ANÁLISE DOS IMPACTOS DO ICMS SOBRE AS CADEIAS PRODUTIVAS DOS PEQUENOS ESTADOS BRASILEIROS – CASO DE GOIÁS

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ANALYSIS OF THE IMPACTS OF ICMS ON THE PRODUCTIVE CHAINS OF SMALL BRAZILIAN STATES - THE CASE OF GOIÁS AND ITS CLUSTERS

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Resumo

O objetivo deste artigo é fazer uma análise sobre as cadeias produtivas dos estados brasileiros a respeito da tributação do Imposto sobre Circulação de Mercadorias e Serviços (ICMS) incidente sobre o Comércio Eletrônico (e-commerce) pelo consumidor final, que não é o contribuinte, por meio de operação interestadual. Portanto, trata-se de um estudo comparativo das regras e incidência desse tributo em nível nacional e internacional bem como dos conflitos gerados pelos entes federativos, conformando um tipo de "guerra fiscal", em decorrência da aplicação do "princípio de origem", que provavelmente não atendem mais aos propósitos da Federação. A análise aborda a importância dessa nova forma de comércio, a partir da descrição da evolução do e-commerce, bem como a delimitação de avanços e perspectivas para esse tipo de comércio. É dado um enfoque especial ao impacto econômico devido ao atual modelo de arrecadação de impostos sobre os Estados consumidores, notadamente o estado de Goiás, mostrando sua influência no aprofundamento das desigualdades regionais. O que se constatou foi que o processo de globalização, incluindo a inovação tecnológica e a consequente modernização da economia, impôs novos desafios e uma necessidade urgente de adequação constitucional e legal do Sistema Tributário Nacional. Isso fica evidente na decisão do STF a respeito do fundamento utilizado na declaração de inconstitucionalidade do Protocolo do ICMS 21/2011 que trata da matéria, porém, alguns deles merecem uma reflexão profunda. A manutenção dessa situação de fato favorece o desequilíbrio fiscal dos estados e compromete o pacto federativo por uma possível violação de princípios constitucionais. A nova Emenda Constitucional (EC 87/2015) pode ter sido o primeiro passo em uma transição necessária da regra de origem para a regra de destino, preconizada por esta tese.

Palavras-chaves: Reforma tributária; Cadeias produtivas; Competitividade; Gestão estratégica dos clusters no Brasil.

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Resumen

Este artículo propone analizar las cadenas productivas de los estados brasileños en cuanto a la tributación del Impuesto a la Circulación de Bienes y Servicios (ICMS) que grava el Comercio Electrónico (e-commerce) por el consumidor final, que no es el contribuyente, a través de la operación interestatal. . Por tanto, se trata de un estudio comparativo de la normativa e incidencia de este impuesto a nivel nacional e internacional, así como de los conflictos generados por las entidades federativas, conformando una especie de "guerra fiscal", como consecuencia de la aplicación de la " principio de origen ", que probablemente ya no sirva a los propósitos de la Federación. El análisis aborda la importancia de esta nueva forma de comercio, desde la descripción de la evolución del comercio electrónico, así como la delimitación de avances y perspectivas para este tipo de comercio. Se hace especial hincapié en el impacto económico debido al actual modelo de recaudación de impuestos en los estados consumidores, en particular el estado de Goiás, mostrando su influencia en la profundización de las desigualdades regionales. Lo que se encontró fue que el proceso de globalización, incluyendo la innovación tecnológica y la consecuente modernización de la economía, impuso nuevos desafíos y una urgente necesidad de ajuste constitucional y legal del Sistema Tributario Nacional. Así se evidencia en la decisión del STF sobre las causales utilizadas en la declaración de inconstitucionalidad del Protocolo del ICMS 21/2011 que trata el asunto, sin embargo, algunas de ellas merecen una profunda reflexión. El mantenimiento de esta situación favorece de hecho el desequilibrio fiscal de los estados y compromete el pacto federativo por una posible violación de principios constitucionales. La nueva Enmienda Constitucional (CE 87/2015) puede haber sido el primer paso en una transición necesaria de la regla de origen a la regla de destino, defendida por esta tesis.

Palabras-clave: reforma tributaria; Cadenas productivas; Competitividad; Gestión estratégica de clusters en Brasil.

Abstract

This article proposes to analyze the production chains of Brazilian states regarding the taxation of the Tax on Circulation of Goods and Services (ICMS) levied on Electronic Commerce (e-commerce) by the final consumer, who is not the taxpayer, through of interstate operation. Therefore, this is a comparative study of the rules and incidence of this tax at the national and international level, as well as the conflicts generated by federative entities, forming a type of "fiscal war", as a result of the application of the "origin principle", which probably no longer serve Federation purposes. The analysis addresses the importance of this new form of commerce, from the description of the evolution of e-commerce, as well as the delimitation of advances and perspectives for this type of commerce. Special focus is given to the economic impact due to the current tax collection model on consumer states, notably the state of Goiás, showing its influence on the deepening of regional inequalities. What was found was that the globalization process, including technological innovation and the consequent modernization of the economy, imposed new challenges and an urgent need for constitutional and legal adjustment of the National Tax System. This is evident in the STF decision regarding the grounds used in the declaration of unconstitutionality of the Protocol of ICMS 21/2011 that deals with the matter, however, some of them deserve a deep reflection. The maintenance of this situation in fact favors the fiscal imbalance of the states and compromises the federative pact for a possible violation of constitutional principles. The new

Constitutional Amendment (EC 87/2015) may have been the first step in a necessary transition from the rule of origin to the rule of destination, advocated by this thesis.

Keywords: Tax reform; Productive chains; Competitiveness; Strategic management of clusters in Brazil

1. INTRODUCTION, AN OVERVIEW OF TAXES IN BRAZIL

In general, the National Tax System can be summarized in five types of collection: taxes, fees, contributions for improvement, special contributions and compulsory loans[i]. However, it is noted that each tax type has its consequences and internal variants. This extensive set of tax species and the long series of laws about the Brazilian Tax System[ii] are legal orders that, compared to other world economies, show its complexity and uniqueness, especially with regards to taxation of goods and services through e-commerce[iii]. Note that the reform of the tax system[iv], at the center of the current discussions on the subject, should organize the Brazilian tax system, taking into account all kinds of trade, but above all, customized the fiscal reality to the singularities of e-commerce - as this it is a form of trade in services and products with consistently growing demand.

Considering all world economies, Brazil is a country that has one of the most onerous tax systems for the productive sector and the end consumer. According to the World Bank report Doing Business 2015, with regards to items paying taxes, the country occupies position 120 in a total of 189 economies[v]. Data from the Brazilian Institute of Planning and Taxation (IBPT) in 2013 put as forecast for Brazil a tax rate of 36.42% of its Gross Domestic Product (GDP), leaving the country in last position among the economic group called BRICS. According to the IBPT, the economies participating in the said block have the following tax burden: "Russia, 23%; India, 13%; China, 20%; and South Africa, 18%. The average of this percentage among the BRICS is 22%, but by excluding Brazil, fell to 18.5%[vi]." This means that Brazil has, in average, almost double of the tax burden of the other member countries of the block.

In the Latin American context, Brazil also has the highest tax burden among the richest countries in average. According to the report "Tax Statistics in Latin America and the Caribbean", prepared by the Organization for Economic Co-operation and Development (OECD), the Inter-American Development Bank (IDB), United Nations' Economic Commission for Latin America (ECLA) and Inter-American Center of tax Administrations (CIAT), Brazil was the only country in the region whose tax burden reached 35.7% of GDP[vii]. The forecast for this biennium 2014/2015 comprises an expected reduction in this collection, since the economy is in a deceleration process, however, tax load for producers and consumers still needing an intensive review.

In general, this heavy tax burden is up to citizens and entrepreneurs. There are 63 taxes cumulatively levied on goods and services - costs that often are embedded in the final price, ultimately burdening the consumer. As for the productive sector, this tax burden has a direct influence on investments (for example, increasing the physical structures of companies; raising production and generation of new jobs in the labor market), which, in turn, influence the ability to generate wealth and economic growth of

the Brazilian State. The high collection rates reach levels similar to those of developed countries in Europe, but that will not be discussed here because it would be out of the object of this study.

The critics to this tax burden, which increased from 21% to 36% of GDP between 1987 and 2012, and how it is put to the division between the states are constant, however, little is discussed about the form of collection of these amounts. It does not analyze where to withdraw the funds needed to finance the state, who receives these resources from the government, and the withdrawal and form of contribution are actually made in order to reduce inequalities. “Debate on tax burden is debate on fiscal policy because it includes what to do with expenses[viii]”, ponders Bernard Appy, former executive secretary of the Ministry of Finance, during a debate on tax reform sponsored by the Folha de São Paulo in August 2013. Fiscal Federalism presupposes a good distribution of public resources in a political and not geographical space, because this overlaps the political and administrative developments.

The federations, in general, face major challenges caused by changes in the economy, in the demographics and in the politics. The Globalization interferes with tax systems, demographics gives rise to new demands for actions and services and the vulnerability of the political situation justifies the conflicts of interest, causing the decisions making to be more difficult[ix].

As is known, the ICMS is the main Brazilian tax, accounting for approximately 25% of the national tax burden. It's about its application in e-commerce, when the end consumer is not a taxpayer, the economic impact that causes to state entities consumers, their reflections on the federative pact and how changing billing can open possibilities to minimize regional inequalities, striking feature of Brazil, which deals with the study. It is not intended, however, to do an exaltation of the tax as a regulatory instrument of the economy, because it is not at first able to extra fiscal action, either by their nature or by reason of its active subject.

The proposed theme is vast and requires some discussions ranging from fiscal federalism, its establishment of rules to the very current EC 87/2015, undergoing major analysis of the ICMS electronic issues that include various aspects, and demonstrating the fragility and the need to change strategies for this tax, which involves figures of millions. A deepening fiscal crisis is inevitable if the country, moved by the e-commerce dynamism, does not adopt a smart way to promote regional development.

Not only in Brazil but in other foreign tax systems, phrases like "consumption tax" are used less and less to approach the ICMS and increasingly "value-added tax", "tax on circulation operation" or "tax on industrial production". Following the doctrine, this is not only a legal formality, before that, what is intended is to link the tax to the entrepreneur, making it barely noticeable in the consumers' eyes.

A major change in the economic framework is emerging from the tremendous speed that information technology develops and, consequently, the rapid growth of e-commerce and Internet users. With respect to e-commerce, it requires a new and appropriate taxation structure to maintain its growth. The aspects of the internet with regards to taxation are neither thought in the country as a whole nor in the sense of transcending the Brazilian borders. The fact is that the human being is always overcoming himself and creating economic environments hitherto unthinkable, and eventually showing an antagonistic national tax system the development as occurs at the moment.

To measure the presence of the population on the internet a comparison is normally elaborated between the numbers of people networked with the country's total population. As shown in the following table concerning the year 2012, it is interesting to see the top 20 countries on all continents in the ranking by the number of Internet users, in which Brazil takes the 5th position. As a curiosity, considering the four

key categories searched by Brazilians internet entertainment ranks first, online retailers (that matter to this study) occupies the second position, followed by news and then travel.

TOP 20 COUNTRIES WITH HIGHEST NUMBER OF INTERNET USERS - JUNE 30, 2012						
#	Country or Region	Population, 2018 Est	Internet Users Year 2000	Internet Users Latest Data	Penetration (% Population)	Users % World
1	China	1,343,239,923	22,500,000	538,000,000	40.1 %	22.4 %
2	United States	313,847,465	95,354,000	245,203,319	78.1 %	10.2 %
3	India	1,205,073,612	5,000,000	137,000,000	11.4 %	5.7 %
4	Japan	127,368,088	47,080,000	101,228,736	79.5 %	4.2 %
5	Brazil	212,946,886	5,000,000	110,494,756	51.6 %	4.6 %
6	Russia	142,517,670	3,100,000	67,982,547	47.7 %	2.8 %
7	Germany	81,305,856	24,000,000	67,483,860	83.0 %	2.8 %
8	Indonesia	248,645,008	2,000,000	55,000,000	22.1 %	2.3 %
9	United Kingdom	63,047,162	15,400,000	52,731,209	83.6 %	2.2 %
10	France	65,630,692	8,500,000	52,228,905	79.6 %	2.2 %
11	Nigeria	170,123,740	200,000	48,366,179	28.4 %	2.0 %
12	Mexico	114,975,406	2,712,400	42,000,000	36.5 %	1.7 %
13	Iran	78,868,711	250,000	42,000,000	53.3 %	1.7 %
14	Korea	48,860,500	19,040,000	40,329,660	82.5 %	1.7 %
15	Turkey	79,749,461	2,000,000	36,455,000	45.7 %	1.5 %
16	Italy	61,261,254	13,200,000	35,800,000	58.4 %	1.5 %
17	Philippines	103,775,002	2,000,000	33,600,000	32.4 %	1.4 %
18	Spain	47,042,984	5,387,800	31,606,233	67.2 %	1.3 %
19	Vietnam	91,519,289	200,000	31,034,900	33.9 %	1.3 %
20	Egypt	83,688,164	450,000	29,809,724	35.6 %	1.2 %
TOP 20 Countries		4,664,486,873	273,374,200	1,776,355,028	39.1 %	73.8 %

Rest of the World	**2,353,360,049**	**87,611,292**	**629,163,348**	**26.7 %**	**26.2 %**
Total World Users	**7,017,846,922**	**360,985,492**	**2,405,518,376**	**34.3 %**	**100.0 %**

NOTES: (1) Top 20 Internet User Statistics were updated for June 30, 2018.

estado.e-commerce.org.br Fonte: http://estado.internetworldstats.com e institutos diversos

Various statistics are cited to illustrate the rapid growth of this type of trade, although the disparity of some information is disclosed. The advances and progress that technology has provided to the modern world in the present times are great, giving a real leverage in the globalization of markets. The act of buying on the Internet is no longer a novelty and became a habit, making way for an era without borders. The difference in the case of e-commerce of goods delivered by non-electronic means and unconventional trade is the way in which the legal business is concluded.

Operations through the internet, telemarketing, demands of markets and communication, showroom, and even trade representative and catalogs, brought many impacts. The tax rules currently in effect showed a mismatch with the dynamics of transactions like the current economic scenario, demands of markets and communication in business operations. In recent decades, the annual sales of online retail sales took an enormous leap, representing a growth of over 2,300%. These data are excluded from auto sales, airline tickets and virtual auctions. This trade grows 30% per year and The World Retail Congress provides that such sales will correspond to the global retail ¼ in 2015.

The federative principle, among the basic tax principles prevailing in e-commerce, is highlighted. That is because the taxation between this type of trade and the conventional should be neutral and fair. Moreover, business decisions must be made for economic reasons and not taking into account the taxation. Taxpayers in similar situations, making similar transactions should be subject to the same levels of taxation. This is actually the principle of equality, which is logical corollary of the principle of ability to pay.

Due to the intensification of these purchases and their potential collection and the lack of specific regulations, the tax authorities now have the challenge to solve some pending subject of occurrences such as preventing loss of revenue, evaluate the current regulation taking into account the incidence of rule, the place of origin definition, establishment of concept etc. These additional difficulties, show that the Brazilian state's ability to tax efficiently and fairly transactions the internet is not being satisfied with. Companies that occupy a single office room can virtually be performing commercial operations anywhere in the world, in places where it is possible to minimize or avoid taxation, which calls the concept of residence or the location of the company headquarters into question, and where certain company exists and can be found in the real world.

As a result of the strong regional disparities in Brazil, the effects of globalization and e-commerce are felt unequally by the states. The ICMS collection in online sales is restricted to entities which are situated the centers of distribution of goods as stated in Article 11, I of LC 87/96 which provides for the

ICMS (Kandir Act) and Article 12, of the same law. Because of the provisions of Article 155, VII, b, of the Brazilian Federal Constitution of 1988, the distribution rules for ICMS, derived from these negotiations, have been the subject of great controversy with regards to transactions where the recipient located in another state is not a taxpayer, being a mere consumer. In such cases, taxation occurs only in the source state, which uses its internal rate, creating a discrepancy between the amounts absorbed by producers' states that collect everything, getting stronger, and consumers' states that collect nothing are getting more fragile.

Brazil has intended to adopt the principle of destination to give to the value-added tax the nature of excise tax in 1988, but the political situation did not allow it[x]. Currently, with the development of the market, there is a technical insight on the subject. On this matter, it is known that is much more favorable for the federation as a whole to adopt the destination, but not the political, especially because of the losses in the short-term, which may result in the more economically and politically strong states. In the long-term a mechanism for better quality is evidenced and it is ideal for all.

The most developed states are home to the largest distribution centers, with the largest online store sales, and because of this they get advantages by the constitutional law. There are states unsatisfied with this scenario, despite the clarity as regards to the sharing of ICMS in e-commerce. Some of these attempted to change the stagnancy of the Constitutional Amendments Proposals (PECs), which was seeking to change the rules of the Congress. In this line, they began to enact laws and signed the ICMS Protocol 21° under the National Finance Policy Council (CONFAZ) in order to temporarily minimize losses. These normative acts were challenged by Declaratory Judgment on Unconstitutionality (ADIs) in the Supreme Court (STF), which were duly provided under various arguments. However, a new understanding of the states in CONFAZ allowed to change the PEC 197/2012 which evolved into the EC 87/2015 should start to produce its effects from the year 2016.

One must not forget that in order to change the system, in a deep and safe way, it is necessary to calculate the impact of the principle of federal autonomy (of political and institutional nature) as opposed to the principle of fiscal neutrality (harmonization and tax simplification). Even the Trade-off dilemma - lose-and-win centralization and decentralization, own tax competence versus participation in centralized taxes should also be addressed[xi], but because of its complexity and variety of alternatives, they will not be fully dissected in this work. This is not an aspect that requires study only, but discussion and political and institutional maturity to be assimilated. The proposal is to discuss to what extent it is possible to preserve the federative autonomy to one state or reach it to another in the face of the necessity of tax harmonization.

Finally, the e-commerce taxation has challenged the tax administrations, legislators, the judiciary, and all those that look out to find solutions for a fairer taxation. A greater interaction is urgent a between the representative and participatory dimensions of democracy, for the perfecting of the ICMS legislation to promote a more competitive country, with proper adjustment of tax injustice now underway.

2. CURRENT RULES OF ICMS IN THE NON-PRESENCE TRADE

Brazil Tax System has in the Tax on Circulation of Goods and Services for Interstate and Intercity Transportation and Communication (ICMS) its most challenging and important component, since it corresponds to 21.20% of the total R$ 1 trillion collected in taxes until August 2011, corresponding to R$202.1 billion in that period as the São Paulo Commercial Association (ACSP).

This work demonstrates that the collection's system of ICMS in e-commerce needs to be changed urgently because of the economic impact that it produces, causing economic and social consequences in the Brazilian regions. The analysis, among other things, takes into account the model of grounded allocation at the origin, under the assumption of the greatest possible degree of federal autonomy (political value) and the highest possible degree of economic neutrality (technical attribute).

People, especially those who invest, produce, generate income and employment, get intrigued with the inertia that prevents structural changes focusing on national interest. The current working system does not produce national solidarity, on the contrary, states are living in eternal battle between themselves, and they do not take risks or design projects aiming at more rational models that assimilate the centralized cooperative, which generates more revenue and less perverse effects. The financing of expenditures is an important debate but cannot be put forward because it inhibits and prevents the main issue.

ICMS is the largest collection tribute in the country and the most awarded by constitutional rules. It has many phases, as it focuses on all stages of the movement of a particular good or service, up to the end consumer; is not cumulative, i.e. every transaction involving the movement of the goods or service is compensable; selective, since it is applied in the essentiality of the goods and service; real, focusing on account of the thing, without taking into account personal aspects; it has tax purposes, although over taxation is also present, especially when implementing their characteristic selectivity; and is an indirect tax, whose launch is for approval, although there are ex-officio hypotheses.

With regards to the distribution of the tax's collection, it is noteworthy that, when arising from the transactions between member states, it is shared with the federal entity, of origin and of destination. In these cases, the interstate rate is adopted, considering that the recipient is a taxpayer and gets the goods to resell. In the case of a taxpayer who acquires as the end consumer, it applies to interstate rate in origin, but, at the destination, the internal rate applies, collecting only the difference in values between the two. Currently, the country has a hybrid model, which, depending on the operation, there is the principle of pure origin, restricted source and destination.

The controversies and lack of harmonic mechanisms for the distribution of the ICMS has generated intense debate, advancing and they bring the idea of inherent insecurity, injustice and uncertainty. Until 1988, there was a certain harmonization of this tax, but with the demand for a consolidation of autonomy for the states in this area, there were profound and crucial changes that impacted differently in them, as major changes occur in the market.

Valadão[xii] warns that, in Articles 157-159 of the Brazilian Federal Constitution of 1988, the principle of allocation of tax revenues that establishes the distribution of revenue from certain taxes between federal entities and, through it, he sought to ensure equivalency economic financial among them being central to the federal balance.

E-commerce has not only changed the form of purchase/sale, but also the structure of the competitive environment between business and social behavior, changing consumer habits of society. The

preponderantly consuming regions are ones using the system the most, because not only the shortage of production in their region, as well as to the facilities offered by large retail conglomerates, located mostly in the south and southeast of the country.

According to Kubota e Milani[xiii], a research published by the Institute of Applied Economic Research (IPEA), most of the turnover of companies in the trade sector in Brazil is obtained by units located in the state of origin of these. For them, the geographic location of companies in the country is an important factor for identification of trade markets in Brazil.

The internet is a global domain environment and because of that sales in its core can be effected from a point to another diverse. This commercial globalization has brought with it one of the biggest difficulties thereby made with e-commerce, data collection by the tax authorities, which increases the number of cases of tax evasion, according to the Ministry of Finance (2001).

3. GENERIC AND SPECIFIC DISCIPLINING OF ICMS

The taxation on commercial transactions (consumption tax) was established by Federal Law No. 4.625 of December 31, 1922, under the name Tax on Merchant Sales (IVM), which focused on traders' sales operations of that time. According to the Brazilian Constitution of 1934, the tax has expanded its scope to focus on assignments and competence. Previously they belonged to the Union. Since then, they were assigned to the member states that were responsible for their implementation. The purpose of this Union delegation was to reduce regional inequalities, allowing states to provide for its incidence and storage, for a consequential benefit of the local population.

Subsequently, the name was changed to "Sales Tax and Consignment" (IVC), which came into force in 1936 and had a negative effect on the Brazilian economy.

According to Ribeiro[xiv], the IVC, in its origin, proved to be a harmful tax to the economy. Especially to the sectors with extensive supply chain, since its functioning resulted in the incidence of the tax at each stage, production, distribution and marketing, creating an effect of "incidence in cascade", which turned the final product more expensive. This scenario led industries to carry out all production stages in their own establishment, focusing businesses in a particular region. The result of this process was the disincentive to the opening of new businesses and the impediment to the creation of jobs.

The non-cumulative taxation principle of the IVC, preventing the "cascading effect" was established with the enactment of Law No. 4,502, of November 30, 1964. During this period, law 5712 of 1966, the National Tax Code (CTN) was created and approved by the 1967 Constitution and, later, by 1988, as a supplementary law. In 1967, Brazil with the reform of its Constitution, added to the Charter the principle of non-cumulative taxes on consumption by the amendment No. 18 is thus the IVC by ICM (Tax on Circulation of Goods) which, based in part on a paper published in Europe in 1963, Neumark report, lasted until 1988.

The tax, with the advent of the 1988 Federal Constitution, in Article 155, Inc. it started to be called Tax on Transactions on the Circulation of Goods and Services (ICMS). ICMS now covers not only the commercial operations, but also the interstate and intercity transportation services and communication services, in order to promote the decentralization of central power.

ICMS is disciplined in general terms in Article 155, item II and VII of the FC/88, in which only are its principles and main duties, and their regulation be implemented through Complementary Law.

> Art. 155. The States and the Federal District have the power to impose taxes on:
>
> (...)
>
> II - transactions relating the circulation of goods and the performance of services of interstate and inter-county transportation and communications, even when the transactions and performance begin abroad;
>
> (...)
>
> VII - for transactions and performances with respect to goods and services destined for end consumers located in another State, the following shall be adopted:
>
> a) the interstate rate, when the recipient is the taxpayer;
>
> b) the intrastate rate, when the recipient is not the taxpayer.

From the text item IX is extracted in art. 155, , the ICMS focuses also on the entry of goods imported from abroad and the entry into the territory of the recipient state, leaving the tax to the state where the acquirer is located.

As constitutional discipline, the incidence (triggering event) of the exaction occurs in movement of goods operations, resulting in the transfer of ownership, as well as communication services, interstate transportation and intercity transportation.

The Federal Constitution of 1988 gave to the Federal Senate, by resolution, and upon the initiative of 1/3 of its members or the President, the authority to establish the rates for operations and services, interstate and export. By establishing this "different tax rates" the constituent would have done in order to favor those less developed states. Corroborating this measure, the Senate, supported in Article 155, paragraph 2, item IV, the FC/88, issued Resolution No. 22 of 1989 establishing that differentiation between the rates of the states favoring the least developed. *In verbis:*

> Art. 1º – The rate of Tax on Operations Related to Goods and on Transport Services Rendered Interstate and Intercity and communication, operations and interstate services, will be twelve percent.
> Single Paragraph - In the operations carried out in the South and Southeast, to meet the North, Northeast and Midwest and the state of Espírito Santo, the rates will be:
> I – in 1989, eight percent;
> II – since 1990, seven percent.

It was also established that the domestic rates could not be lower than those of the operations of more than one state unless there otherwise determined by the states and the Federal District, as recommended by the FC in Article 155, XII, "g".

In the presence of CA No 18/65, the requirement of ICM in a single rate of 15% has exacerbated inequalities and regional differences between producer and consumer states. This was due in part to the requirement of Complementary Law to establish how the Senate could decide, by resolution, on interstate

rates. In 1968, this subordination was moved away, and senatorial resolutions now have exclusive competence to guarantee uniformity of ICMS rates, aiming to give greater flexibility to their decisions. In this context LC No. 24/75 (which provides for the agreements for the granting of exemptions from ICMS) came and with it, the National Finance Policy Council (CONFAZ).

The main source of the ICMS is the Complementary Law No. 87 of September 13, 1996, known as "Lei Kandir" (Kandir law), which is mandatory for all member states and the Federal District. In this diploma is the general structure of ICMS, as well as the definition of who are the taxpayers, the taxable event, the calculation basis, the establishment of commodity or good or that place where at the time of occurrence of the triggering event.

The state laws regulate the operations, at the state level, observing the provisions of the Constitution and the Complementary Law No. 87. Thus, there is a restriction of the autonomy of the states at the time of tribute institution. This imposition is practiced in order to avoid any regulatory conflicts by the federative states.

ICMS taxation can focus on destination and origin, but when the purchase is made via the Internet, by end consumers not taxpayer, the triggering event of ICMS only occurs at the in origin, by applying internal rate as established in Article 155, § 2, VII, "b" of the FC. This generates as pointed in Fariello (2011), which the richest federal states concentrate the country's main distribution centers, and consumers' states remain with small local economic pace.

In fact, this new business relationship shook the rules of distribution of taxes to the point of displacing commercial transactions with the end consumer, not ICMS taxpayers to different aspects of what predominantly occurred with the promulgation of the Constitution of 1988. The current constitutional rule of ICMS of revenue's distribution in the case of interstate transactions was made almost fifty years ago, when there was the dynamism of current trade. According to the Constitution, the ICMS is collected at the place where the product is dispatched in network distribution center, which not necessarily is the state in which the property was acquired.

In Brazil, the electronic form of commerce does not change its nature, that is, the buying and selling of goods and services, according to the National Tax Code, Law No. 5,172/66, provides in Article 4, *in verbis:*

> Art. 4º the specific legal nature of the tax is determined by the triggering event of the related obligation, being irrelevant to qualify it:
>
> I – the name and other formal characteristics adopted by law;
>
> II – the legal allocation of the proceeds from its collection.

Indeed, the constitutional and legal provisions relating to electronically traded goods generates a new and unhealthy competition - the so-called fiscal war - unlike the previously known method, based on granting tax benefits policies. This is based on the unbridled attempt to target state of destination receive a portion of the revenue collected by the home state.

As verified in 1966 a type of trade that, by their nature, could give rise to profound changes in the adoption of the collection of the tax was not expected. Transactions between companies of the same group, those to which the law of "transfer pricing[xv]" applies to, is another area that has been significantly affected by e-commerce, since the development of intranet brought serious obstacles to tax inspection, when they have restricted access to their users.

Complementary Law 24/75 delegated to the National Finance Policy Council (CONFAZ), a treasury body, the provisional power to regulate matters, except perhaps as reminders of the law of the authoritarian period, predicted the "unanimity" of the resolutions relating to tax exemptions. The organ at times went further and began to legislate leading to harmonization intended to become fragmented. It is a fact that the unanimity rule does not exist even to change the constitution (3/5 votes) or to approve binding precedents of the Supreme Court (2/3) vote. This is the only rule with existing unanimous approval requirement throughout the Brazilian political system.

The agreement of CONFAZ No. 70 was published in April 2014. It provides rules for forgiveness and amnesty's credits for incentives and benefits by authorized by the states, which had not been approved by the Council. It is pending in Congress the PLP 238/12 (executive), whose last movement was in March 2015, and establishing new criteria for the validation quorum of the tax benefits approved by CONFAZ. As stated in the project, its decisions would no longer be unanimous to be 3/5 of the components, being necessary to approve 1/3 of each of the states divided by 5 regions of the country.

In 2009, federal entities were prejudiced by the rampant growth of e-commerce and the lack of the Constitution and relevant laws to protect them. This collection system at this new social and technological environment started to adopt legislations, which were unconstitutional in principle because it, ultimately, taxed the end consumer of product twice. The first were the states of Ceará, in 2008, and Mato Grosso in 2009, followed by the state of Bahia, Piauí and Goiás, in 2010, and Paraíba, in 2011. At this point another kind of war tax between the states begins with a saga of consumer's state to get their share.

Thus, in 2011, in order to regulate the ICMS in interstate non-presence relations through internet, telemarketing or showroom, an original movement of the Northeast under the CONFAZ obtained the membership of other Regions consolidating the signing of the Protocol ICMS 21/2011 for the affected entities may have access to part of the tax in this type of trade. His menu so had "established discipline related to the requirement of ICMS on interstate transactions directing products or well to the end consumer, whose acquisition occurs not face form the sender establishment".

This regulation was widely criticized because it was understood in numerous violations of the Federal Constitution, such as the inadequacy of the legal instrument that was used; incidence in full at the origin and complementation of entrance of destination's state; tax substitution "forward" on a nonexistent subsequent operation; violation of the principle that prohibits the tax differences between goods and services of any kind, due to their origin or destination; violation of the principle of free movement of goods and people; prohibition of business operation (the principle of free competition and initiative), etc.

The Federal Supreme Court (STF) granted in February/2014 an injunction suspending the effectiveness of the ICMS Protocol 21. The Plenary declared, unanimously, the unconstitutionality of this protocol at the judgment of Direct Unconstitutionality Action (ADI) in conjunction with the ADIs 4628 and 4713, which took place in 09/17/2014. For ministers, the rule was against provisions of the

Constitution, whose reasoning is explained in item 5 of this study, where an analysis about the economic impact that the ICMS's partitioning of the e-commerce causes in the states of destination. The Court also recognized the existence of general repercussion of the constitutional issue raised in Extraordinary Appeal (RE) No 680089, in which the possibility of levying of ICMS was discussed, by the destination's state of the good in interstate operations of goods for sale to end consumer, conducted in a non-face manner.

Similarly, on the laws of federal entities, 14,237/November 2008-CA, 6041/Dec 2010-IP, 9582/Dec 2011-PB and of the decrees 8969/Feb. 2004 and 12,324/Dec. 2010-BA, 2033/JUL 2009- MT and 7303/Jan. 2010-GO that were subject of the following ADIs 4596/Constitutional Amendment, 4565/PI, 4705/PB, 3380/BA, 4599/MT and 7303/GO (SL-543), respectively, the decision of the STF as manifested in Piauí and Paraíba's cases, shall also impact those other such states in the same manner decided regarding ICMS Protocol 21, with recognized general repercussion and modulation of their effects.

The National Congress made a Constitutional Amendment Proposal (PEC 197/2012) that was approved on 4.15.2015 and provided a gradual transition of taxes from the origin state to the destination state. That PEC was changed to adapt the proposal made by CONFAZ, result of an understanding of the states, which were unsatisfied with the decision of the Supreme Court. They did not cool tempers and reached an agreement on a historic meeting that took place in Piauí, in March 2014.

The text that is now a Constitutional Amendment (CA 87/2015) provides that the ICMS on e-commerce - purchases made by both the Internet and by phone - will be spread gradually among the states involved in the operation, comprising partly disadvantaged states with the current rule in the Transitory Constitutional Provisions Acts (ADCT). At the end of 2019, the collection of the product will be divided between the state of origin and destination.

Thus, it is expected that the purchases made by individuals, the transition defines that in 2015, 20% of the ICMS goes to state of destination and 80% goes to the state of origin; in 2016, 40% in the state of destination and 60% of origin; in 2017, the situation will reverse, with 60% on destination and 40% at origin; in 2018, the destination states will get 80% of the collection, and those of source only 20%; and finally, from 2019, 100% of the difference of the ICMS's rates will stay with destination state. This was not exactly the proposal that the states wanted, but it was the one that was possible to be approved at the meeting of CONFAZ. It is important to remember that although it came into force before the amendment, it only started to take effect from 2016.

Also, another proposal is in progress that may be relevant to the future of the Brazilian National Tax System. In case of approval, the Senate's Draft Resolution PRS (No. 01/2013) that establishes new rates of ICMS for the states, reducing them until 2025. The Constitutional Amendments Proposals 56/11, 103/11 and 113/11, which amended provisions of article 155 of CF/88, modifying the ICMS's collection system in operations that are conducted in s nonphysical manner were being processed in set given the scope of the proposals, but had their original texts damaged and were filed. Its consequences could be followed by the Constitutional Amendment Proposal 197/12.

With regards to this scenario, full of challenges, obstacles and resistance, the rules of collection and distribution of the ICMS in e-commerce continue to produce effects, through which the collected tax

stays with the state of origin of the goods. In the speech, the unanimity on the need for effective tax reform is absolute, but in practice the dissent prevails.

4. PRINCIPLE OF ORIGIN AND DESTINATION FOR THE PURPOSE OF INCIDENCE AND REVENUE SHARING

With respect to ICMS, it is undeniable that the principle of origin and destination for the purpose of incidence and revenue sharing is one of the most crucial points in the income distribution system in electronic commerce. The tax shall be charged and paid to the state where the good is produced or where the service provider? It would be more efficient to transfer the collection from origin to destination?

The emergence of the Internet challenges traditional concepts and plays with various elements of the tax incidence of rule-matrix, such as spatial criterion (domicile) and substantive test (source and classification of the nature of goods, services or income), not counting the impact on transfer pricing.

The essential now is to analyze the tax principle of jurisdictional coordination, origin and destination. The tax jurisdiction has as an instrument the origin and destination, which, despite being limited to the field of Tax Law, its theoretical support comes from the Economic Law. The principle of tax revenue allocation is out of the legal and obligatory relationship between active and passive subject. The option is pre-legal, related to economic-financial policy and the federal balance.

As anticipated, the Brazilian Federal Constitution provides for the rules on the determination of ICMS's rates for the operations and movements of goods between member states. In each one of them the collection is related to the production and consumption. According to the principle of origin, everything that is produced in the country should be taxed, that is, the products produced and used domestically, as well as exports. On the other hand, the imported products are not taxed. With regard to the destination principle, the tax incurs on imports, in other words, they stay submitted to the same tax and sales system that domestic products while exports are completely exonerated from taxation. Thus, for interstate transactions, the principle of origin creates a tax on the production of companies throughout the country; and the taxation on destination taxes the consumption or use of goods in this state.

The adoption principle of origin in electronic transactions at the interstate level has been shown as an aggravating to the regional inequalities, leading to unfair distribution of income, since the production is more concentrated than consumption. With these revenues retained in the exporting state, there is an increased need for federal transfers aiming at minimizing these imbalances. In order to seek the reduction of regional and social inequalities, FC of 88 established differences in rates for the movement of transactions in goods between the states when it was related to a contributor consumer. This was justified because it was understood, among other things, that it was not be possible to charge tax on the end consumer, which was not inscribed in state administrations of the finance due to the small amount involved in operations. Nevertheless, one could imagine at first that change from origin to the destination could make first lose interest in collecting tax, considering that the amount of tax does not belong to it. The practice adopted so far has been the apportionment of revenue when taxpayer, at destination and, when non-taxpayer, only to origin.

From the point of view of the principle of equity, it is understood that taxes income on goods and services is attributed to the state where its final consumption occurs, which is, primarily, consumers demand public services. In these cases, it is possible to tax and charge at the origin and assign the product of collection to the destination due to the markets supposedly being integrated.

On the aspects outlined here, it appears that the new trade relations motivate changes in the allocation of the storage product. It is not intended to create a new roster of criteria of transfers of revenue but which identify critical points, with possible exemplary solution. With limited resources, these less developed entities maintain their prejudiced autonomy, and this autonomy is not an end in itself, but only instrument for achieving the fundamentals and objectives intended by the Federal Constitution.

Origin and destination as taxation and collection are issues that relate to active subject, holder of the tax's competence, while the allocation of the sharing of the product is related to the political entity, which holds the revenue. There are some mechanisms that operationalize these two principles in the field of Tax Law (adoption of different rates depending on the sharing system of tax replacement) and of the field of Financial Law (creation of funds and clearing house). In other words, if the mechanism requires taxpayer performances to produce the desired results, it is the tax law field, but after the tribute entry affects the coffers of the holder of the power to tax, it is Financial Law.

Taking into account these theoretical references, it appears that, in the present, the effects of the regulation of ICMS in e-commerce, to the end consumer, not to the taxpayer, provides that its reception shall be at the origin, penalizing the federal states that are essentially seen as consumers. It is true that the rates and the incidence in origin/destinations of these operations are economically impacting in a considerable manner and should be reviewed in order to earn a higher balance of ICMS to the damaged entities.

The economic reality that emerged from virtual trade requires a change to face the fragile and unfair current model. The differentiation and variety of rates in the inter and intrastate operations (selectivity due to the essentiality of goods and services) already cause by itself a complex and unpredictable situation in taxation.

The Economic Analysis of Law is the application of the economic approach to try to understand the law and interrelated worlds, shows how one can understand and explain the logic, as well as predict the implications of fact, when faced with a certain legal order, in other words, is an attempt to verify the effects of the rules on agents' behavior determining if such effects are socially desirable. Thus, with the contributions of the studies supported by Economic Law and in the analysis of the Kaldor-Hicks' efficiency (more elaborated than the Pareto criterion) it is understood that a constitutional change that make the collection of ICMS in e-commerce only in the destination feasible could, in principle, imply losses for a few states, but simultaneously improve the condition of the others who make up the majority of the federation states. Considering the 26 states plus the Federal District, 21 of them would benefit from the constitutional amendment, which comprise a large part of the population and that, with the growth of their economies could accelerate economic and social development of the whole country with a visible reduction of inequalities.

The principle of Kaldor-Hicks does not condition a distribution of resources aiming that nobody gets lost, but it is only a systematic through in which the increase of wealth (indirect measure sufficient to

check an increase of satisfaction or utility) be sufficient to compensate those states that may lose. What can be seen is that the actions of each one of the Brazilian states, given their autonomy, they tend to maximize their own utility, even if it generates harmful effects for the nation as a whole.

The principle of fiscal autonomy is always invoked to justify the maintenance of the model in force of the ICMS. The trade balance of states give indicators of the difficulties imposed by the ruling of e-commerce. The adoption of the principle of origin to tax and charge, and destination to allocate the products of these collections is the most relevant technical output that consumers states propose at that time, but the conviction in the political plan for constitutional change has moved slowly, however, an output that may not be the best has been glimpsed, but it is still a great achievement.

Between the origin and destination systems, at first, it is known who loses or gains between one or the other option, but in the long term a correct allocation scheme, guided by an appropriate and coherent decision in its wake substantiated by measures to cope with this initial moment, all citizens and economic agents would win, the country would win. If a strong and competitive market is the goal, a change of this tax to a consistent target system must be designed.

So, the best option, at first, would keep revenue within the consumer state, eliminating the predatory tax competition. Ally to the ICMS charged on the origin and destination, among others, a policy of exoneration of industrial and commercial activities. A simpler taxation is able to balance the imbalances of each state of the federation, bringing about greater investment and encouraging the industrial and productive sector.

5. DEFINITIONS OF ESTABLISHMENT FOR PURPOSES OF SHARING OF COMPETENCE

Commercial establishment is regarded as the set of capital aimed at the achieving of a business, and it is also regarded as commercial establishment (autonomous) the virtual one, which is based on Article 1142 of the Civil Code. The virtual serves as a platform for trade "on" (selling in itself) and "offline" (physical delivery). In the case of offline sales where there is activity being practiced online as payment, it has as rule of attraction of the establishing the location of access, of server or at the border, implying competence for taxation at destination. The situation here is similar to door-to-door sales and not to sales catalog, and this operation preceded by a transfer between institutions of the same owner.

There is a great doctrinaire concern regarding a precise definition of commercial establishment. With the spread of internet, the problem of how to tribute in relation to that site appears and is a core premise to be placed. In principle, the output of the good or service of the property of the taxpayer's is what sets the taxable event of the tribute, the wording of Article 12, item I, of the Brazilian Complementary Law (CL) 87/96.

In Brazil, Article 11 of the CL 87/1996 meets the determination of Article 155, § 2 XII of FC/88, stating that the responsible commercial establishment is, in the case of goods or good, the place where occur the taxable event. It is understood to have been this the way chosen to give a generic definition, as in §§ 3° and 5° of the CL of 87, are provided for borderline situations. This definition is prior to the new Civil Code, and that through the application of Article 110 of the National Tax Code (CTN) must be interpreted dynamically.

Jonathan Vita[xvi] warns that in the Brazilian federalism, particularly in relation to tax matters, there was a series of stands taken in political matters that established the general rule for allocation of tax revenues (between origin and destination) when the ICMS levied on interstate transactions.

The author proposes that, in not accepting the proposed interpretation to the § 3 of article 11 of CL 87/96, only a constitutional amendment or a change in the concept of commercial establishment (allowing the registration of the site as an autonomous institution) is the ways that would make possible the taxation at destination (or the allocation between origin and destination) of the goods sold over the internet. He makes it clear that the site can be considered virtual property, there is conflict of jurisdiction or, at least, states should make the register of the commercial establishment as autonomous. For example, a site could be registered in several states and contribute to the one where the recipient was. Lacks give a consistent legitimacy to this new interpretation. A change of the CL, not accepting of § 3, Article 11, should focus on changing the concept of commercial establishment.

According to Chiesa[xvii], "it is undisputed that the criterion adopted by the Constituent of 1988 is inadequate to the new reality of trade relations". For him, commercial establishment is where the merchandise is located and he adds:

> If the ICMS is due to the state in which is located the sender commercial establishment, some criteria deserve attention: check the location in which it the company was registered, the unit that is the export of the goods, the place where the site is hosted, in which the access happened and the one of the issuance of bill of sale. The site can be considered a virtual establishment? With regard to the owed part to the recipient unit of the goods, is the receiving physical unit or is where it is domiciled or headquartered the purchaser of the goods?

He also warns that, to diagnose the commercial establishment in purchases online, one can have access in the state 1, the site hosted in state 2, the register of the company in the state 3, the storage in the state 4 and delivery in state 5. And when the state headquarters of the buyer is still in another state? And when the invoice is issued by a subsidiary of the state of access? Where the ICMS should be paid?

With intermediate position between the two authors, Greco[xviii] says that this concept should be revisited because the sale made by internet is very different from that made by catalog, being this last closest to door to door sales. He argues that the site can be seen as one of the three cases: as a mere showcase of advertising; as an extension of the physical property; or as a new commercial establishment, separated from the physical property of the taxpayer. In the first two cases, the physical location of the taxpayer shall be considered, and in the latter, where the internet service provider is to be found. And what if the provider is located in a different location than where the legal entity operating the site is based?

Portella[xix] considers that the establishment must be defined according to the data offered by the parties themselves and consider how possible permanent commercial establishments the service providers, network servers, web pages and place where the physical network of the company that operates on the Internet is. For those who emphasize the "physical and human presence" the providers servers of network access serve better. Those who are allied to the "activity performed or service provided" continuously in

one place consider that the webpages should be the permanent establishment. The author stands defending the second as the best option, bearing in mind the tax control.

According to the Agreement Model of the Organization for Economic Co-operation and Development (OECD)[xx], the expression permanent establishment (PE) means a fixed place (time and condition of location), through which the enterprise is wholly or partly carried on its activity. In the field of electronic commerce, the requirements of duration and location of the activity are already obsolete, because in it there are people and companies spread around the world involved in various transactions, whose supports are only their computers. These operate on servers located in a third place, with software that comes from various situations, including open source or even free, acquired by download.

In short, to the OECD, a web site, where a company carries out business, cannot simply be considered a permanent establishment. However, on the other hand, claims that physical human intervention[xxi] is not essential to the concept PE, since the operations can be carried out automatically. As a result, servers can fit, because they require the existence of a physical device located somewhere and with some degree of permanence. Permanent establishment is a legal and tax framework that is equivalent to a center of imputation of income, regulated in Article 5 of the treaties that follow the OECD, UN and OAS model.

This was not all existing hypotheses. Therefore, this concept deserves special attention, given their interpretative dynamic, as reaffirmed in the Supreme Court judgment of Direct Unconstitutionality Action (ADI) 1945[xxii].

As can be seen, there are still many conflicts of jurisdiction in the field of connecting factors, in the virtual trade. A legislative change in provisions of CL/87 is claimed for the fulfillment of its role on this aspect. While there is no specific legislation, for the non-presence trade, discussed during this study, taxation in Brazil will remain inadequate, unfair and inconsistent.

Any adjustment to be done must be accompanied by a transitional model, representing a determining role in the success of the reform and the quality of indirect taxation. The steps and rhythms of this transition depend, among others, on the desirable final effects. The implementation should take the necessary time to reduce the uncertainties that arise in cases such as this, noting that faster economic growth favors to a shorter transition that integrate all desirable effects.

FINAL CONSIDERATIONS

According to the Agreement Model of the Organization for Economic Co-operation and Development (OECD)[xxiii], the expression permanent establishment (PE) means a fixed place (time and condition of location), through which the enterprise is wholly or partly carried on its activity. In the field of electronic commerce, the requirements of duration and location of the activity are already obsolete, because in it there are people and companies spread around the world involved in various transactions, whose supports are only their computers. These operate on servers located in a third place, with software that comes from various situations, including open source or even free, acquired by download.

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In conclusion, the tax system based on ICMS, which is a state tax, is important for production chains. This study shows that the Federative Pact between states, municipalities and the Federal Union should be reassessed because new taxes such as those that will be applied to e-commerce should not continue to comment on the injustices of unequal distribution, favoring the richer states.

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[i] **TAX**– is the tribute that has as taxable event an independent status of any specific state activity related to the taxpayer (Article 16 of the CTN.). In other words, tax is the tribute that is not tied to a direct consideration to who is paying. Tax revenues are not meant to cover works or services for the benefit of those who pay them, but to be used to defray the general expenses of the State, aiming to promote the common good; **FEE** – It is the tax that can be levied by the Federal, State, Federal District or municipalities within their respective powers, whose taxable event the exercise of police power or the effective use or potential specific public service and divisible provided the taxpayer or at his disposal (Article 77 of the CTN.); **CONTRIBUTION FOR IMPROVEMENT** – is the charge levied by the Federal, State, Federal District and municipalities, within their respective powers, in order to meet the cost of public works in which there is real estate valuation, with the total limit the expenditure incurred and as individual limit the added value that the work result for each benefited property (Art 81 of the CTN.); **SPECIAL CONTRIBUTIONS** – They are laid down in Articles 149 and 149-A of the Constitution, are taxes charged to cost of out-of-the-state activities and can be: social, intervention in the economic domain and economic or professional categories interest; and **COMPULSORY LOAN** – is the only tax that can be imposed by the Union through supplementary law, in cases of public calamity or foreign war or the imminence that require extraordinary resources, i.e., in addition to the planned EU fiscal budget; public investment of an urgent nature and relevant national interest. RIBEIRO, Robinson. The Brazilian Tax System, November 2nd, 2006 at: http://estado.administradores.com.br/artigos/administracao-e-negocios/o-sistema-tributario-brasileiro/12864/. Access Jan 09, 2021.

[ii] There are 63 taxes levied cumulatively on goods and services - costs that often are embedded in the final price, burdening the consumer ultimately.
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[xii] VALADÃO, Marcos Aurélio Pereira. **Efeitos da Globalização no Sistema** Tributário. Brasileiro. Available at: http://inc..ucb.br/sites/000/90/globalizationeffectsonthebraziliantaxsys.pdf. Access on June 20, 2019.

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[xv] It refers to the price charged in the purchase and sale (transfer) of goods, rights and services between related parties (related persons). In view of the particular circumstances in the transactions between related undertakings, the price may be stipulated in advance and thus diverge from the market price negotiated by independent undertakings under similar conditions - price based on the arm's length principle. According to Emmanuel and Mehadfi, according to Vicente Rosseto, perhaps the most complete definition of a transfer price is that it is the monetary expression of the movement of goods and services between organizational units of the same company (Wells, 1968).
[xvi] VITA, Jonathan Barros. "O ICMS no comércio eletrônico pós-Protocolo CONFAZ 21/2011: uma necessária (re) análise do conceito de estabelecimento". In: Instituto Brasileiro de Direito Tributário. In: Revista de Direito Tributário: São Paulo, 2012.
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[xx] Tax and *e-commerce*, OECD, **Clarification on the application of the Permanent Establishment definition in e-commerce: changes to the commentary on the model tax convention on article 5**, OECD Committee on Fiscal Affairs, Dec. 2000.
[xxi] "(…) the Committee believes that a requirement of human intervention could mean that, outside the *e-commerce* environment, important and essential business functions could be performed through fixed automated equipment located permanently at a given location without a permanent establishment being found to exist, (…)", can be read on p. 4 of the document referred to in the previous note.
[xxii] In the judgment of ADI 1945, the STF (re)affirmed the need for a dynamic interpretation of legal texts that relate to new technologies.
[xxiii] Tax and *e-commerce*, OECD, **Clarification on the application of the Permanent Establishment definition in e-commerce: changes to the commentary on the model tax convention on article 5**, OECD Committee on Fiscal Affairs, Dec. 2000.
[xxiv] "(…) the Committee believes that a requirement of human intervention could mean that, outside the *e-commerce* environment, important and essential business functions could be performed through fixed automated equipment located permanently at a given location without a permanent establishment being found to exist, (…)", can be read on p. 4 of the document referred to in the previous note.
[xxv] In the judgment of ADI 1945, the STF (re)affirmed the need for a dynamic interpretation of legal texts that relate to new technologies.