Cunha); as "to make clear what hitherto was obscure, because wrapped, concealed," as to remove from the plicas (folds) – "ex-plicare" – what was hidden there; in accordance with the competent lesson of José Souto Maior Borges (VIEIRA, 2002a, p. 90).

José Roberto Vieira, in this particular, follows the lessons of José Souto Maior Borges, who begins the analysis of the activity of the law scientist identifying the non-unanimity of understanding regarding the meaning of its descriptiveness. Indeed, as we have seen, it is almost unanimous that the content of the propositions of the law scientist is descriptive, but in no way are the conceptions of this descriptiveness peaceful. Faced with this, Souto Maior Borges warns that if it is considered a task of the Science of Law to merely describe norms, it would be, its activity, superfluous. It also draws attention to the fact that the description as a cognitive function of Law Science should not be confused with the description contained in the hypothesis of incidence of norms. Having made these recommendations, Souto Maior Borges maintains that a broad range of meanings can be attributed to the descriptive function of Law Science, such as "…*commenting, interpreting, describing in the strict sense, enunciating, formulating hypotheses and deducing the implications, generalizing, exposing…*", that is, the term description must be understood as comprehensively as possible. Next, he concludes that the Science of Law is not merely to describe the Positive Law, but rather, using its own methodology, to explain it. Certainly, in order to grasp the real meaning, which is obscured by the terminological question, an etymological excavation of both terms – explain and describe – is necessary, Souto Maior Borges analyzes them. It begins with the etymology of the term "explain". He teaches that explaining derives from the Latin "explicare", whose meaning is "…to unfold, to develop, to justify, to interpret, to expose, to comment, to explain […] to clarify, to elucidate". It is a word formed by the prefix "ex" and by the word "plicare". The prefix "ex" has the same function as the prefix "des", that is, denote separation or change of state. "Plicare", in turn, means to preach"…in the sense of pleating or plicating." Plica means fold. "Dobra" has the same etymological root as "double", and both correspond to "double". Thus, "explaining" is the same as "un-duplicating", that is, discovering or clarifying what was hidden in the darkness of the plications (folds). In the natural sciences, plics are in natural phenomena, whereas, in the Science of Law, "…they are in a linguistic phenomenon". "Describe", in turn, derives from the Latin "describe", whose meaning is "…expose, narrate, refer

with a certain development, delineate…". Significance somewhat limited, if compared to that of the term "explain". Souto Maior Borges affirms that if the degree of terminological precision were raised, both "explanatory propositions" and "descriptive propositions" would be contained under the genre "cognitive propositions of positive law". However, the frequent use of the term "descriptive propositions" allows the continuity of its use, as long as we consider the fact that its meaning is comprehensive (BORGES, 2000, pp. 123-127).

In addressing the exegetical task, José Roberto Vieira reminds us of the possibility of interpreting law as a body of language. For him, "*…**language** is the capacity of the human being to communicate through signs…*", which are "*…the first unit of the system.*" And, starting from the teachings of Charles Sanders Peirce, he identifies the "sign" as a trinitarian relationship, and then considers "***physical support** (the word spoken or written in linguistic terms), **meaning** (the object of the world) **signification** (the notion that is raised to us)…*". And in Law, the analogy would be perfectly possible: "*Of the **legal texts** (physical supports); which turn to an object of the world – the **intersubjective human conduct** (meaning) – seeking to discipline it, we extract the judgments that correspond to the **juridical norms** (significations)*". He further states that the analysis of the prescriptive language of law must go through the three planes of semiotic investigations, namely, the syntactic (relations of the signs to each other), the semantic (relation of the signs to their meanings) and the pragmatic (signs with their users) (VIEIRA, 1993, pp. 50-52).

In the syntactic plane, there are the relations of the signs to each other. In the investigations developed in this plan there is no place for the examination of sign designations, nor of its relations with its users. Applying it to the legal field, Luis Alberto Warat states that "*…an expression is syntactically well formed when the statement about an action is deontically modified.*" The semantic plane is limited to studying the relations that the signs maintain with the objects to which they refer, or rather, with their meanings. When we examine the meaning of the word used by the legislator, the analysis performed is that of the semantic plane. The pragmatic plan focuses on the study of sign relations with its users, with the users of language (WARAT, 1995, pp. 40-45).

In another writing, José Roberto Vieira briefly deals with methods, means, techniques or processes of interpretation. Starting from the literal, grammatical or philological interpretation, visiting the historical, logical and teleological methods, finally, to reach the systematic interpretation. It is clear from reading the text that the interpretation is unique. What may vary are the methods or means employed to construct it. It is quite true that "*Although jointly applicable, it is possible to identify the stage and arrangements that correspond to each of these techniques…*". And José

Roberto Vieira does this by stating: "*…we deem it indispensable to the study that we will do, to establish at least a radical hierarchy, pointing to the literal method as the poorest, most miserable and sterile of them, and identifying the systematic method as the more opulent, fertile and fruitful*" (2002a, pp. 91-93). On the two methods, he writes:

> The *literal interpretation* is inevitable as the beginning of the hermeneutical process […], because the legal texts correspond to the necessary starting point of the interpretive activity […]. *Nothing more than that, however: starting point and gateway*. If we stop at it, satisfying ourselves with textual literalism, our hermeneutical career will not have gone beyond the starting line, our exegetical adventure will not have surpassed the thresholds of access, it will not have transposed the thresholds of the portico of the interpretation land, which begins from then on, from the text forward. […]
> The *systematic interpretation*, wide and broad, includes literal and logical methods, in the syntactic plane of language, as well as historical and teleological methods, in the semantic and pragmatic planes of language; that is, the systematic view not only goes through all the levels of the language of law, but also demands and presupposes all other interpretive methods. […] In this technique, we not only enter the hermeneutic country entirely, but we examine all its songs, we analyze all its corners, we search all its shadows; we go through the text yes, but much further, we delve deep and long in its context (2002a, pp. 92-93).

And he concludes his teachings on the subject: "*Frequently, the literal interpretation is, as a result, empty and frustrating wasp combs. Usually, systematic interpretation surprises, as a reward for its labor, full and appetizing honeycombs*" (2002a, p. 93).

2 ABOUT THE NOTION OF SYSTEM IN LAW

On the notion of system, José Roberto Vieira wrote "The notion of system in law" (2000, pp. 53-64), published in the Journal of the Faculty of Law UFPR. On the first page of the article, we can identify the presence of two very interesting topics: the difference between "legal order" and "legal system" and "polysemy of words". After dealing with the various "system notions" – beginning with the first notion, in what system is understood as a set of objects, which is called "repertoire", plus its relations, according to certain rules, to what is called "structure"; passing through the second notion, in which there is present, besides repertory and structure, also "unity", that is, the elements would relate, forming a unitary whole; in the third notion of system, in which adds the characteristic of "ordering" or "coherence" – José Roberto Vieira examines the "coherence" and the differences between "Law Science" and "Positive Law", as well as the logic that inform them, that is, "classical logic" and "deontic logic", concluding that both Law Science and Positive Law are systems. It is his words:

> We have just mentioned *three possible notions of system*. The first (repertory and structure), insufficient. The second (repertoire, structure and unity), enough to explain it at the level of Positive Law. The third (repertoire, structure, unity and coherence), apt to mean it in the sphere of Law Science (2000, 61, emphasis in original).

The interesting thing is that just before launching his conclusion, José Roberto Vieira acknowledges having changed his mind about what he was advocating. In the article, it expressly stated that "*…although devoid of full coherence, law is a system for the reasons we briefly outline*" (2000, p. 59). Before, in 1993, in his classic "The IPI incidence matrix rule: text and context", he mentioned that "***…the ordering points in the direction of being a system****; but, we add now, it will not succeed in the last instance.* ***Only legal dogmatics (juridical science in the strict sense) can achieve such a level****, because it exempts from contradictions that do not spare the set of positive norms*" (1993, pp. 33-35, emphasis in original).

3 ABOUT TAX CREATION AND TAX COMPETENCE

3.1 IS THERE A TAXPAYER?

The Constitutional Legislator named Section II of Chapter I of Title VI of the Federal Constitution of 1988 as "The Limitations of the Power to Tax". José Roberto Vieira shows us that foreign and national doctrine called for the possibility of instituting and demanding taxes as a "power", directly linked to the sovereignty of the State. And that, in opposition to this understanding, formed doctrine that removed the examination of the tributary power of the idea of sovereignty. But even dissociated from the idea of sovereignty, the notion of "tax power" remained imprecise. Something unacceptable within a discourse that was intended to be scientific (2005c, pp. 610-618). José Roberto Vieira warned that the "*heterogeneity of the expression tax power points to the scientifically reprehensible attitude of manifest inexactness of admitting the coexistence of different functions and competences within the same conceptual category…*" and, following the steps of foreign doctrine, deals with "tributary power" in order to better describe the various meanings attributed to it by doctrine (2005c, p. 615). According to him, Renato Alessi separated the tax power in primary tax power and in complementary tax authority. The first one referred to the action of editing juridical norms with the scope of establishing tributes, while the second was linked to the application of the norm that instituted them, which demonstrated its administrative character. He goes on to explain that it was up to Gian Antonio Micheli to develop the distinction, separating the tax power in the Tax Power – which was nothing more than the

possibility of the State legislating, in tax matters, creating and regulating benefits of this kind – on the one hand, and on the Powers of Imposition – application by the State of the previously established norms, in order to achieve the tax benefit, a characteristically administrative activity – on the other. He also mentioned Antonio Berliri, for whom "Tax authority" referred to legislative activity, and "Regulatory power of the public administration in tax matters", in turn, alluded to administrative activity; and, finally, brought up Albert Hensel's understanding, which used the expression "Tax Power" to refer to the possibility of abstractly creating the tribute, and of Competence for administrative activity intended to meet the requirement. Undeniably, José Roberto Vieira has demonstrated what he calls his "*great variation in terminology…*" that he experiences in his own words (2005c, pp. 616-618).

But is there a "Tax Power"?

José Roberto Vieira says that it is misleading to mention a tax power whose holders would be the political people Union, states, Federal District and municipalities (2005c, p. 610). It was endowed with "power" – be it of any kind, including tributary – was the National Constituent Assembly, which, by laying the foundation stone of the Brazilian legal system – the Federal Constitution of 1988 – enjoyed wide freedom to establish the juridical system. Exhausted the exercise of said power, what remained were his plots. The parcels of this "tax power", distributed among political people, are called "tax jurisdiction"[1].

3.2 THE CONSTITUTION CREATES TAX

Let us remember with José Roberto Vieira and Diego Marín Barnuevo Fabo that tax jurisdiction is "*…rigidly and integrally established in the Brazilian Constitution, being distributed by the three spheres of government, by virtue of the Constitutional Principles of the Federation and the Autonomy of the Municipalities*" (1997, p. 96).

The tax jurisdiction is usually conceptualized by the doctrine as the aptitude or faculty to abstractly "create" the tribute, observing the procedure established in the Constitution for that purpose. This, of course, if we consider it – as it is part of the doctrine – as a permissive norm directed to the legislator, so that by means of law, usually ordinary,

[1] Let us remember, with José Roberto Viera, that there are no real conflicts of competence. He says: "*In sum, then, the so-called 'conflicts of competence' are nothing more than the delusion that fascinates, of the appearance it seduces, because, after all, they are nothing more than conflicts of laws generated – here the unmasked legal real, the constitutional reality that has been clarified – by* ***interpretive conflicts***" (2013b, p. 60, emphasis in original).

the tax is abstractly instituted. In this conception, the legislator is allowed to institute an obligation – a type of deontic mode (2005c, p. 639).

Here, however, it is necessary to launch a question: tax jurisdiction is the ability for the infra-constitutional legislator to abstract the tax, or just institute the tax, completing its rule of incidence, from the indispensable elements already present in the constitutional text?

Most of the doctrine maintains that the Federal Constitution does not create tributes, limiting itself to distributing competences between the political people so that they do it.

José Roberto Vieira defended, in his work "The IPI incidence matrix rule: text and context", which, despite all legal rules, found its basis of validity in the Federal Constitution, the fact of seeking the ordinary law establishing the tax its foundation of validity in the Federal Constitution did not authorize the assertion that the creation of the tax had already begun in the constitutional text. In this work, in 1993, José Roberto Vieira argued that the Constitution does not create taxes, limiting itself to the distribution of competences (1993, pp. 43-46). In 2005, José Roberto Vieira said bowing "…*to the rich and well-posed argumentation of the master*" José Souto Maior Borges. (2005c, pp. 605-606). In these pages, he demonstrates the reasons that led him to reformulate his understanding (2005c, pp. 630-641). Principia conducting the etymological analysis of the verb "to create" and the noun "creation", informing us that lexics point to parallels "…*generate, form, produce, invent, institute,…'give existence to' and 'take from mothing'*". Then he walks the paths of philosophy dictionaries and realizes that they confirm the meanings of "creating" and "creating" lexicons. He concludes, however, that to Law, because it is a cultural object, the fruit of human construction, only the first meaning applies: "to give existence to" – insofar as the latter – "draw from nothing" "*Creatio ex nihilo*" – refers to divine activity. Given this, it is worth transcribing one of the conclusions reached:

> And even though one speaks of something that would never have existed before, marked by originality, it is to be hoped that *the degree of novelty will always be relative*, either by virtue of the fact that a new juridical institution is characterized as such only in the well delimited enclosure of a certain order, whose scope extends to precise frontiers, both spatial and temporal, and to the limits inherent in the human condition. In this sense, *we find creation of law at all levels of the hierarchy of laws*, from the constitution to administrative or judicial acts. Although lawyers always prefer to speak here of the application of law, the idea of their production is undeniably concomitant (2005c, p. 633).

Let us remember that the theoretical referential of which José Roberto Vieira leaves are the teachings of Hans Kelsen. On the basis of them, he recalls that, turning his eyes to any

point in the legal system, we find both acts of law enforcement (execution) as well as acts of creation (normative production), appearing one or the other, depending on the point from you look at. When looking at the system from its highest point, one sees a series of processes of production (creation) of Law. If, on the contrary, we look from the bottom up, we will be faced with a series of legal enforcement procedures. This does not happen when we direct the focus of the vision to the limits of the system. When contemplating the Federal Constitution, we will find only act of production of Law. Otherwise, if we focus on a final act of execution, we will not find any pretense of legal creation or production (2005c, pp. 634-635).

Strong in these premises, José Roberto Vieira analyzes the two main arguments handled by those who understand that the Constitution does not create the tribute. To the first of his arguments – that it did not seem correct to him to affirm that positive law was completely contained in the body of the Constitution – replies, José Roberto Vieira, that those who defend the creation of the tribute by the Constitution follow exactly the teachings of Hans Kelsen, insofar as they consider that the bodies responsible for the creation of the law and its procedure are, to a certain extent, not exhaustively covered by the Constitution. Even because the Constitution, as the supreme law of a given legal system, has a degree of abstraction far greater than the laws that apply to it. Against the second argument – that the judicial sentence, despite seeking its foundation of validity in the Constitution, is not created by the Constitutional Legislator – José Roberto Vieira ponders that, in an embryonic way, judgments and judicial acts find space in the Constitution, concluding that "*…as legal entities finished, sentence and act were not created in the Constitution; at least essential of those juridical entities, sentence and act began to be created in the Constitution yes*" (2005c, pp. 635-637).

José Roberto Vieira concludes that the Constitution creates "*…minimum tribute…*", emphasizing that the process of creating the tax is initiated with the granting of powers, and that, even though the constitutional provisions are insufficient for the complete design of the tribute, does not mean that such constitutional provisions are non-existent (2005c, pp. 639-640). The essential data of the legal standard of incidence of taxes are already presented in the Constitution.

Regarding this position, José Roberto Vieira warns that he should not be apprehended literally, insofar as the Federal Constitution does not conceive the tax in its entirety, apt to, from the outset, affect, if hypothetically described fact occurs in the hypothesis of incidence of and thus trigger the corresponding tax relationship (2005c, p. 621). In addition to the essential elements set forth by the Federal Constitution

– incidence hypothesis, subjects of the legal relationship (assets and liabilities) and calculation basis –, the ordinary law imposing the tax should be detailed, and prescribe the applicable rates.

3.3 THE CHARACTERISTICS OF TAX COMPETENCE

The characteristics of tax jurisdiction were also examined by José Roberto Vieira (2005c, pp. 622-624). Recall that the doctrine attributes to tax jurisdiction six characteristics: i) non-eligibility; ii) non-negotiability; iii) Incapacity; iv) inalterability; v) privatization; and vi) optionality.

José Roberto Vieira manifests himself in the sense of accepting, "*without any discrepancies, irrelevance and irrerenuableness…*" as characteristics of tax jurisdiction (2005c, p. 622). The "indelegability" is the impossibility of the political person who received from the Federal Constitution the competence to institute a particular tax transfer it to another political person, for whatever title. José Roberto Vieira affirms that the "irrevocability" of the tax jurisdiction (2005c, p. 622) is irrevocable. "Incapability" stems from the fact that the non-exercise of tax jurisdiction, for a long period of time, does not extinguish it. The course of time is not a circumstance that prevents the political person holding the tax jurisdiction from exercising it. Therefore, the tax jurisdiction is eternal. The fact that there are taxes with fixed periods of validity, with date constitutionally set to expire – as in the case of the IPMF and the CPMF –, does not remove from tax jurisdiction the characteristic of incaducability. According to José Roberto Vieira, these are tributes added to the tax jurisdiction of one of the entities of the Federation. The competence originally established by the Constitution is eternal. If this were not the case, the autonomy of the Union, states or municipalities would be impaired, and, as a consequence, also the Federative Principle – a clause that is part of the role of § 4 of article 60, of the Federal Constitution of 1988 –, as also injured would be the Principle of Municipal Autonomy, whose error authorizes even the federal intervention in the states that disobey it, as prescribed in article 34, VII, "c", of the Federal Constitution of 1988 (2005c, p. 623). The "inalterability", as it seems obvious, is characteristic that demonstrates that the tax jurisdiction cannot be changed. In examining it, José Roberto Vieira emphasizes its relativity, taking into account the point of view from which we depart. If it is that of the political person who is the recipient of the tax jurisdiction, the tax jurisdiction will be unchanged. However, if analyzed from the possibility of constitutional reform through amendment, it will be alterable (2005c, p. 623). There are those who argue that the reforming competence may, wishing to make changes in the discriminatory framework of

tax jurisdiction; and that both the constitutions of the states and the organic laws of the municipalities can – by increasing taxpayers' guarantees, and by providing, for example, the Annuity Principle – to stifle the tax jurisdiction conferred upon it by changing it. Rebating these arguments, José Roberto Vieira understands that they are not sufficiently able to remove the inalterability as one of the characteristics of the tax jurisdiction. In his view, it is a circumstance of self-limitation of competence, which is also permitted, by virtue of another characteristic, faculties (2005c, p. 623). Regarding "privatization", José Roberto Vieira understands it as a characteristic of tax jurisdiction based on two strong arguments. The only exclusive tax jurisdiction would be that of the Union. In order to reach this conclusion, he invokes Article 154, II, of the Federal Constitution, which prescribes that "…*the Union may institute […] imminence or in the case of external war, taxes extraordinary, whether or not included in their tax jurisdiction, which will be gradually abolished, ceasing the causes of their creation.*" We can see from the reading of this constitutional provision that there are circumstances – imminence or a case of external war – in which the Union is constitutionally authorized to invade the sphere of competence of states and municipalities. It may, therefore, in certain cases, exercise, the Union, tax jurisdiction that the Constitution attributed to states and municipalities. If another political person, other than the municipality, can exercise the tax jurisdiction that the Constitution granted him, and if another political person, besides the state, can exercise the tax jurisdiction attributed to it by the Constitution, it is not necessary to speak of privativity, when the characterization of the tax jurisdiction of these two political persons was undertaken. From this point of view, exclusive even the tax jurisdiction of the Union. The other argument is the cumulativeness of competences in the hands of the Union, in the cases provided by article 147 of the Federal Constitution (2005c, p. 624). The aforementioned article prescribes that "…the Federal Government is subject to state taxes and, if the Territory is not divided into Municipalities, cumulatively the municipal taxes; to the Federal District, municipal taxes are the responsibility". Finally, as regards "faculties", José Roberto Viera, convinced by the argument that "…before a state that has not established the ICMS in its territory, it would remain for the others to seek redress for damages, never considering that it would be incumbent upon the judiciary to legislate or determine the omission of the state to do so in relation to this tax", remains firmly in a position to understand tax jurisdiction, even that which deals with the ICMS institution, which bears the characteristic of faculties. (2005c, p.624).

4 ABOUT THE PRINCIPLES: THE GENERAL PRINCIPLES

José Roberto Vieira affirms to be "*…an urgent priority…*" to identify the juridical principles of the constitutional system, inasmuch as "*…it depends on the possibility of a broad understanding of the system and its structural schemes, since* ***they function as unassailable assumptions of the activity interpretive***" (1993, p. 38, emphasis in original). And, it attaches greater importance to the principles of the Republic, the Federation, the Municipal Autonomy and the Isonomy of Constitutional Persons "*…in light of the lights that affect the province of the new legal order*" (1990, p. 95).

4.1 PRINCIPLE OF THE FEDERATION

On the Principle of the Federation, José Roberto Vieira devoted a few pages of written article in the early 1990s. However, we cannot forget the debates he held with Clémerson Merlin Clève, in lectures and defense stalls for master's and doctoral degrees, and of the extensive study written on the occasion of the homage to José Eduardo Soares de Melo, entitled "*The principle of federation, Soares de Melo and a 'Federal' work*" (in press).

The examination of the Federation Principle is important inasmuch as, and José Roberto Vieira warns, it collaborates with the implementation of the Republic (1990, p. 103). The mention of the Federation comes early in the Constitutional text. Article 1 states that "*The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal District, constitutes a Democratic State of Law and has as its basis…*". This model was copied, as early as 1891, from the US constitutional system. The importance of federation is elevated to the point of being a stony clause, integrating the hard core, the unalterable core, of the Federal Constitution. There it is, in its article 60, § 4, I, that "*The proposal of amendment tending to abolish:…the federative form of State will not be object of deliberation*". The word "federation" derives from the Latin "*foedus, foederis*", which refers to the idea of pact, union, association, alliance (1990, p. 102). He recalls, in that in press article, that "***…there is no federation but federations. They are many, and each one with its own traits****, although several of them are common*" (in press).

The US federation, for example, was "…composed of a **centripetal movement** from the periphery to the center", also called "Federalism by aggregation or association." The Brazilian federation, has "*…**centrifugal inclination**, moving from the center in the direction of the perimeter…*", called of "federalism by segregation or dissociation" (in press).

In the view of José Roberto Vieira, they characterize the Federation: the constitutional division of powers, the participation of the will of the partial legal orders in the will of the national legal order, and the possibility of self-constitution (local constitutions). And, the constitutional rigidity and the existence of a constitutional body in charge of carrying out the constitutionality control of laws, maintains the Federation (1990, p. 102 and item 2.6, in press).

This stony clause is, for José Roberto Vieira, "*…an undisputed member of the constitutional heart*" (1998, p. 527) and holds "***…a high degree of juridical relevance…***" (in press).

We close the topic mentioning the vision of José Roberto Vieira on the "integrate" or not the municipalities the Federation. He says, in item 2.8 ("Municipality: Non-Federative Entity") of a study still in press: "***…although bearers of all the constitutional dignity of their indefectible autonomy, our municipalities are undoubtedly federative entities***" (in press).

4.2 PRINCIPLE OF THE TRIPARTIMENT OF FUNCTIONS

Instead of "Separation or Tripartition of Powers", José Roberto Vieira prefers "Tripartition of Functions", based on the lessons of Renato Alessi and Celso Antônio Bandeira de Mello about the idea of function. Alessi defines function as "*…the power conceived in relation to the realization of certain interest*". Celso Antônio Bandeira de Mello, in turn, adds that "***…the power directed to the implementation of the legal purpose is intended to safeguard the interests of others***" (1990, p. 100)

José Roberto Vieira starts the examination by quoting the doctrine on the separation of the functions of Charles-Louis de Secondat, Baron de La Brède and Montesquieu. In the spirit of the laws there is passage that translates to perfection what theorization aims to avoid:

> When in the same person or in the same body of magistracy, the legislative power is reunited with the executive power, there is no freedom; because one might fear that the same monarch or senate would create tyrannical laws to enforce them tyrannically. Nor is there freedom if the power to judge is not separated from the legislature and executive power. If it were united to the legislative power, the power over the life and freedom of the citizens would be arbitrary, because the judge would be legislator. If it were united with the executive power, the judge could have the power of an oppressor (MONTESQUIEU, 1996, p. 168).

José Roberto Vieira explains that "*The theory starts from the existence of* ***three state functions****: the legislative (production of the general act), the executive (production of the special act) and the judicial (resolution of controversies); functions which in the Absolute state were concentrated in the hands of the sovereign, enabling tyranny.*" Montesquieu, in the aforementioned book, "*…conceived a system*

in which ***such functions are delivered to distinct and autonomous organs****, which, in restraining and substituting reciprocal ones, configure that system of 'checks and balances'…*" (1990, p. 100, emphasis in original).

However, José Roberto Vieira does not limit himself to stating Montesquieu's theorizing. He also mentions that of Hans Kelsen, who identified two functions of the State: the creation of law (Legislative) and the application of law (Executive or Administration and Judiciary); but also refers to the doctrine of Oswaldo Aranha Bandeira de Mello, which presents the Administrative Function, which comprises legislative action and executive action, and the Jurisdictional Function, which comprises the judicial action (1990, p. 100).

4.3 PRINCIPLE OF THE REPUBLIC

José Roberto Vieira is emphatic in stating, in agreement with Geraldo Ataliba, that the Principle of the Republic is the "*…most important and decisive of our Public Law*" (1990, p. 101). However, "*In republican and democratic terms we also find ourselves, Brazilians, at a young age*" (2002b, p. 98). According to him, it is characteristic of this regime of government, the Republic: "*the* ***representativity****, resulting from the electivity, the* ***transitoriness*** *and the* ***responsibility***" (1990, p. 101, emphasis in original). The most relevant of these characteristics, in his view, is representativeness, inasmuch as "*…the authorities are mere administrators of the public property –* ***res publica*** *– by way of representatives of the people, who own their property*". For this reason, the idea of a mandate would be the Republic's "Touchstone" (1990, p. 101). It is true that part of the doctrine questioned the integration of the Republic into the role of stone clauses. José Roberto Vieira is emphatic in allocating it to the unchanging nucleus of the Constitution[2].

Could we ask whether the concept of Republic was an "obvious howl"? Mainly because "***…undoubtedly, among some of the most common, currents, beatings, trivial of Public Law***" (2006a, p. 187, emphasis in original). Definitely not, teaches us José Roberto Vieira[3].

[2] *"Although Brazilian constitutional doctrine, after the advent of the 1988 text, in an unfortunate literal tendency, inclines itself to the fact that the Republic no longer constitutes an untouchable clause, it is clear that, on April 21, 1993, the possibility (article 2 of the Transitional Constitutional Provisions Act), its core idea of representation (direct, secret and universal vote - Article 60, § 4, II) is still present, as is that of temporariness (periodic vote - Article 60, § 4, II), and even equality, for those who understand it as a member of the republican notion (between individual rights - Article 60, § 4, IV). For Carmem Lúcia Antunes Rocha, whose position seems to us to be sensible, between the constitutional promulgation and the plebiscite of 1993, the republic was not a stony clause, for the possibility of its modification by the revisionary route, after which, it regained its condition of immodifiable, as implied material limit "* (2004, p. 180).

[3] *"If in the first moment of this text, considering that* ***Republic and Democracy*** *are concepts so assiduously well-versed in publicist doctrine, we think we may regard it as obvious, although doubting this condition,*

4.4 PRINCIPLE OF MUNICIPAL AUTONOMY

The Principle of Municipal Autonomy, according to José Roberto Vieira, was already established in Brazil Colony, "***…before any cogitation of political autonomy for the Member States***". This principle is expressly provided for in article 34, VII, "c", of the constitutional text. It should also be remembered that municipalities, although not part of the Federative Pact, have "…***the capacity to legislate*** *on* ***their business*** *by* ***their own authorities***" (1990, p. 103 and item 2.7, in press).

4.5 PRINCIPLE OF LEGAL SAFETY

José Roberto Vieira taught us that "***the notion of legal security is, as a rule, identified with that of certainty of right***", encompassing, however, more than it, insofar as it includes "…***idea of predictability of state action****, to remove from individuals the surprises that repugn to our legal system*" (1990, p. 99). In fact, "*From the Latin 'securus' (free from danger), or, in more detail, from the conjunction of Latin words 'sine + cure' (without worries), security means freedom from caring*" (2005d, p. 319, emphasis in original).

In the tax constitutional subsystem, José Roberto Vieira identifies some principles that carry out legal security. They are: the Principle of Strict Legality, the Principle of Nonretroactivity (Article 5, XXXVI and Article 150, III, "a"), the Principle of Previousity (Article 150, III, "b") and the Principle of Universality of Jurisdiction (Article 5, XXXV) (1990, p. 99, 1997, p. 98). Of these, two integrate, alongside the Equality Principle and the Contributory Capacity, the so-called Taxpayer Statute: the Principle of Priority and the Principle of Equality (2011, p. 364). As to the Principle of Priority, let us remember, its meaning would be "*to avoid surprising taxpayers*" (1997, p. 97). This Principle protects "*…the effectiveness of the laws that institute or increase taxes for the subsequent exercise*" (2004, p. 199, 2005d, p. 353).

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does ***not bother us to admit, just to argue, this truism; since it was not adjective of 'ululant'****, composing the complete Rodriguean image. This is because if, at the sole level of theory, the eventual connotation of evidence of these notions can be tolerated, this does not occur with resplendent and flashing clarity at the level of practice, for the way in which they are concretized in the experience of states contemporary, especially in our particular, lies at an immeasurable distance from the high altitude of its abstract speculations. Theoretical-practical departure that, in a reverse turn, is, of course, inevitable, to demand an accusation. In other words, even if it is not obvious that the concepts, let alone howls,* ***of undeniable obviousness, even ululating, is negligence in its concretization****, negligence in its materialization, the scarcity of its execution, the absence of its realization "* (2006a, p. 187, emphasis in original).

To the Principle of Legality, for its superior importance, we will dedicate our own topic. In the context of the guiding principles of security, José Roberto Vieira is direct: "*There is no doubt that, in this scenario, the main role is always reserved for Legality*" (2005d, p. 324).

The principle of non-retroactivity, in turn, is generally recognized (Article 5, XXXVI) and, in tax matters, it is specifically formulated (in Article 150, III, "a"), by prohibiting "…*the tributes in relation to facts occurring before the law was enacted or increased…*" (1997, p. 97).

4.6 PRINCIPLE OF LEGALITY

In analyzing the foreign doctrine, José Roberto Vieira makes an interesting historical retake of the Principle of Legality, emphasizing that before the promulgation of the *Magna Charta Libertatum*, on the banks of the Thames, by King John, there were previous documents "***…in which the common note is the consent of the addressees of certain taxes***" (1999, pp. 103-114, 2014a, pp. 945-957, 2015, pp. 171-178, emphasis in original). We will not extend the historical examination of the Principle of Legality, as this is not the scope of this homage. However, it should be noted that "*historians, jurists, and political scientists do not differ in recognizing that* ***this fundamental canon has its origin intimately connected with the consent of the tributes***" (1999, p. 101, emphasis in original).

As for the Principle of Legality, which is "…*a practically unavoidable presence in modern states…*" (1999, p. 101), José Roberto Vieira examines it in a first moment, based on the theorization of the Portuguese administrativist named André Gonçalves Pereira, which deals with a restrictive conception and an expansive conception of the Principle of Legality. The first (Principle of Preeminence of Law), which is already passed, brings the idea of "*not breaking the law*", that is, establishing a "…*relationship of non-contrariness or compatibility (to act in a way not contrary to or compatible with the law, which only sets limits – what is not prohibited is allowed), in a minimal notion of legality*". The second (Principle of the Law Reserve), in turn, is accompanied by the idea of "*acting in accordance with the law*", that means it is identified with a "…*compliance relation (acting according to the law, which sets limits and permissions (which is not allowed is prohibited), in a notion of maximum legality*" (1990, p. 96, 2002b, p. 104) [4]. But in Brazil? José Roberto Vieira does not hesitate in

[4] Here it is important to mention that the Principle of Legality covers the Principle of Constitutionality. Here are the words of José Roberto Vieira: "…*it makes no sense to consider a legality that excludes from consideration the constitutional*

> …*proclaim* ***the Principle of Legality as a relation of conformity with the law in a formal sense****, an act originating from the body that has constitutional competence to legislate and clothe in the established way for the laws, and not only in a material sense, generic and coercive behavior rule* (1990, p. 96, emphasis in original).

It is also important to mention, in the words of José Roberto Vieira, the double meaning of Tax Legality. He says:

> *While tax law, in the formal sense, corresponds to the requirement of law as a vehicle, an act originating from the legislature; the tax law, in the material sense, is exactly the same in terms of content, the closed type, the need for all the data of the standard of incidence to be specified by law. And that they be so with high rigor and precision* (2016b, p. 179-180).

Let us remember, with José Roberto Vieira, that "***law is the supreme manifestation of the popular will****, the will of every citizen, through political representation, making the instrument of popular sovereignty almost perfect*" (1990, p. 97, 1991, p. 147, emphasis in original). That is why he affirms that it is legality to "…the first station in which republican-democratic representativeness unravels…" (2002b, 103). It is by the "…*road*…" of legality that "…*Law gains the dimension of reflexivity and the 'homo juridicus' jumps from the plains of 'imposition' to the heights of 'self-imposition'*" (2004, p. 186). In the current Constitution, this principle is established both in its general meaning, in Article 5, II, and in its specific tax provision, in Article 150, I, which "…*enables and realizes the idea of self-taxation*" (2002b, p. 108). Here, there is room for the examination of the meaning of "institute tribute". According to José Roberto Vieira, it is legislating that the tribute is instituted. In this way, tax jurisdiction is, above all, legislative competence. It ends by concluding that to institute tribute is "***…to edit, with all its details, the legal norm of incidence***" (2014a, p.941, emphasis in original). Citing the previous constitutions, so José Roberto Vieira manifests on Tax Legality in Brazilian Law:

> The constitutional legislator, with the help of the Tax Code, built the monumental citadel of Tax Legality. On the foundations and foundations of the Republic and on the foundations and democratic foundations, he erected a formidable castle for legality, which at first sight seems invulnerable and impregnable. And he did it gradually and gradually, over the centuries, in the slow and patient compass of our various constitutional diplomas, from the imperial document of 1824, the authoritarian ones of 1937 and 1969, and the democratic republicans of 1891, 1934, 1946, 1967 and 1988. It is no wonder that its condition as a fundamental right (Article 5, II) and the taxpayer's guarantee (Article 150, I) protects it from any investigation contrary to it (Article 60, § 4, IV), as a true clause "stone", of the purest and unattainable stone. However, a

text, the 'law of laws', since legality consists, nothing more, nothing less, and its most respectable portion and venerable, in authentic constitutionality. From another angle, the assertion that an unconstitutionality constitutes a qualified illegality is irrefragable. Therefore, ***the Principle of Legality includes and encompasses the Principle of Constitutionality****, this, exactly, as its portion of greater nobility, as its share of greater nobility, as a* ***fair share of excellence in Legality***" (2014b, pp. 604-605, emphasis in original).

> second and more attentive look, as we have just addressed in this work, reveals that *this fortification, far from invincible, exhibits weaknesses; far from unconquerable, shows weaknesses* (2016b, p. 190).

Examining the provisions of article 153, paragraph 1, of the Federal Constitution, José Roberto Vieira points out that this is not an exception to legality. At most, an apparent exception, "*…because the license of the Major Code for the executive is not broad and unrestricted, but strictly subordinate to the demarcations that the law imposes*" (1998, p. 555, 2006b, pp. 194-195). In a text published in 2014, José Roberto Vieira, in a chapter titled "Mere Attentions, No Exception", explains that there will be an exception to generic legality in only one case: that of provisional measures provided for in Article 62 of the Federal Constitution, normative of government, that with the law does not identify itself. However, it is emphatic in stating that there are no exceptions to the Principle of Tax Legality. His words, in the text finished on April 30, 2014, St. Pius V's Day:

> *The only constitutional provision that reduces the rigidity and intransigence of Tax Legality, with respect to the legal definition of the structural data of the tax incidence rule (Article 153, § 1), does not even exclude it, corresponding only* ***to slowdowns, and merely attenuations of the principle*** (2014a, pp. 957-961, emphasis in original).

We find a true exception to Legality, for example, in the provisions of article 177, § 4, I, "b", of the Federal Constitution, included in article 3 of Constitutional Amendment n. 33, dated December 11, 2001 – of dubious constitutionality as opposed to article 60, paragraph 4, IV –, which prescribes that

> *The law that establishes an intervention contribution in the economic domain related to the importation or commercialization of petroleum and its derivatives, natural gas and its derivatives and fuel alcohol shall meet the following requirements: I – the contribution rate may be: […] b) reduced and restored by act of the Executive Power, not being applied the provisions of art. 150, III, b.*

In dealing with a matter directly related to Legality, in 1997, José Roberto Vieira, in co-author with Diego Marín-Barnuevo Fabo, stressed that, in Brazil, "*…Provisional Measure cannot be used to institute or increase taxes, before a constitutional provision that requires law for such measures…*" (1997, p. 97). Years later, in 2004, however, he warned:

> In the contemporary Brazilian State, the sweet civic flavor of Legality in general, specifically of Tax Legality, masks the bitter taste of the Provisional Measure. And Brazilian citizens, in the innocence of their republican and democratic childhood, celebrate public life with gleaming and seductive bowls, because with their edges soaked with the sugary sweetness of the *honey of legality*, a fundamental food, and, most of the time, there remain deluded by the amena mask that insidiously hides *the dangerous substance of the provisional measure*; in our clinical case, a drug that, due to excessive and uncontrolled use,

> caused addiction and addiction, becoming an *authentic poison*! (2004, p.175, emphasis in original).

Let us begin, then, the treatment of this "*…potentially toxic substance […] that hides under the sweetness of Generic and Tax Legality*", which are the Provisional Measures (2004, p. 190), for which José Roberto Vieira dedicated his thesis of doctorate (1999).

According to José Roberto Vieira, the Provisional Measures provided for in Article 62 of the Federal Constitution are "*primary normative acts of government, endowed with only the force of law*" (2004, p. 196). It is interesting to remake the argumentative path taken by José Roberto Vieira to reach such a conclusion. At first, he justifies his disagreement with those who see it as a "*legislative act*". He is emphatic in stating that "*Provisional Measure is not law*". Here are the reasons: i) if a provisional measure were a law, it would not be necessary for it to be expressly granted by the constitutional legislator, by force of law; ii) if a provisional measure were law, it would not be necessary for the National Congress to convert it into law. After all, "*…it is evident that only what is law is not converted, transformed, transformed into law*"; iii) if a provisional measure were a law, it would not only have "force of law"; iv) "*The fact that it is granted, temporarily, force of law, does not in any way mean that it has the value of law (nature)*" [5]. (2004, p. 192-193).

José Roberto Vieira does not fall into the group of those who exclude the possibility of using Provisional Measures in the field of taxation. In spite of the fact that "*…alongside those who do not accept the provisional governmental instrument for the institution and the increase of taxes*" – because of the affront to Legality and Priority –, he admits their use in certain cases that "*…do not carry risk for freedom and property…*" (2004, pp. 198-199). One such case is the increase in the tax rates provided for in article 153, paragraph 1, of the Federal Constitution. The Executive Branch, in addition to the Decree, may avail itself of the Provisional Measure[6].

[5] And he concludes: "*In summary*, we have the law, characterized by normality, permanence, consistency, past efficacy preserved and independence of assumptions; the provisional, exceptional, ephemeral, precarious measure, capable of losing its effectiveness forever, and restricted to the hypotheses of urgency and relevance" (2004, p. 194).

[6] "Regarding the **possibility of a Provisional Measure**, although the Supreme Text has assigned it its own instrument and less rigor (decree), when it is urgent and relevant, we do not think we can refuse the executive the prospect of calling the legislature to divide the responsibilities of decisions, in tribute to the Principles of Legality, the Tripartite Functions and the Republic itself" (1993, p.130, emphasis in original). In another text from 2004, he adds: "The hypothesis is improbable, because if the President of the Republic can take the measure by decree it would hardly do so by the stricter path of the provisional measure. It is a possibility, however, and we find no reason to reject it. If it were unipessoally the president could do it, and he decided to invite the representatives of the people and the states to the decision, respecting the principles mentioned (Legality, Republic and Tripartite Functions), plus that of Democracy, we would add, *on the contrary, it is only a basis for encumments.* […] This is a pure and primary application of the '*a fortiori*' argument, of the '*a maiori ad minus*' type, expressed, as Georges Kalinowski points out, in the formula of the old *qui potest* plus, *potest minus*, which, obviously, is not always possible to use, as Chaïm Perelman explains, but in this case he can not be blamed" (2004, pp. 202-203, emphasis in original).

The constitutional discipline of the Provisional Measures has undergone a considerable modification, through Constitutional Amendment n. 32 of 11 September 2001, a "terrorist" amendment (2005a, p. 713). This Amendment, which was adjectived as "timid and pusillanimous" and "indulgent" and "condescending" towards the Executive Power; and who was responsible for bringing new obstacles to the institute of the Provisional Measure, resulting from which "disenchantment" and "discouragement" are experienced, brought, in the view of José Roberto Vieira, positive aspects and negative aspects, so that it is possible to say that "*…it carries some honey and much poison*" (2004, p. 212)[7]. He is emphatic in stating that

> *…with such an amendment we receive, instead of the desired normative solution, new outbreaks of normative problems; instead of the constitutional remedy sought, new tremors of constitutional disease; instead of the coveted civic cure, new crises of civic disease; rather than the citizen's longed for relief, new convulsions of citizen infirmity* (2004, p. 206-207).

As for the positive aspects, they are: i) negative material restrictions, with the establishment of subjects that cannot be disciplined by means of a Provisional Measure; ii) limitation to the possibility of reissuing (extension) to a single one, in the same legislative session; iii) express determination of the parliamentary assessment, prior to the examination of merit, of its constitutional presuppositions; iv) application to the Provisional Measures of the emergency regime applicable to the bills of initiative of the President of the Republic; and v) the automatic inclusion of the Provisional Measures in force in the agenda of the extraordinary conventions of the National Congress (2004, pp. 207-208). As for the negative aspects, José Roberto Vieira classifies them into "*low or medium negativity*" and "*high or very high negativity*". They are of low or medium negativity: i) the increase of the period of exceptionality from thirty to sixty days; ii) the suspension of the counting of the term during the recess of the National Congress; iii) the end of the extraordinary convocation of the National Congress, in five days, to consider a provisional measure issued during its recess; iv) express admission of the possibility of revoking one interim measure for another (2004, p. 208-209). The aspects of high or very high negativity are the following: i) to consider the list of material limitations

[7] It is interesting to remember that this amendment was the subject of a specific article, already classic. In 2005, José Roberto Vieira wrote shortly after commenting on Manuel Maria Barbosa du Bocage: "And why these literary and poetic considerations in the introduction of legal work on provisional measures?! […] There are two more specific reasons, however. The first one is related to a curious and interesting episode of the life of BOCAGE that tells us DEONÍSIO DA SILVA. An aspiring poet gave him a sonnet he had written, asking him for the valuable appreciation, and more, to mark with crosses the errors that might have been detected. His initial surprise must have been great when, after reading it, BOCAGE returned the poem without any mark. But the frustration must have been even greater when he heard **the poet's explanation: there would be so many crosses that the amendment would be worse than the sonnet!** We can not imagine a better description of what happened with the constitutional amendment that tried to correct problems of the normative design of the provisional measure, as it will certainly remain clear from the reflections that we are about to undertake. So much so that we adopt the expression in the title of this work" (2005a, pp. 694-695, emphasis in original).

as a limitation; ii) the express admission of a reissue (extension) of the Provisional Measure in the same legislative session; iii) the possibility of reissuing a Provisional Measure tacitly or expressly rejected in the following legislative session; iv) the establishment of a loss of effectiveness as a result of rejection, and not from editing, in cases of failure to issue the relevant legislative decree in sixty days to discipline the legal relations arising from the Provisional Measure not converted into law; v) the extinction, for the future, of the limit imposed to the Provisional Measures that deal with subjects subject to amendments, from 1995; and vi) the transformation of all the Provisional Measures issued and in force until then, in Permanent Measures, until the later deliberation of the National Congress or until its express revocation (2004, pp. 208-210).

Specifically, in tax matters, even acknowledging José Roberto Vieira some positivity, because of "*…submission of the institution or tax increase to the previous not in relation to the provisional measure to take the measure, but in relation to the law in which to convert the measure provisional…*", he is emphatic in pointing to the supreme negativity

> *…that goes by the scope of the folly and the constitutional disparity, of the admission of provisional measure for institution and increase of taxes, on one hand […]; and on the other, of the emptying of the material presupposition of the urgency of such provisional measure, by subjecting it to the formerness of the law in which it is to become…* (2004, pp. 210-211).

Let us now turn to the analysis of the material constitutional assumptions of the Provisional Measures. The first of these, relevancy, is relational. This is because "*…the possibility of adopting a provisional measure would therefore be directly related to the impossibility of the parliament to take the measures contained therein in a timely manner to make them effective, by virtue of the minimum procedures and deadlines that are inherent in the discipline of parliamentary action*" (2005d, p. 330). It is necessary, then, to find, in the Constitutional Text itself, what this term is. Or rather, what is the deadline for processing bills of initiative of the President of the Republic on an emergency basis? The answer is one hundred days: "*urgent is the provisional measure that can not wait for the normal course, or with urgent request – 90 days, usually, or 100, in case of amendments – of bills presented by the President of the Republic; otherwise, it will not be so, thus rendering it inadmissible*" (2005d, p. 331)[8].

[8] In another paper, José Roberto Vieira mentioned this period as being 45 (forty-five) days (2005a, p. 703). Here is Jose Roberto Vieira's explanation for the change of understanding: "*In view of the pertinent constitutional provision, however – If…the House of Representatives and the Federal Senate do not manifest themselves, each successively, within forty-five days, all other deliberations…until the voting is completed*' (Article 64, paragraph 2, in the wording of Constitutional Amendment No. 32, of September 11, 2001), it seems to us today that the syntactic effort of a no more than literal interpretation is enough and sufficient. Once the "each" clause has been placed before the 45-day deadline, the respective

If, as far as urgency is concerned, there is precision, unfortunately we cannot say the same about relevance, which is one of those "indeterminate legal concepts". Its concept must be sought through constitutional contextual interpretation. As a result, "*It is always and inevitably in the public interest, and in light of the scale of relevance derived from the values constitutionally enshrined in its principles, that the President of the Republic may make use of the provisional normative instrument*". It should do so in a reasoned way (2005d, pp. 336-342).

Finally, he concludes that there are two barriers to the use of Provisional Measures for the institution and increase of taxes: Tax Legality and Tax Precedence (2005a, p. 710).

There is another issue that we must deal with: the impossibility of legislative delegations to institute taxes. José Roberto Vieira warns that the constitutional legislator, through Article 25 of the Transitory Constitutional Provisions Act, "*…evidenced a general provision to the detriment of legislative delegations…*", especially when he established the revocation of the mechanisms that delegate or delegate to the organ of power Executive competence assigned by the Constitution to the National Congress, especially with regard to "normative action". In fact, he is correct in concluding that "*In the area of taxes, then, there would be very little effect of the Tax Legality, requiring a law for the creation and increase of taxes, if it were possible for the legislature to delegate these functions with a high tax impact to the Executive*" (2016b, p. 181-182). If it did, the Legislature would betray the people[9]. Before this was the only betrayal of the Legislative to the Brazilian people! We know that your daily betrayals are much more scandalous.

Both in the production and in the application of positive Brazilian tax law, it seems to us, we live the nightmare of the law of the jungle! [10] And in this nightmare, the doors of our fortress – which

clause shall be given separately and separately to each of the two houses of parliament, in a total of 90 days. Did the constitutional legislator say that the House and the Senate should manifest themselves "for up to
forty-five days, each successively", and then the location of the reference to the term preceding the clause "each successively" would prevail for the whole of both houses, each being restricted only to the successive and not simultaneous condition of the manifestation of each one of them. It is not so, however, and so we begin to see the question in this way" (2005d, pp. 333-334).

[9] "In fact, since legality, supported by the notions of the Republic and of Democracy, has always been semantically charged throughout history with the expressiveness of popular representation, if the parliament, the original holder of the office of legislation, delivers it graciously to the chief of the executive, chosen by the people for a very diverse public iter, the people will be betrayed by a disloyal legislature and unfaithful to its political and constitutional mission" (2016b, p. 183).

[10] José Roberto Vieira says: "*If we monitor compliance with the commands that carry out the republican-democratic representativeness. Moreover, if we ensure respect for the rules that implement effective popular participation in legislative decisions. Moreover, if we denounce the impairment of norms that respect the fundamental values of freedom and equality, especially and especially when it falls short of the merely formal. For example, in tax matters, we clarify and point out the commandments that belittle the narrow commitment of the order to the principle of contributory capacity, thereby neglecting the grand principle of tax equality; such as those of the ICMS and IPI legislation that affect selectivity, or those of the IPTU legislation, which insult progressivity. If our responses to these and so many other similar ones are indecisive, hesitant, hesitant, hesitant, then we are not only imbued with authentic republican-democratic spirit*

boasts "*…a strong and strong appearance of a strong one of the most rigid and tough rock…*" – of Legality, regrettably, are of paper (2016b, p. 190-191).

4.7 PRINCIPLE OF EQUALITY

The Principle of Equality integrates, "*…without a chance of contestation…*", the Taxpayer Statute (VIEIRA, 2012, p. 173). In examining the caput of Article 5 of the Federal Constitution, José Roberto Vieira affirms that "*Everyone is equal before the law, without distinction of any kind…*", is a command that "***…does not limit itself to equating individuals with laws…***", establishing also "***…equality in the law***" (1990, p. 97, emphasis in original).

José Roberto Vieira also points out that the "***…rule of equality is not absolute***". He attributes to Aristotle the idea of "***relative equality***", which goes back to "Nicomachean Ethics". In "Prayer to the Young Men" – a text addressed to the graduates of the Faculty of Law of Largo São Francisco, 1921 – Rui Barbosa declares, in the view of José Roberto Vieira, "*…the most beautiful statement…*" (1990, p. 98):

> The rule of equality consists only in quoting unequally to the unequal, insofar as they are unequal. In this social inequality, proportionate to natural inequality, is the true law of equality […]. To treat inequality with equality, or with inequality with equality, would be flagrant inequality, not real equality (2003, p. 26).

It is true that José Roberto Vieira warns that this "*…multisecular and beautiful construction still does not strip all the latitude…*" of the Equality Principle. He also says that "*…we know […] today, of* ***the undisguised insufficiency of this conception****…*" (2012, p. 177, emphasis in original). It would be necessary to face the question posed by Celso Antônio Bandeira de Mello: "*Who are the equals and who are the unequals?*" (VIEIRA, 1990, p. 98). According to José Roberto Vieira, it is Celso Antônio Bandeira de Mello, whom we must understand that

> *…the first effort, among us, to deepen research in this field, identifying the conditions for the realization of the principle, through examination; of the discrimination factor; of the logical correlation between this factor and the established legal treatment […] and of the consonance between this correlation and the constitutional values.*

but, on the contrary, we end up turning in the opposite direction and choosing as a path and destined the domain of the Law of the Jungle, barbarism and prehistoric animality. Then the nightmare! If, on the other hand, our responses to these and similar ones are firm, decisive, determined, resolute, then, in addition to revealing republican and democratic awareness, we maintain a good course, choosing as itineraries and port of arrival the scope of legality , civilization and the humanity of an enlightened future. There the dream!" (2002b, p. 108).

He recalls, however, that Humberto Avila prefers "compatibility with purpose" (2012, p. 177).

4.8 PRINCIPLE OF CONTRIBUTIVE CAPACITY

The Principle of Contributory Capacity, now expressly provided for in article 145, paragraph 1, of the Federal Constitution, could continue to be implicit. This is because, undoubtedly, as José Roberto Vieira states, it is "***…corollary of the Equality Principle in Tax Matters***" (2012, pp. 177-178, emphasis in original). Let us remember that "*…the foundation of Contributory Capacity is found in the Principle of Equality*" (2013a, p. 22). Or, further, that the "***…Principle of Equality*** *[…] is expressed, in tax matters, by the duty to pay taxes according to the* ***Contributory Capacity*** *of each…*" (2008a, p. 510, emphasis in original). Some might criticize the content of the mentioned paragraph 1, because of the expression "economic capacity", contained therein. Critics do not, however; let us remember, as José Roberto Vieira, that "*…the entire expression – 'economic capacity of the taxpayer' – removes the inequities, since it clearly indicates the one whose available wealth is qualified, making it apt to the passive subjection of a tax obligation, in the condition of 'taxpayer'*" (2012, p. 180).

In spite of its "*inherent indeterminability*", in order to reach a "*reasonable notion*" of the Principle of Contributory Capability – José Roberto Vieira warns – it is not necessary "*…to follow all [their] historical-conceptual evolution…*" (2012, p. 180). In pursuit of this notion, it is necessary to differentiate "contributory capacity" from "economic capacity" and "financial capacity". And if we accompany Jose Roberto Vieira, we will walk well. In investigating this "reasonable notion," he writes:

> It is not, therefore, the simple disposition of wealth, which would indicate mere **economic capacity**, but of having sufficient wealth for submission to the tribute, thus surplus of wealth enough to meet only the minimum necessary for a dignified life, satisfying more than mere basics necessities to a citizien (Constitution, Article 7, IV), a condition that would then point to a genuine **capacity to contribute** to the survival of the State; a diverse idea, even of **financial capacity**, is focused on the notion of liquidity (2012, p. 632, emphasis in original).

Once the first distinction has been made, to identify contributory capacity as that which exceeds the existential minimum, it is essential to point to another classical distinction made by doctrine between "*Absolute or objective contributory capacity*" and "*Relative or subjective contributory capacity*". Regarding "absolute or objective tax capacity", José Roberto Vieira understands that

> *…it is for the legislator to select, for the hypothesis of incidence of the tax rules, facts that are revealing of contributory capacity […], or, in other words, facts that constitute signs that allow to establish the presumption of existence of this capacity – aspect that performs the function assumption or legal basis of the tax.*

This kind of contributory capacity is linked to the hypothesis of tax incidence (2012, pp. 180-181, 2013a, p. 25, 2014b, pp. 633-634). In addressing the second case, José Roberto Vieira states that

> *…it is necessary to establish the contribution to the measure of the economic possibilities of a certain taxable person, adjusting the quantum of the tax to the economic size of the event and adapting it to the personal circumstances of the citizen; aspect that fulfills the function of criterion of graduation of the tribute and of fixing its limits.*

This kind of contributory capacity is related to the consequence of the tax norm (2012, p. 181, 2013a, p. 25, 2014b, pp. 633-634). However, these notions were not well delimited. José Roberto Vieira himself acknowledges, in affirming, mentioning works by him, that "*…such a distinction was referred to in a somewhat implicit way, without much clarity and specificity*" (2016a, XXXVI, 32). In this Preface, in exemplifying one of the "*flights with an instructor*", he wrote:

> This is also the case in sub-item 4.5.1.2, when, in studying the classification of contributory capacity as absolute or objective, on one hand, and on relative, and on the other, the author follows our interpretation, in the sense that , **if the adjectives "absolute" and "objective"** are equivalent, such synonymy does not occur between the adjectives "relative" and "subjective", each of which has its own and unmistakable senses. When the tax is established, adjusting its "*quantum*" to the economic size of the tax legal fact, it is taking into account the relative tax capacity; and when the adequacy of the tax is promoted to the personal circumstances of the taxable person, it is attentive to the subjective contributory capacity (2016a, p. XXXVI, emphasis in original).

It is worth mentioning, albeit brief, other principles: the Principle of Progressivity, the Principle of Personality, the Existential Minimum, and the Principle of Non-Confiscation.

The Minimum Existence, which has its constitutional basis in the dignity of the human person, provided for in Article 1, III, in the objective of eradicating poverty and reducing inequalities, mentioned in article 3, III, and in the Principle of Contribution Capacity, 145, paragraph 1, all of the Federal Constitution, is the lower limit of the ability to contribute. This is, in the view of José Roberto Vieira, "*…a clear allusion to sufficient resources for a minimally dignified life, satisfying the basic vital needs of the citizen (Constitution, article 7, IV)*" (2012, pp. 196-197). The Principle of Non-Confiscation, which is of "*…high indetermination…*" reflects the "*…tendency to prevent the destruction of wealth recorded by tax incidents*" (1997, p. 98). The Progressivity Principle establishes "*…the increase of the tax in proportion to the growth of its calculation base…*",

and is considered by José Roberto Vieira as a result of the Principle of Equality and Contributory Capacity (1997, p. 98). The Personality or Personalization Principle, in turn, that "*…takes into account the conditions and personal characteristics of the taxpayer, constitutes a technique of graduation of the Contributory Capacity […] establishing the proportionality of the tax with the subjective or relative*" (2012, pp. 182-183).

To conclude this topic, two more brief words on themes related to the ability to contribute: extrafiscality and practicality. As for the extrafiscalidade, José Roberto Vieira says that his conviviality with the contributory capacity is "*…painful and precarious…*". According to him, the "*…first extra-fiscal experiences…*" date back to the eighteenth century. However, the early 20th century is regarded as the "*…contemporary phase of the extra-fiscal use of taxes…*". The classic case, judged by the US Supreme Court in 1904, is the "United States Versus McGray," which considered the taxation of margarine more burdensome compared to that of butter because of health criteria. Since then, the distinction between "power to tax" and "police power" has emerged in American doctrine. The first, tied to taxation with the scope of bringing financial resources to the State. The second, related to taxation purposes "*…not merely tax collection, but of a social or economic character*". Extrafiscality, here. Taxation, there (2013a, pp. 26-27). Here in Brazil, there is no doubt about the "*permanent and definitive presence*" of extrafiscality. However, the problems arising from it do not escape our perception. According to José Roberto Vieira, the "*…most important and delicate concerns their constitutional legitimacy. The ends sought by the extra-fiscal use of the tribute must necessarily "…find clear and clear constitutional consecration…*", otherwise it will violate the taxpayer's capacity and, consequently, equality. Then there were two doctrinal currents on the subject. The first one, "*…frankly averse to extrafiscality…*", whose maximum exponent is Sáinz de Bujanda, is, in the view of José Roberto Vieira, overcome. The second, defended by Fernando Moschetti, considers possible the conjugation of the contributory capacity and extrafiscality. Those who adhere to this thesis, which is, in the view of José Roberto Vieira, "*…an overly simplifying and purposeful explanation intended to overcome the contradictions…*"; and "*…a perhaps heroic attempt, but of very difficult and even impossible support, under penalty of notorious vilification to the Contributory Capacity*", they understand that one could only consider contributory capacity when it presents the respect to the Principle of the Solidarity, taking in collective needs. José Roberto Vieira's view on the subject is very specific: in the application of extrafiscality there would be a "softening" of the Principle of Contributory Capacity, maintaining

the "*simultaneous and cumulative attendance…*" of its minimum and maximum limits, its "floor"and its "ceiling", namely, the existential minimum and the prohibition of the confiscatory effect. And, with the partial withdrawal of contributory capacity, there is no doubt that there is a blemish, partial, and quite true, of equality itself (2013a, pp. 27-30). How to apply extrafiscality? José Roberto Vieira points out that "*proportionality*" is a "*precondition*". Here are his words:

> It is the triple exam of proportionality: verify that the measures chosen are appropriate to the extra-fiscal pursued (adequacy, in the relation "middle x end"); in the presence of alternative measures, those adopted are the least restrictive and prejudicial to equality (necessity, in the relation "middle and end"); and whether the advantages derived from the desired extra-fiscal purpose are proportional to the disadvantages arising from the established inequalities (proportionality in the strict sense, in the "advantages vs. disadvantages" reaction) (2013a, pp. 30-31).

Finally, let us remember that a great deal of attention is needed here. The word "extrafiscality" should not be seen as "*…a word of prestige, as a word of sorcerer, to make the legislators wide open the seductive and fearful doors of agency.*" Let us strive to control, then, the "Wolf of extrafiscality" (2013a, p. 38).

Regarding practicality, José Roberto Vieira dedicated a specific topic on the theme, entitled "Equality x practicality" (2012, pp. 183-188). In these pages, José Roberto Vieira begins the development of the theme by presenting two distinct and, to a certain extent, antagonistic notions regarding the relations of practicability with fiscal justice. The first is from the German Hans-Wolfgang Arndt of the University of Mannheim, for whom practicality and tax justice are incompatible. The second, by José Casalta Nabais, a Portuguese widely read here, for whom there would be no incompatibility. In the face of the two conceptions, writes José Roberto Vieira: "*…there remains the affliction of the anxious and disturbing question: with which of the two jurists is the reason?*" Let us then look for a deeper understanding of what this "practicality" is all about[11]. It, according to the Professor of UFPR, refers to "*…**generalizations and standardizations** that, by considering the normal and regular conditions, and abandoning the particular circumstances, atypical or abnormal, conclude by the average of the cases or by the most frequent types…*". Its scope is called "***…average normality…***". And in order to achieve it, presumptions, fictions, clues and simplification rules are used[12]. Of course, the use of "standardizing" or "normalizing" techniques is

[11] José Roberto Vieira warns that the doctrine uses a series of synonyms: "*In addition to 'Praticabilidad', the doctrine uses other words – excluding those that do not exist in our lexicons – such as practicality, pragmatism, facticity, typification or standardization*" (2012, p. 185).

[12] "*…it should be noted that the generalizations and standardizations established by the legislator can not constitute absolute presumptions (juris et de jure), inadmissible and intolerable, but only presumptions (juris tantum),*

not the best of all worlds[13]. However, he believes that they are manageable, provided they are compatible with the Equality Principle, "*…in a more than reverent and respectful attitude, effectively docile and submissive*" (2012, p. 188).

4.9 PRINCIPLE OF SELECTIVITY

The aliquot, for which we unduly pay too little attention, is, you see, "***…instrument of realization of the Principle of Selectivity***". In the selectivity, provided for in Articles 153, §3, I, and 155, §2, III, of the Federal Constitution, there is the "*…concern of the constitutional legislator with the* ***ability to contribute***" (1993, p. 126, emphasis in original). The criterion chosen by the constitutional legislator is the essentiality. There is no doubt about that. One could, however, question the parameters for the assessment of essentiality[14].

Although the Federal Constitution does not expressly mention what it considers essential, let us remember, "*…the silence of the text is not equivalent to that of the constitutional context*" (1998, 554). José Roberto Vieira understands that there is no other way than to "***…seek in the current***

which are acceptable only because those which admit evidence in the contrary […]. This is because, in the face of practical situations that are far removed from the type assumed, in the face of real situations that are clear deviations from the standard, it is imperative to revoke generalization for the sake of specificity, it is necessary to remove abstraction for the sake of concreteness, it is imperative to abandon the presumption in favor of reality "(2012, pp. 186-188). It is easy to stress, as José Roberto Vieira does, that the presumptions are an "***unstable and marshy terrain…***" (2009, p. 487, emphasis in original). In the same text, he explains what are simple presumptions, so as to clarify their structure shortly afterwards. Simple assumptions, also called "simple type", "common", "*facti*" or "*hominis*", are those that are not fixed by the legislator. As for the structure, it teaches: *"…given credit to the* ***basic fact****, the* ***presumed fact*** *is confirmed, which, in general, connects with the first. MARÍN-BARNUEVO calls the basic fact of* ***base-affirmation****, explaining it as the fact whose credit allows the decision-making body to give credit to another fact; and designates the presumed fact of* ***affirmation-result or presumed affirmation****, explaining it as the fact on whose truthfulness conviction is attained as a consequence of the credit given to the base statement. Maintaining the meaning, MARIA RITA FERRAGUT opts for another terminology, using the expressions "****fact fact****" and "****fact indicted****". And LEONARDO SPERB DE PAOLA refers to the first as* ***evidence****, identifying it as the starting point of the mental process of presumption, and the second as a presumption proper, granting him the condition of the point of arrival of the presumptive process. […] Even with regard to nomenclature, there is* ***a complete identity between the basic facts and what is usually called 'evidence'***" (2009, p. 489, 491-493, emphasis in original). As for fictions, it is interesting to refer also to José Roberto Vieira's understanding, for whom legal fiction is "***…the normative provision of establishing the identity of two different legal institutes to extend the discipline applicable to the former also to the latter***" (2015, p. 699, emphasis in original). In the same text, it warns us that fictions violate the Principles of Typicity, Legality, Contributory Capacity and Equality (2015, pp. 712-714).

[13] *"Although this generalist and standardizing inclination, by stripping the details, specificities and minutia of each case, for the sake of typing, often ends up slowing down, sometimes even banning the realization of Equality and identification of the real and concrete Contribution Capacity; it must be considered that reverse radicalism takes the risk of making the law unenforceable. […] Behold, Practicability also operates in favor of Equality, since legal impracticability undoubtedly offends and damages the same Equality"* (2012, p. 187-188).

[14] *José Roberto Vieira states: "It is not disputed that the meaning of the constitutional norm is to promote a selection of the products that are the object of the operations that will be affected by the tax, using the* ***idea of essentiality as a selection criterion****, in order to graduate the intensity of the tax. What can be discussed are the* ***parameters of gauging essentiality****, about which the Maximum Statute has been silenced*" (1993, p. 126, emphasis in original).

constitutional text and context those values that are normatively embodied, which enable us to ascertain the essentiality that is considered there" (1993, p. 127, emphasis in original). The starting point for the investigation would lie in the interpretation of Article 7, IV, of the Federal Constitution. Let us remember that in dealing with the vital minimum, we turn to Article 7, IV, in order to identify the minimum necessary for the maintenance of a dignified life by the citizens. In it, the Constitution prescribes that basic vital needs are "*…housing, food, education, health, leisure, clothing, hygiene, transportation and social security…*". There is no denying that such "vital" and "basic" needs must be considered "essential."

Although there are two possible ways to "*…implement the choice of products…*", the aliquot is the means by which the principle is realized. And this is, as José Roberto Vieira teaches, "***…by establishing the aliquots in the inverse ratio of the need for the products***", that is, as the degree of essentiality of the product increases, its rates must necessarily decrease, and the greater the degree of superfluity or even the harmfulness of the product, the higher the established rates (1993, p. 127, 2006b, p. 194).

4.10 PRINCIPLE OF NON-CUMULATIVITY

The non-cumulative IPI is in article 153, paragraph 3, II, of the Federal Constitution, according to which the IPI "*will be non-cumulative, offsetting what is due in each operation with the amount charged in the previous*". This is the only constitutional prescriptive statement that expressly mentions non-cumulative IPI, and is the main one for the disclosure of its exact boundaries. In fact, from the economic point of view, IPI can be considered as value added tax. Legally, no. In value-added taxes, tax will only be levied if, in the subsequent operation, there is an increase in relation to the value of the previous operation. If there is no increase to the value of the subsequent transaction, the tax does not apply.

This is not the case with the IPI, which is subject to the indirect subtraction system (tax against tax). Even in cases where the value of the subsequent operation is lower than the previous operation, there will be an incidence of IPI. Although the incidence is given on the total value of the operation, including both the present and previous ones, and not only on the

value added by the latter, the credit system prevents cascade taxation. In other words, even if the basis of calculation is the total value of the operation, the buyer of inputs, intermediary products or packaging material will be credited with any tax relating to previous operations (2005b, p. 725).

Although Article 153, paragraph 3, II, of the Federal Constitution prescribes that the IPI "shall be non-cumulative, offsetting what is due in each operation with the *amount charged* in the previous ones" [emphasis added]; and also Article 49 of the National Tax Code prescribes that the IPI "*…is non-cumulative, provided the law so that the amount due is the result of the greater difference, in a given period, between the tax on products exiting the establishment and the payment for products entered into it*", "*…it is not the levying of tax by the supplier which legitimizes the purchaser's credit*" (2005b, p. 721). Here are the teachings of José Roberto Vieira:

> In summary, the acquirer's credit right is legitimized by the occurrence of the supplier's operation. Irrelevant that in this previous operation the IPI was "launched", "charged" or "paid". More: irrelevant until in the previous operation the IPI was "affected". It is enough that it has existed, and that it can be quantified, in some way, the IPI that would be relative, regardless of incidence, launch, collection or payment. (2005b, p. 724).

But what if one of the chain's operations is exempt? In fact, the fact that one of the operations of the chain is exempt does not give rise to any consequences for the right to credit. It should be noted that if the word charged, present in the constitutional statement, were interpreted literally, in cases of exemption, there would be no right to credit and, therefore, both exemption and non-cumulativity would fall to the ground.

Let us return to the lessons of José Roberto Vieira, according to which, if the exemption inhibits the right to credit, in non-cumulative taxes, exemption will not be treated, but a mere "deferral" (2005b, p. 729).

Consider the following example. In a production chain in which all the products that integrate it are taxed at the rate of 10%, and one of the chain links is an exemption. Imagine that "A" sells inputs to "B" for R$ 100.00 (one hundred reais). On this amount you will have to pay R$ 10.00 (ten reais) of tax. And "B" will be entitled to a credit of R$ 10.00 (ten reais). In the next operation, which is exempt, "B" sells product to "C" for R$ 200.00 (two hundred reais). In this case "B" will not collect anything by way of tax, in so far as the operation is exempt. This does not mean, however, that "C" cannot be credited with R$ 20.00 (twenty reais). Finally, "C" sells the product for R$ 300.00 (three hundred reais). There will be R$ 30.00 (thirty reais) as a tax, which will be paid with the credit of R$ 20.00 (twenty reais) plus R$ 10.00 (ten reais) paid in cash.

In this example, non-cumulativity was respected, as was exemption. If there were no "C" credits of R$ 20.00 (twenty reais) related to the purchase of inputs of "B", the amount of tax paid by it would not be related only to the operation performed by it, but also relative exempt operation. The exemption would become deferral and non-cumulativity would give rise to cumulativeness. In these cases, the IPI would become a tax on the accumulated value – the previous value plus the added value –, as José Roberto Vieira (2005b, p. 726) teaches.

And there are other arguments to definitively remove the understanding that acquisitions of exempted inputs – and of the beneficiaries in general – do not generate the right to credit. Let us remember that, with regard to IPI, the Non-cumulative discipline is completely different from that of the ICMS. For IPI, there is no imposition of existing obstacles to ICMS. This difference between the Non-Cumulative Discipline in ICMS and IPI was also perceived by José Roberto Vieira. It also recalls that the right to credit arising from non-cumulative IPI enjoys constitutional stature and is therefore safe from the attacks of the infraconstitutional legislator (2005b, pp. 730-732).

Once the understanding that the acquisition of exempted inputs generates the right to credit is confirmed, it is necessary to question the rate applicable to the calculation of the credit arising from this operation. In this case, correct is the understanding of José Roberto Vieira, that the aliquot to be used should be exactly the same as the final product, in which the inputs, raw materials and exempt intermediate products are used (2005b, p. 735 et seq.).

5 ABOUT THE FUNCTIONS OF COMPLEMENTARY LAW

Regarding the functions of the complementary law, José Roberto Vieira says, there is an "*…endless doctrinal quarrel […] that has dragged on for decades…*" (2013b, 79). The theme, in fact, is interesting. In a 2008 text, José Roberto Vieira examines the issue, using as background the Spontaneous Denunciation and the relations of the National Tax Code with the provisions of article 44 of Law no. 9.430, of December 27, 1996. At the beginning of the item for the specific examination of the theme, he warns that he will undertake a typical systematic interpretation, about which we have already dealt. He says: "*…**we will take into consideration** the whole normative environment, in this case, the whole constitutional environment, but **especially** those fundamental norms of this system, **the constitutional principles***." The principles that, according to him, would particularly interest the theme are i) the

Federation Principle; ii) the Principle of Municipal Autonomy; and (iii) the Principle of the Isonomy of Constitutional Persons (2008b, pp. 399-400).

His main concern is the notion of "*general rules on tax legislation*". This is because it is

> …a highly imprecise and nebulous concept, instituting insecurity and facilitating spurious incursions into the tax competencies of the spheres of government; already rigidly drawn by the legislature of the Constitution, in a perennial and intolerable threat of invasion of the same powers and of disrespect for such expensive constitutional principles as those mentioned above (2008b, 401).

He then signs his "***…contextual notion of the general tax norms, which are prestige of the principles at stake***", such as those rules "*…of declaratory character, to which it is necessary to make explicit what is already implicit in the constitutional text, without innovating, only and thus reinforcing the constitutional profile of taxes in order to prevent the emergence of conflicts of jurisdiction*" (2008b, p. 401). He then mentions the two main currents about the functions of the complementary law. The "trichotomic" chain, with its "*…insistent attachment to the letter of the Text of the Mother Law, has three functions […] to dispose of conflicts, regulate limitations and establish general norms.*" The "dichotomous" chant – to which José Roberto Vieira renames, recalling Maria do Rosário Esteves's "unifuncional" alert – would point to two functions of the complementary law: "*to dispose of conflicts and regulate limitations, both members of so-called general rules*". The definitive fact, according to José Roberto Vieira, that prevents him from considering the behavior of the trichotomic current is the "*…**lack of explicitness of the way in which art. 146, III, is compatible with the high constitutional principles in question and in danger***" (2008b, pp. 402-403, emphasis in original).

After analyzing the reflections of Heleno Taveira Tôrres, he examines the position of Humberto Avila and the three arguments he has raised to adhere to the trichotomic current. The first argument concerns the fact that the rules that determine competence for the establishment of general norms must necessarily be interpreted in line with the Federative Principle, whose meaning would arise at a later time than the analysis of the other norms that maintain it semantic connection. Secondly, it argues that it is not impossible to assign meaning, albeit minimal, to constitutional provisions. And third and last place, because the Federal Supreme Court has joined the trichotomous current.

José Roberto Vieira faces each of the arguments. In response to the first of them, he writes:

> […] it is clear that the basic meaning is not sufficient in principle, and the meaning of context is also demanded, but equally evident that this demand can not be extended to the point of claiming the excess of the interpretation of the principle in relation to art . 146, III, when **it is necessary to understand the latter device in the light of that principle**; in addition to the fact that both norms find shelter in the constitutional text, even sharing the same logical structure (syntactic homogeneity) does not remove its **colossal semantic heterogeneity** […] whose greater weight intensifies its normative meaning, reinforces its principiological and determines its irrecusable primacy in the interpretive activity, a fact that just and irrevocably occurs with the principles involved in this case. (2008b, pp. 405-406, emphasis in original).

The second argument is opposed by José Roberto Vieira in the following sense:

> **The unifunctional thesis, it is clear, from the outset, never failed to assign a minimum meaning to the rules of art. 146, III**, which is embodied in the recognition of the applicability, here, of the two purposes enunciated in the preceding paragraphs: disposing of conflicts and regulating limitations. It remains to be ascertained whether that interpretation respects the limit of the legislative text. Indeed, **however much literalness must give way to systematicity, in interpretative terms, one must recognize this condition as a hermeneutic limit**. (2008b, p. 406, emphasis in original).

Jose Roberto Vieira's answer to the third argument reminds us of the function of the judge:

> Unlike the States whose organization belongs to the Common Law family of jurisprudence, ours belongs to the Roman-Germanic family, where the pre-eminence is of the law…. Again, abstracting the minutiae, again, because its examination would be inappropriate and inadequate here, let us stay with the essential: **the hermeneutic operation of the judge**, at first identified with that of the scientist, since he returned to the concrete case, because committed to is normative production, since it is committed to decision-making, since it is pressed by the anguish of judging, is, after all, at least partially different and distinct? More: **does not it ask for a peculiar coloring, perhaps a limiting one? Does not it require some qualification, perhaps something restrictive?** Regardless of this answer, which is neither the place nor the moment to seek, there is no doubt that the claim that the jurisprudential inclination is a sufficient basis for following the trichotomic theory, considering it as a decisive argument of scientific choice, at least, a certain radicalism. […] **However, lawyers in general […] are obliged, rather than law, to fulfill this duty of scientific independence**. It is not because the Supreme Court has just decided that only a supplementary law can dispose of general taxation rules concerning prescription and decay by embracing the trichotomy – in a conclusion which we consider to be extremely unfortunate and orphaned by the best scientific foundations –, that we will take flight from the arena of thought, allowing "…anesthesia of the critical sense" and succumbing to the vice that Master Souto identified as "satelitization of intelligence." It is not because the summary approved after this unfortunate decision binds the "…other organs of the Judiciary…" and "…direct and indirect public administration…" (CF, art 103-A), which we will give ourselves as scientifically linked, thus abdicating our intellectual autonomy and beginning to gravitate around the conceptions of jurisprudence! Such an attitude would correspond to a genuine demand for the dismissal of the Science of Law, since the docile and uncritical behavior that leads to immobility, stagnation and inertia definitely does not harmonize with the minimum of scientificity. (2008b, pp. 409-411, emphasis in original).

In the same text, José Roberto Vieira acknowledges that Humberto Ávila's observation prompted him to think and rethink the position regarding the final part of Article 146, III, of the Federal Constitution. For José Roberto Vieira, it does not appear that the general rules on

tax legislation, enacted through a complementary law, are limited to strictly disposing of conflicts of jurisdiction and regulating constitutional limitations on tax jurisdiction. It is also incumbent upon them to dispose of what is provided for in subparagraphs "c" and "d" and the sole paragraph of item III of article 146 of the Federal Constitution, owing to the particularities of the subjects they contain. And, in a text from 2016, which revisits the topic under "*…brand new perspective…*", it recalls Article 146-A, added by the text of Constitutional Amendment no. 42, dated December 19, 2003, to conclude: "***Therefore, in the scope of the function of establishing general tax rules****, of article 146, in addition to the purposes of disposing of conflicts (item I) and regulating limitations (item II),* ***a third purpose to cover these specific objectives*** *(Article 146, subsection III, points c and d, and sole paragraph, and Article 146-A)*" (2016c, p. 706, emphasis in original).

6 CONCLUSION

From the analysis of the work of José Roberto Vieira, we perceive that he practically examines all the subjects of the constitutional tax law, such as the interpretation, the notion of system, the constitutional creation of the tax and the tax jurisdiction, as well as its characteristics, the constitutional principles of taxation and the functions of the complementary law.

He understands that the function of the Science of Law is to explain, and not merely to describe, the Positive Law. The interpretation of law, in his view, must be systematic, not just literal. And to carry out this activity, it is possible to use the tools of semiotics, analyzing the legal discourse in its syntactic, semantic and pragmatic planes.

In dealing with tax jurisdiction, he brings relevant contributions to the national doctrine, in developing the reasoning that there is no real tax power and that the Constitution creates the tribute. And he identifies as characteristics of the tax jurisdiction *irrevocability, non-renunciability, incaducability, inalterability and faculties*.

As for the principles, which for him are unassailable assumptions of the interpretative activity, many were his contributions. He carried out an in-depth examination of the principles of the Republic, the Federation, the Autonomy of Municipalities and the Tripartite Functions. As for the general constitutional principles, his lessons on the principle of legality are profound, examining its possible mitigations, as well as the constitutional regime of the provisional measure, as well as the advances and setbacks brought by Constitutional Amendment no. 32, dated September 11, 2001. Relevant, too, is his examination of the manifestation of equality in tax matters.

Indeed, his examination of the principle of contributory capacity is complete, especially in drawing the distinction between absolute or objective contributory capacity, subjective contributory capacity, and relative contributory capacity. The same can be said about his reflections on the relation between contributory capacity and extrafiscality and practicality. And, also, of the manifestations of the taxable capacity in ICMS and IPI, that is, the principle of selectivity and non-cumulativity.

Finally, in joining the unfunctional chain, it is understood that it is the function of the complementary law to establish general rules on tax legislation, which are not limited to strictly disposing of conflicts of jurisdiction and regulating constitutional limitations on tax jurisdiction. It is also incumbent upon them to dispose of what is provided for in items "c" and "d", and the sole paragraph of item III of article 146, and article 146-A of the Federal Constitution.

However, his conceptions about the theory of the tax norm, as well as his reflections on the IPI, the Corporate Income Tax, the Personal Income Tax and the Tax Criminal Law were left out of this article.

The reliable works of José Roberto Vieira – the great name of the Tax Law of Paraná, and one of the largest in Brazil –, which influenced more than one generation of Brazilian taxpayers, deserve a prominent place in national doctrine. His lessons far exceed the territorial boundaries of the state of Paraná, reaching not only the privileged academics of the Federal University of Paraná who have him as a teacher in the classroom.

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