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FORMALIZATION OF TAXING COMPETENCE RULES IN BRAZILIAN TAX LAW: A CRITICAL ANALYSIS ON THE CURRENT APPROACH

FORMALIZAÇÃO DAS NORMAS DE COMPETÊNCIA NO DIREITO TRIBUTÁRIO BRASILEIRO: UMA TENTATIVA DE ANÁLISE CRÍTICA

FORMALIZACIÓN DE LAS NORMAS DE COMPETENCIA EN EL DERECHO TRIBUTARIO BRASILEÑO: UN INTENTO DE ANÁLISIS CRÍTICA

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RESUMO
O principal objetivo deste trabalho é analisar criticamente o conceito e as propostas de formalização das regras de competência tributária postuladas por alguns estudiosos do Direito Tributário. O diagnóstico do trabalho, baseado em importantes contribuições dos estudiosos da teoria de direito, que destacaram que não é possível conceber essas normas como regras prescritivas típicas, é que esse equívoco é, de fato, apenas um sintoma de um problema mais sério, relacionado ao amplo uso de um conceito muito restritivo de "norma" na ciência tributária brasileira. Ela obscurece a distinção entre conceitos fundamentais da Ciência Jurídica, como "direito", "dever", "poder", "competência", "permissão", "obrigação", "proibição", "ônus" e "sanção", dificultando o desenvolvimento de uma teoria mais consistente do Direito Tributário Brasileiro
Palavras-chave: Competência tributária; formalização; normas de competência tributária.

ABSTRACT
The main objective of this work is to critically analyze the (mis)concept and the proposals of formalization of the taxing competence rules some Brazilian Tax Law scholars have postulated. The diagnostic of the paper, based on important contributions of Law Theory scholars, who have evidenced it is not possible to conceive those norms as typical prescriptive rules, is that such misconception is, in fact, only a symptom of a more serious problem, related to the widespread use of a very restrictive concept of “norm” on Brazilian Tax Law Science. It blurs the distinction between fundamental concepts of Juridical Science, such as "right", "duty", "power", “competence”, "permission", "obligation", "prohibition", "onus" and "sanction", hampering the development of a more consistent theory of Brazilian Tax Law.
Keywords: Taxing Power; Taxing Competence Rules; Formalization.

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RESUMEN
El objetivo principal de este trabajo es analizar críticamente el concepto y las propuestas de formalización de las normas de competencia tributaria que han postulado algunos estudiosos de la ciencia Tributaria brasileña. El diagnóstico del artículo, basado en importantes contribuciones de los estudiosos de la Teoría del Derecho, que han destacado que no es posible concebir esas normas como reglas prescriptivas típicas, es que tal error es, de hecho, solo un síntoma de un problema más grave, relacionado al uso generalizado de un concepto muy restrictivo de "norma" en la ciencia del derecho tributario brasileño. Borra la distinción entre los conceptos fundamentales de la Ciencia Jurídica, como "derecho", "deber", "poder", "competencia", "permiso", "obligación", "prohibición", "responsabilidad" y "sanción", obstaculizando El desarrollo de una teoría más consistente del Derecho Tributario Brasileño.
Palabras clave: competencia tributaria; formalización; normas de competencia tributaria

SUMÁRIO

INTRODUCTION

Unlike other national constitutions, the Brazilian Constitution regulates tax matter in detail. As a consequence of the Brazilian federal system, very rigid constitutional rules divide the taxing power among federal, state and municipal levels of government so that a small room is left for the infra-constitutional regulation[1]. Indeed, the Brazilian Constitution indicates the *nomen juris* and the main limits and characteristics of all the taxes that government is allowed to lay[2]. After all, it is possible to say that the Brazilian Constitution almost creates the taxes themselves[3]. Because of this, we say Brazilian different spheres of government have no actual "taxing power", but only "taxing competence", that is, a constitutionally limited taxing power.

Thus, the concept of "taxing competence" is more restrict than the concept of "taxing power". It means the constitutional ability to validly create and impose taxes, and is especially relevant in this legal system. Since taxing competence is established by rules, we need an adequate formal reconstruction of these rules, under a law theory approach, for a good understanding of the Brazilian Tax Law System.

[1] CHIESA, Clélio. **A Competência Tributária do Estado Brasileiro:** desonerações nacionais e imunidades condicionadas. São Paulo: Max Limonad, 2002. p. 27.
[2] FALCÃO, Amílcar de Araújo. **Sistema Tributário Brasileiro:** Discriminação de Rendas. Rio de Janeiro: Edições Financeiras, 1965. p. 26.
[3] VIEIRA, José Roberto. E, Afinal, a Constituição Cria Tributos! *In:* TÔRRES, Heleno Taveira (coord.). **Teoria Geral da Obrigação Tributária:** Estudos em Homenagem ao Professor José Souto Maior Borges. São Paulo: Malheiros, 2005, p. 594-642. p. 629-633.

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Taking into consideration the available literature on this issue, in this paper we are going to refer to the proposals of: [1] Cristiane Mendonça[4], [2] Eurico Marcos Diniz de Santi and Daniel Monteiro Peixoto[5], and [3] Tácio Lacerda Gama[6] that seem to have taken a wrong starting point for this investigation: their basic assumption is that taxing competence rules are typical prescriptive norms, which allow (permit) competent authorities to create a tax under certain procedural and material conditions. In this perspective, the nullity resulting from non-compliance with taxing competence rules is wrongly conceived as a sanction or a penalty, applied by the judicial body or by another authority empowered to invalidate the tax rule.

In our view, such proposals reflect the erroneous conception according to which all the rules have the same logical structure and all the norms extracted from the interpretation of legal texts can be somehow rewritten as prescriptions. Or, rather, it derives from the assumption according to which the "true" (or “complete”) legal rules are only the prescriptions, that is, those propositions whose structure links the hypothetical description of a fact to a legal requirement of a certain behavior.

However, there are other theoretical approaches that do not identify legal norms only with prescriptions and do not conceive the possibility of equating nullity and sanction. Also, several of those alternative theoretical approaches have not been adequately considered by Mendonça, Santi/Peixoto, and Gama in their studies.

In this text, we first briefly present the proposals of Gama, Mendonça, and Santi/Peixoto, then we contradict some of their assumptions and conclusions, and, finally, we present an alternative proposal. Taking into account that this text concerns only about the form, not the content of the tax competence rules, we will not discuss if the constitutional provisions related to the matter establish types or concepts when defining which taxes can be created by the legislator.

1 THE PROPOSAL OF SANTI/PEIXOTO, MENDONÇA AND GAMA

For Santi and Peixoto, the taxing competence rule establishes that "If someone is the entity A and the circumstances of fact B or C are present, then A has the permission to legislate

[4] MENDONÇA, Cristiane. **Competência Tributária**. São Paulo: Quartier Latin, 2004.
[5] SANTI, Eurico Marcos Diniz de; PEIXOTO, Daniel Monteiro. PIS e Cofins na Importação, Competência: entre Regras e Princípios. **Revista Dialética de Direito Tributário**, São Paulo, v. 121, 2005.
[6] GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009.

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on the matter D, within limits E, according to procedure F"[7]. The structure they conceive is the following one:

NCL = D {[hs.ho] → P [cs.(m.-i.p.d.r).cp.ct.ce]}

The "D" indicates this is a deontic utterance. The "→" links the hypothesis to the consequence. The hypothesis "hs.ho" indicates both the competent subject ("hs") and the factual circumstances which must be observed for the valid use of tax competence ("ho"). The consequence – P[cs.(m.-i.p.d.r).cp.ct.ce] – establishes the permission (P) for someone ("cs") to create a tax, defined by some characteristics ("m", "i", "p", "d" and "r"), under certain (specific) procedural, temporal and locational circumstances ("cp", "ct" and "ce").

For Mendonça, in turn, there are in general two possible structures for competence rules. It depends on if the competent authority has a mere permission (authorization-permission), or an obligation (authorization-imposition) to act[8]. Nonetheless, she considers that the use of tax competence is always optional. Thus she shapes the structure of the tax competence norm in the manner of a permissive rule. As a consequence, her proposal of formalization is as follows[9]:

Dsm T = {Hct = [Cm+Ce+Ct] → Cct = [Cp (Sa+Sp) + Cda (Lf+Lm)]}

In the hypothesis ("Hct"), the taxing competence norm ("NCT") describes a fact characterized by being practiced by someone ("Cm"), located in given conditions of time ("Ct") and space ("Ce"). It is linked to the consequence ("Cct") by a neutral deontic connector ("→"). The consequence ("Cct"), in turn, is governed by a non-neutral connector ("Dsm"). It indicates the subjects ("Cp") and objects ("Cda") involved in this legal relationship. "Sa" is the person who has the permission to issue the rule; "Sp" is the taxable person, that one who has the duty to obey the tax rule. Finally, either the formal and material limits ("Lf+Lm") to the creation of a tax are parts of the object of a valid legal norm (as conditions).

[7] SANTI, Eurico Marcos Diniz de; PEIXOTO, Daniel Monteiro. PIS e Cofins na Importação, Competência: entre Regras e Princípios. **Revista Dialética de Direito Tributário**, São Paulo, v. 121, 2005. p. 37.
[8] MENDONÇA, Cristiane. **Competência Tributária**. São Paulo: Quartier Latin, 2004. p. 70.
[9] MENDONÇA, Cristiane. **Competência Tributária**. São Paulo: Quartier Latin, 2004. p. 107.

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Finally, Gama conceives the competence norm (*"Njcom"*) as the proposition that enounces, as a precedent (protasis), the necessary elements to the valid enunciation, and prescribes, in its apodosis, a juridical relation determined by the validity of the tax rule[10]. This structure is represented by the formula below:

Njcom = H {[s.p(p1,p2,p3...].(e.t)} → R [S(s.sp).M(s.e.t.c)]

The hypothesis ("H") describes the "norm-producing fact", which is identified by four criteria: (1) the personal criterion (“s”) indicates the subject who must perform the conduct of enunciating; (2) the location criterion (“e”) indicates the place where the subject can validly perform the enunciation; (3) the temporal criterion (“t”) establishes the circumstances of time in which the verb can be regularly enunciated, and (4) the procedural criterion describes one ("p") or more (" p1, p2, p3...") formal acts which must be accomplished to validly create the tax[11].

This hypothesis (which describes the "form" of regular action) is linked to the consequence (which regulates the content of the activity of creation of tax rules) by an inter-propositional connective (→), i.e., a neutral logical operator that resumes the legislator decision to submit certain matter to the enunciation of a certain type[12].

The consequence, in turn, prescribes the “legal relationship of competence” (“R”). On the one hand, it gives to the competent person ("s") the right to create the legal norm, about certain matter (“m”), delimited by the indication of its subjective ("s"), spatial ("e") and

[10] GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009. p. 61-62. Although without formalization, the same idea was defended in a previous work, in which he described the competence norm in this way: “The hypothesis of this norm describes a fact – the enunciation procedure necessary to tax creation – and the consequence attributes to someone the faculty of setting taxes”. Free translation of the original, in Portuguese: *“No antecedente dessa norma, descreve-se um fato – o processo de enunciação necessário à criação dos tributos – imputa-se a esse fato uma relação jurídica cujo objeto consiste na faculdade de criar tributos”* – GAMA, Tácio Lacerda. **Contribuição de Intervenção no Domínio Econômico.** São Paulo: Quartier Latin, 2003. p. 73. His proposal is followed by CARVALHO, Paulo de Barros. **Direito Tributário, Linguagem e Método.** São Paulo: Noeses, 2008. p. 232. The idea is also similar to the one defended by IVO, Gabriel. **Norma jurídica:** produção e controle. São Paulo: Noeses, 2006. p. 30 – though this author does not specifically refer to taxing competence, but to competence in general.

[11] GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009. p. 69.

[12] GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009. p. 75.

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material ("c"[13]) limits. On the other hand, it defines the taxable persons ("sp") and the duty to "accept" the legal text regularly created[14].

For Gama, the intra-propositional deontic connective may be governed by either the "permissive" or "obligatory" deontic modes. The former are the unconditioned competences; the latter are the competences whose regular practice depends on the observation of certain conditions[15].

According to the author, this primary norm (which regulates the act of setting a tax rule) is linked to a secondary, sanctioning rule, which prescribes the reaction of the legal system to the practice of an unlawful conduct[16]. In the binary structure conceived by him for the competence rules, the penalty or sanction would be, precisely, the declaration of invalidity of the rule created in violation of the competence rule. Hence, the sanction relationship is represented by a rule with the following structure[17]:

Ncom.s = H [s.p(-c). e.t] → R [S(s.sj).M(s.e.t.c)]:

The hypothesis (*"H"*) is formed by the indication of a subject (*"s"*) competent to judge the validity of the norm, plus the indication of the existence of an irregular norm [p-(c)] and, also, by the indication of the locational and temporal circumstances for the valid enunciation of the sanction[18]. The consequence ("R") points out both the holder of the standing to access the jurisdiction ("s") and the authority (*"sj"*) able to apply the sanction, as well as the material boundaries (M) of the nullifying norm ("s.e.t.c"), i.e., its personal, temporal, locational, and material data[19].

[13] The "c", in Gama's proposal, corresponds to the material limits ("Lm") of Mendonça's and, nearly, to the expression "m.-i.p.d.r", found in Santi/Peixoto's proposal.
[14] GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009. p. 76-78 and 90.
[15] GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009. p. 87.
[16] GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009. p. 103.
[17] GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009. p. 107.
[18] GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009. p. 108.
[19] GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009. p. 110-111.

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The summary table below compares those proposals, showing their similarities and differences:

Table 1 – Comparing the proposals.

Competence norm	Hypotheis (H/Hct)	→	(Deontic modal) [Dsm]	Consequence (Cct/R)	Sanction (Ncom.s)
Santi/Peixoto	hs.ho	→	P	cs.(m.-i.p.d.r).cp.ct.ce	?
Mendonça	Cm.Ce.Ct	→	P u O	Cp (sa.sp).Cda (Lf.Lm)	?
Gama	s.p (p1, p2, p3...).e.t	→	P u O	S(s.sp).M(s.e.t.c)	H [s.p(-c).e.t] → R [S(s.sj).M(s.e.t.c)]

Source: FOLLADOR; VALADÃO; VALLE.

Although there are some differences among them, mainly in the determination of which terms compose the protasis and the apodosis[20] of the rule structure, there seem to be at least some points of agreement.

First, all of them departs, implicitly or explicitly, from the assumption that the "true" legal rules are only the prescriptions; all the rest are just "parts" of norms or "incomplete norms"[21]. For these authors, the "true" juridical norms always have the same basic structure – the hypothetical description of a fact, linked, by a neutral "normative operator", to a juridical relation, governed by a deontic vector (prohibited [Ph/V], obligatory [O] or permitted [P]), so

[20] One of the main differences concerns to the normative hypothesis content. Mendonça, Santi and Peixoto insert there the description of the fact "being the competent person". GAMA, instead, conceives that the hypothesis describes the "producing-rule fact", that is, the enunciation of the statement which sets the taxing norm. It sounds weird, since, in his own conception, the right of producing the tax norm only appears in the consequence of the competence norm.

[21] In this direction, Gama says that "for being an unit of the normative system, the norm must regulate coercively the human behavior…"; otherwise, "if will be only a part of a norm" – free translation of the original, in Portuguese: *"para ser uma unidade do sistema, a norma jurídica deve regular coercitivamente a conduta humana"*; *"se não regular qualquer dos elementos da conduta, será apenas fragmento de norma"* – GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009. p. 18.

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the competence rules might have the same basic structure[22]. Second, for all three proposals, every legal rule is necessarily sanctionable; if it is not sanctionable, it is not a legal norm[23]. So, in competence rules, nullity would play the same role of a sanction. The criticisms of this paper focus on those two points.

2 CRITICAL ANALYSIS OF THE THREE PROPOSALS

The striking similarities among the proposals above make it seem that the idea according to which competence norms are typical prescriptions is univocal. However, that is not true. Calsamiglia observes that, although everyone recognizes the importance of the competence rules for an adequate rereading of legal systems, it has not been possible to reach a sufficiently shared conceptual construction, yet[24]. According to Peña Freire, the use of the term "competence" by jurists is definitely not peaceful[25].

There are many and quite heterogeneous theoretical proposals concerning this issue. It seems possible to divide them, initially, into two large groups: first, that of "unitarian" proposals, which conceive a unique form for the competence rules; second, that of "non-unitarian" proposals, which do not consider it possible to attribute one single logical structure to deal with legal competence issue.

Unitarian proposals can be divided between (i) those that reduce the competence rules to prescriptions or parts of prescriptions, and (ii) those that take them as utterances different from prescriptions. Some authors of the first group think of competence rules as indirect obligations. Other scholars interpret them as "permissive norms of higher order". Kelsen is the

[22] Many scholars of the same Tax Law School think precisely this way. For Gabriel Ivo, "All juridical norms have the same syntactic structure: (…) if the fact F occurs, then the subject S must do or omit que conduct C" – free translation of the original, in Portuguese: *"Em todas as normas jurídicas encontramos a mesma estrutura sintática: (...) 'se se dá um fato F qualquer, então o sujeito S deve fazer ou deve omitir ou pode fazer ou omitir a conduta C ante outro sujeito"* – GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009. p. XLI. Also for Tárek Moysés Moussallem, all the norms have an "identical syntactic archetype" – MOUSSALLEM, Tárek Moysés. **Fontes no Direito Tributário.** São Paulo: Noeses, 2006. p. 76. Paulo De Barros Carvalho identically conceives that "all juridical norms are syntactically homogeneous" – CARVALHO, Paulo de Barros. **Direito Tributário, Linguagem e Método.** São Paulo: Noeses, 2008. p. 231.

[23] GAMA, Tácio Lacerda. **Competência tributária:** fundamentos para uma teoria da nulidade. São Paulo: Noeses, 2009. p. 106.

[24] CALSAMIGLIA, Albert. Geografía de las normas de competencia. **Doxa:** Cuadernos de Filosofía del Derecho, Alicante, nº 15-16, p. 747-767, 1994. p. 747.

[25] PEÑA FREIRE, Antonio Manuel. Reglas de competencia y existencia de las normas jurídicas. **Doxa:** Cuadernos de Filosofía del Derecho, nº 22, p. 381-412, 1999. p. 383.

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most representative author of the former group[26]. Von Wright is the most notorious upholder of the latter[27].

The aforementioned proposals seem to make an undue and incomprehensible mix of those two perspectives. On the one hand, they start from the Kelsenian assumption, according to which the only genuine legal norms are the prescriptions, backed by threats of sanctions (sanctionable norm). On the other hand, they consider that the tax power-conferring rule corresponds to a permission to create taxes, whose non-compliance generates the penalty of nullity. Nevertheless, Kelsen himself denies, peremptorily, that the nullity is a penalty for non-compliance with the competence rule.

In fact, he simply does not attach a penalty rule to the competence rules. On the contrary, he says that, precisely because competence norms are only a part of the protasis of the "genuine" norms, the competence rules cannot even be transgressed themselves. By the way, according to Kelsen's assumptions, if competence norms were backed by a sanctionable norm, they would be complete rules, and then there would be no reason to conceive them as "parts of norms", or as "non-independent rules".

Confirming this observation, Ferrer Beltrán assures that, in the Kelsenian thought, the competence norms are not backed by sanctions for the case of non-compliance[28]. According to Carlos Nino, Kelsen thinks it is not possible to equate nullity with the sanction because he conceives that the norms which prescribe nullity hypotheses are not complete or autonomous

[26] KELSEN, Hans. **Pure Theory of Law.** Transl. Max Knight. Clark, N.J: The Lawbook Exchange, 2005. In the same direction: ENGISCH, Karl. **Introdução ao Pensamento Jurídico**. 3. ed. Tradução de: J. Baptista Machado. Lisboa: Calouste Gulbekian, 1988. p. 71. It is common to insert ROSS among those who conceive the competence rules as indirect obligations because the Danish author expressly states that "... a norm of competence is an indirectly expressed norm of conduct y" – ROSS, Alf. **On Law and Justice**. Oxford: Oxford University Press, 2019. p. 44. For some authors, even in "Directives and Norms" Ross confirms his main thesis, saying that any competence norm can be converted into a prescription norm of conduct, whereas the contrary is not possible – CALSAMIGLIA, Albert. Geografía de las normas de competencia. **Doxa:** Cuadernos de Filosofía del Derecho, Alicante, nº. 15-16, p. 747-767, 1994. p. 752-754. Others, however, claim that, in this work, *Ross* changed his position, in order to comprehend competence rules as constitutive rules – BULYGIN, Eugenio. Sobre las Normas de Competencia. *In*: **Análisis Lógico y Derecho**. Madrid: Centro de Estudios Constitucionales, 1991, p. 485-498. p. 491. Finally, there are also those who say that both visions of *Ross* are compatible, and that he did not change his thinking concerning this issue – FERRER BELTRÁN, Jordi. **Las Normas de Competencia:** Un Aspecto de la Dinámica Jurídica. Madrid: Centro de Estudios Políticos y Constitucionales, 2000. p. 89.

[27] VON WRIGHT. Georg Henrik. **Norma y Acción:** Una Investigación Lógica. Madrid: Tecnos, 1970. p. 198.

[28] FERRER BELTRÁN, Jordi. **Las Normas de Competencia:** Un Aspecto de la Dinámica Jurídica. Madrid: Centro de Estudios Políticos y Constitucionales, 2000. p. 31.

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norms, but only a part of the prescriptive rules[29]. Kelsen himself confirms it in his "General Theory of Norms", by saying that the inobservance of competence rules does not result in a sanction unless there is another rule linking that non-compliance hypothesis to a sanction[30].

Despite denying independent normative status to competence norms – which raises some specific objections[31] -, Kelsen notices clearly the structural differences between the utterances which regulate behaviors under threats of sanction (prescriptions) and those which enable someone for practicing certain juridical acts. Not coincidentally, Kelsen identifies an "essential kinship" between the notions of "competence", "capacity", "legitimacy" and "ability to impose penalties"[32] – concepts which can be easily inserted in a broader concept of competence. In the same way, Guibourg says competence is not a permission, but only a "special type of normative relevance" of certain behaviors in a normative system[33].

Actually, according to Hernández Marín, the Kelsenian distinction between independent and dependent norms reveals he was aware that not every legal discourse is prescriptive[34]. Thus, despite the adoption of Kelsenian assumptions, the Brazilian authors mentioned above seem to not have properly followed his conclusions. The main objections to the theories that conceive

[29] NINO, Carlos Santiago. **Introducción al análisis del derecho**. 2. ed. Buenos Aires: Astrea, 2003. p. 198-199.
[30] KELSEN, Hans. **General Theory of Norms**. Transl. Michael Hartney. New York: Oxford University Press, 1991. p. 294-295.
[31] Here are some objections to the conception of competence rules as "parts of norms": (1) If the norms governing conduct and sanction have "parts" that do not integrate their strict concept, then they are both parts of an even more complete rule, whose content, however, is absolutely indeterminate; (2) The notions of "complete" and "incomplete" or "part" and "all" norms are incompatible with Kelsen's notion of validity, since the relation of validity, in his thought, is given according to a ratio of "lower" norm to "higher" norm; the relation between "part" and "all" does not seem compatible with the relation between "inferior" and "superior", which can only be logically established between two distinct things - two "entire" or two "parts", one inferior and another superior, of the same object; (3) As Herbert Hart points out, who reduces all kinds of legal statements to prescriptions ends up paying a very expensive price to obtain a pleasant, but artificial, uniformity, disregarding other important elements of law - HART, Herbert. **The Concept of Law**. 2a ed. Oxford: Oxford University Press, 1994.; (4) Describing the competence rules as "parts of rules" says nothing about the competence rules themselves; (5) Saying the competence rules are just "indirect obligations" means to say, on the one hand, they are useless, since they do not have any function until the prescription to which they refer has been edited; on the other hand, at the very moment when such a competence rule is applied, resulting in the creation of the prescription, it becomes totally superfluous, since the prescription norm already regulates, directly the same obligation – FERRER BELTRÁN, Jordi. **Las Normas de Competencia:** Un Aspecto de la Dinámica Jurídica. Madrid: Centro de Estudios Políticos y Constitucionales, 2000. p. 39.
[32] KELSEN, Hans. **Pure Theory of Law.** Transl. Max Knight. Clark, N.J: The Lawbook Exchange, 2005, p. 291; also, KELSEN, Hans. **General Theory of Norms**. Transl. Michael Hartney. New York: Oxford University Press, 1991. p. 294-295.
[33] GUIBOURG, Ricardo. **Pensar en las Normas.** Buenos Aires: Eudeba, 1999. p. 129.
[34] HERNÁNDEZ MARÍN, Rafael. **Introducción a la Teoría de la Norma Jurídica**. Madrid: Marcial Pons, 1998. p. 228.

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competence norms as permissions – such as those proposed by Von Wright[35], Bobbio[36] and, until a certain moment, by Alchourrón-Bulygin[37] - arise at this precise point. They are fully applicable to the proposals criticized here.

The first objection, initially raised by Hart, and formulated more completely by Alchourrón-Bulygin[38-39], points out that, in most normative systems there are, simultaneously, both rules that confer competence (enabling the production of valid rules) and norms that prohibit the use of that same competence, without generating any contradiction. And this would be impossible if competence norms were permissions since permission and prohibition are contradictory deontic propositions.

For example, a soccer referee is normatively enabled to interpret the facts that occur on the game field and, according to this interpretation, determine a penalty kick. The referee has the power to validly put the ball on the penalty kick mark, even if the play actually does not characterize a foul. But, if he does so, he can be punished by the disciplinary commission of the referees, which is usually not participation in the next matches of the championship. That happens because determining fouls that did not really occurred is a valid behavior, although prohibited.

There is no contradiction here because the power (the ability, capacity) to point out (validly) the foul that did not happen has nothing to do with the permission to point it out. When a play that does not characterize a foul occurs, the referee "can, but should not" point to it. This distinction makes power and permission unmistakable, and it is fully valid for the normative analysis of tax competence: having the ability (capacity) to impose a tax is completely independent than being allowed, bound or prohibited - eventually under sanction - to do so.

The big problem of the theory examined is, in fact, its inability to explain satisfactorily the (infrequent, but fully conceivable) cases in which the person who was granted with the competence is forbidden or compelled to use it. Tusseau states that "The permissivist thesis cannot understand some very frequent legal phenomena. It is not infrequent for an authority to

[35] VON WRIGHT. Georg Henrik. **Norma y Acción:** Una Investigación Lógica. Madrid: Tecnos, 1970.
[36] BOBBIO, Norberto. **Teoria Geral do Direito.** Tradução de: Denise Agostinetti. São Paulo: Martins Fontes, 2007. p. 198.
[37] ALCHOURRÓN, Carlos Eduardo; BULYGIN, Eugenio. **Introducción a la metodología de las ciencias jurídicas y sociales**. Buenos Aires: Astrea y Depalma, 1998. p. 106-120.
[38] ALCHOURRÓN, Carlos Eduardo; BULYGIN, Eugenio. Definiciones y normas. In: BULYGIN, Eugenio et al. (comp.). **El lenguaje del derecho** - Homenaje a Genaro R. Carrió. Buenos Aires: Abeledo-Perrot, 1983. p. 11-42.
[39] BULYGIN, Eugenio. Sobre las Normas de Competencia. *In*: **Análisis Lógico y Derecho**. Madrid: Centro de Estudios Constitucionales, 1991, p. 485-498. p. 489.

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have an obligation to use its power"; "Conceiving empowerments as permissions cannot explain such situations, where the same act is both empowered – i.e. permitted – and forbidden"[40]. Or, as Atienza-Ruiz Manero point out, the conception of conferring-power rules as permissive norms is inappropriate to explain the irregular use of these powers[41]. Although it is most common to have permission to perform the acts for what one is enabled, it does not mean that this ability supposes or implies the "permitted" status of this action[42].

The second objection to the permissivist thesis is that it obscures the enormous differences between "nullity" and "sanction". Taking such concepts as equal categories is really tempting because they have an undeniable resemblance: both consist of a "negative" reaction of a legal system to a certain conduct. Nevertheless, such negative reactions are so diverse, and they are linked to such different hypotheses, that treating one as a species of the other is a procedure similar to include tomato tree in the class of leguminous plant, or the dolphins and whales in the class of fishes.

Nullity and sanction (in the sense of penalty) are doubtless different categories. A sanction is applied to who had the duty to behave in a certain way, and violated it; the nullity, in turn, derives from (i) acting outside (*ultra vires*) the sphere of the competence, and/or (ii) unfulfilling the conditions (*onus*) for the regular use of a legal power. The hypothesis of the penalty rule describes the violation, by the debtor of the primary rule, of a duty (prohibition or command) established in the consequence of that logical proposition. The nullity derived from the irregular use of a competence, however, simply cannot be described in that way, since the competent subject is not the "debtor" of any conduct, but precisely the holder of the prerogative to practice the act described in the competence norm.

The conditions that he eventually needs to observe in order to regularly practice that act are not "legal duties", but legal onus. These must-do acts are performed in his own behalf, not in someone else's interest. That is to say: there is no creditor or debtor for the conduct of regularly exercising the competence. The relationship between the subjects affected by the competence norm cannot be described in terms of rights and duties, but only in terms of powers and subjections.

[40] TUSSEAU, Guillaume. Jeremy Bentham on Power-Conferring Laws. **Revue d'études benthamiennes,** nº 3, nov. 2007. Available at: http://etudes-benthamiennes.revues.org/160. Last access: 30/11/2021.
[41] ATIENZA, Manuel; RUIZ MANERO, Juan. **Las Piezas del Derecho.** 2. ed. Barcelona: Ariel, 2004. p. 71.
[42] FERRER BELTRÁN, Jordi. **Las Normas de Competencia:** Un Aspecto de la Dinámica Jurídica. Madrid: Centro de Estudios Políticos y Constitucionales, 2000. p. 20.

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Furthermore, as Moreso observes, while the primary rules (those which impose duties) are only contingently accompanied by the sanction, the conferring-power rules are conceptually linked to the nullity[43]. The absence of sanction undoubtedly prejudices the prescriptive norm effectiveness, but it is far from denying existence or meaning to it. As a matter of fact, any lawyer of any country could easily indicate a legal provision which establishes a non-sanctioned duty. But no one could point out a validity condition whose inobservance would not generate nullity. If the non-compliance to a validity condition does not imply nullity, then, in fact, it is not a validity condition at all.

Finally, there is another peculiarity of empowering rules. If a non-normative action "p" is prohibited, the realization of "p" is still possible, despite the risk of sanction. By the way, the existence of the prohibition of "p" presupposes the simultaneous possibility of either fulfilling or violating it, since the legal requirement of a necessary or impossible conduct would be completely meaningless. Competence norms, on the other hand, behave in a different way. As Makinson exemplifies, when a person tries to celebrate a marriage or issue a passport, but lacks the power to perform those acts, "then we say that he has not in fact celebrated a marriage or issued a passport (for emphasis: has not issued a valid passport) but has only gone through the motions or given the appearance of doing so"[44].

Therefore, Spaak is completely right when he states that:

> To conceive of competence as a special case of permission is simply a mistake. Writers who maintain that competence should be analyzed in terms of permission seem to be saying either (a) that competence 'is' a permission, or (b) that competence 'presupposes' permission. The first alternative is difficult even to understand, and the second alternative does not comport with the facts. For we all know that a thief can sell stolen goods to a bona fide purchaser without being permitted to do so, and a person who is authorized to act on behalf of another can – but may not – act contrary to his instructions.[45]

[43] MORESO, José Juan. El encaje de las piezas del derecho. **Isonomía:** Revista de Teoría y Filosofía del Derecho, nº 15, p. 165-192, out. 2001. p. 169.
[44] MAKINSON, David. On the Formal Representation of Rights Relations: Remarkson the Work of Stig Kanger and Lars Lindahl. **Journal of Philosophical Logic**, v. 15, p. 403-425, 1986. p. 411-412.
[45] SPAAK, Torben. The Concept of Legal Competence. In: **The IVR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law**, may 2005. Available at http://ssrn.com/abstract=923531. Last access: 30/11/2021.

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3 TAXING COMPETENCE NORMS AND NORMAS ON THE USE OF THE TAXING COMPETENCE

In our view, taxing competence is regulated by various types of norms. Each one of them regulates a different aspect of the taxing law-making discipline. None of those norms is "complete" in the sense that it regulates all important aspects of competence. Hence, we subscribe to the "non-unitarian" conception of competence rules, in the line proposed by Calsamiglia and Guastini.

Calsamiglia strongly criticizes the "essentialism" of the "Unitarian" proposals. He offers a classification of the different competence norms, distinguishing among (i) power-conferring rules; (ii) rules that regulates procedures; (iii) rules that regulate matters; and (iv) rules that regulate the specific contents of the standards to be produced[46].

Guastini, in turn, argues that the class of secondary rules on legal production is composed of several sub-classes, which should not be treated unitarily. He discerns five classes of norms: (i) rules that confer the power to create a certain type of law source – law, decree, judicial decisions *etc.*; (ii) procedural rules; (iii) rules that define the scope of the power conferred; (iv) rules that reserve certain matter to a certain law source; and (v) rules regarding the content of future normative activity[47].

Despising some terminological discussions, the essential step is to observe that: (i) some legal utterances confer competence, immediately enabling someone to practice a certain act with a specific normative meaning[48]; (ii) other statements create the very possibility of existence of a behavior with a certain meaning in the normative system; (iii) some legal provisions establish the *onus* that must be fulfilled by the competent subject in order to produce the normative result he sought[49]; (iv) finally, there are also prescriptive rules, which qualifies

[46] CALSAMIGLIA, Albert. Geografía de las normas de competencia. **Doxa:** Cuadernos de Filosofía del Derecho, Alicante, nº. 15-16, p. 747-767, 1994. p. 757.
[47] GUASTINI, Riccardo. **Distinguiendo:** Estudios de teoría y metateoría del derecho. Barcelona: Gedisa, 1999. p. 309.
[48] This is, precisely, the conception of competence norms defended by FERRER BELTRÁN, Jordi. **Las Normas de Competencia:** Un Aspecto de la Dinámica Jurídica. Madrid: Centro de Estudios Políticos y Constitucionales, 2000. p. 134 and 147, quote 268 –, MENDONCA, Daniel. **Las Claves del Derecho**. Barcelona: Gedisa, 2000. p. 134), and, according to them, also Hernandez Marín.
[49] SPAAK, Torben. Norms that Confer Competence. **Ratio Juris**, v. 16, n. 1, mar. 2003. p. 99 – conceives competence norms as technical norms: "My own view is that competence norms do not guide human behavior by giving reasons for action, and that, consequently, we should not recognize them as genuine norms. Competence norms fulfill the same function in practical reasoning as so-called technical norms,

such normative action as prohibited, permitted or compulsory, eventually under a penalty or a sanction.

The main problems found in the proposals on the nature of taxing competence norms are related to the fact that they seek to insert, in the structure of a single and typical prescriptive norm, both the regulation of (i) the validity of the tax created and (ii) the deontic "status" (permitted, prohibited or obligatory) of the use of taxing competence.

In our opinion, it is the consequence of the dissemination of a very restrictive concept of juridical norm, by Brazilian Tax Law scholars. According to it, for a statement to be considered a "norm", it must be framed in a quite specific formal structure, on which one of the deontic vectors (permitted, prohibited or obligatory) is necessarily present. This posture disregards the existence of other types of norms, as important as prescriptions, to the organization of life in society.

As stated above, all kinds of normative utterances - and not only the prescriptive ones - have their place in the discipline of taxing competence. There are, first, constitutive-performative utterances, whose predicative structure "empowers" certain individual (Union, States, Federal District or Municipalities) to create some specific tax. For example, given the provisions of Article 156, III, of the Brazilian Constitution, federal entities defined as "municipalities" are immediately contemplated with the prerogative to validly impose the so called IPTU ("*Imposto Predial e Territorial Urbano*" – a tax on urban real property, commonly named as real estate property tax).

This empowerment rule does not confer, by itself, the "right" to institute the IPTU. It just confers the "power" to validly impose it. The existence of the competence only indicates that, if the subject "s" really creates the "IPTU", obeying to all validity conditions, then someone (normally himself) will have the "right" to require property owners to pay the tax, as long as the taxable persons will have the duty to comply with it, paying the tax whenever the taxable event occurs. The "right" (permission) to edit the rule may exist - and it seems that it actually exists in the IPTU case - but it is relatively independent of the "power" to edit the norm. The existence of this right presupposes the existence of the power to validly issue the tax norm, but the reciprocal is not true.

Hence, we do not agree with Moussallem when he says that conferring competence implies a legal relationship between the competent entity and the community, in which the

which means that they have the same kind of normativity, or, if you will, normative force, as technical norms".

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former is the holder of the right to create legal norms, and the latter is the "debtor" of the legal duty not to prevent the use of this entitlement[50]. In our opinion, when an entity is classified as "competent" to establish a tax, nothing is necessarily said about his "right" to create the tax, and no duty is given to the addressee of his normative discourse. This empowerment rule only confers validity to the tax the competent entity sets, which means that the taxable people will be ineluctably subjected to the normative force of the tax incidence utterance. In other words, the incidence of the validly created tax rule occurs independently of the will of the taxable person. He or she cannot prevent the existence and normative force of the tax created, in a juridical sense, even though it is possible for him or her to violate its precept, by not paying the tax despite the existence of a taxing event.

Likewise, the normative utterances, which deny competence for a certain entity to impose a particular tax, neither "prohibit" its edition, nor give to the would-be taxable person a "right" to prevent it. Actually, they establish an impotency, incapacity, disability case, in which one is simply unable to set a valid tax norm. At the same time, it sets to its addressees a situation of immunity (non-subjection) to the norm irregularly issued.

In sum, rules that confer or deny taxing competence merely indicate the legal possibility or impossibility of editing valid taxation rules in certain circumstances. They have nothing to do with the deontic regulation of the use of the power, which is regulated by other norms, or even simply not regulated (in this case, the system has a gap). The empowerment rules and its deontic regulation are totally independent, although it is possible that both of them are derived from the interpretation of one single legal provision.

Notwithstanding, "being competent" is a necessary but insufficient condition for the valid use of competence. That is, being competent is not enough to create a valid tax rule. For creating a regular tax, the competent subject must also fulfill the material and formal limits of his legislative action. From the point of view of the competent entity, that norm has the structure of a technical standard. From the point of view of the recipients of the competence rule, the same utterance shall be rewritten as a definition, or as a constitutive rule (for example: "If the competent entity to impose the IPTU respects all the formal and material limits to that institution, then he produces a fully valid IPTU norm").

What is important here is to observe that neither the competent entity has the duty to obey the legislative procedure and the material limits, nor the addressees of the rule have the

[50] MOUSSALLEM, Tárek Moysés. **Fontes no Direito Tributário.** São Paulo: Noeses, 2006. p. 83

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right to demand its observation. Instead of it, the competent entity has the *onus* of observing these conditions so that his performance is to be considered valid. If these conditions are observed, then the addressee of the norm will be subjected to that statement, that is to say, he will be obliged to fulfill it, although it is possible for him to disobey this utterance, eventually under sanction. If the onus are not observed, the result will be, according to other norms of the system, or (i) the production of another valid norm, but different from that which the subject was reportedly intended to produce; or (ii) the production of an "existing" but invalid standard, such as the institution of an unconstitutional or illegal tribute, whose demand by the government would represent irregular confiscation; or (iii) finally, the production of a pseudo-normative statement, inexistent to the legal system, as it would be, for example, a tax ruling with normative intention issued by a group of students.

With a basis on the foregoing arguments, following is our proposal for the formalization of the norm ("NCompx") which regulates the valid creation of the tax "x":

NCompx = Csx ∧ p ∧ t ∧ e ∧ M → RIx, where:

- "Csx" represents all the entities with the regular taxing competence;
- "p" means "procedure";
- "t ∧ e" are the locational and temporal requirements that the competent subject must observe in his normative action;
- "M" is the material content of the competence;
- "RIx" is the incidence rule of the "x" tax.

That is to say, "if the subject Csx, competent for the imposition of tax x, observing procedure p, the conditions of time (t) and space (e), plus the matter for whose regulation it is competent (m), then it gives birth to the rule of incidence of tax x". If any of these variables is not satisfied, no "RIx" is produced, but either a pseudo-norm or another norm, which could be valid or invalid.

This conduct of regularly producing Csx can be allowed, prohibited or obligatory, without this having any reflection on the validity of the behavior of Csx, that is, without having any effect on production or non-production of the tax norm "Rix". Although the use of the taxing competence is usually permitted to the competent entity, there are, in Brazilian Law, some cases in which it is mandatory, or prohibited, to validly issue a tax (or a tax exemption) legislation.

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On the one hand, for example, most of scholars agree that the Brazilian States and the Federal District are not only authorized, but actually obliged to institute the ICMS ("*Imposto sobre a Circulação de Mercadorias e Serviços*", equivalent to a value-added tax, under some restrictions, incident on the sales of goods and some specific services). It is also common to say that States, Municipalities and the Federal District are compelled to establish a tax on the remuneration of the government employees, in order to fund the social security.

On the other hand, Municipalities and the Federal District have been legally forbidden to establish exemptions on the ISS tax ("I*mposto Sobre Serviços*", equivalent to a municipal sales tax, incident on most of the services), in some cases. Although in some cases these exemptions can be declared null, in other cases the prohibiting utterance does not set invalidity on the exemption norm, but only a penalty for the public agent who did not obey the duty of non-establishing the exemption (Art. 8º-A of Complementary Law n. 116/2003, combined to Art. 10-A of Law n. 8.429/1992). That is to say: the exemption is valid, although the public agent was forbidden to establish so.

There are no concrete rules in Brazil that prohibit the valid use of the taxing competence. Usually, normative provisions contrary to the practice of a taxing activity will be interpreted as truly denying competence, and not as merely prohibiting its use. So, the non-compliance with these norms will normally generate nullity, and not sanction. But it is not unconceivable a rule that prohibits, under sanction, the use of some taxing power, instead of establishing nullity for this action.

It would be the case, for example, of a rule that ordered a federated entity to establish an exemption, under the sanction of not participating in the Union budgetary transfers, in the case of disobedience to this duty. Here there would be no incompetence at all, but a real prohibition of the valid use of a competence.

Finally, we do not agree with the authors who say that the nullity derived from non-observance of the norms that regulate taxing competence depend on the opinion of a judicial or administrative body. In our view, it simply depends on the non-compliance with such rules, that is, on the non-accomplishment of any of the *NCompx* terms. In some cases, the authorities who should recognize and declare the nullity of a tax fail on the observation of this duty. However, it does not mean that the nullity does not exist, since nullity corresponds, tautologically, to the non-compliance of a condition of validity. The judicial error on the interpretation of the facts or the norm cannot be equated to the very inexistence of the fact or of the norm.

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CONCLUSIONS

The proposals for taxing power rules formalization found in Brazilian Tax Law Science always seek to insert the regulation of the tax empowerment in the tables of a prescriptive structure. However, transferring the logical structure of the legal prescriptions in order to understand the legal competence phenomena implies several theoretical drawbacks.

First, the formal and material limits the competent entity must fulfill in order to regularly establish a tax can hardly be presented as "duties". Second, the "power" to issue the tax legislation is completely independent of the "right" to do so. Finally, there are serious obstacles for interpreting the nullity declaration as the imposition of a penalty.

The misconception pointed out above is due, in part, to the use of a very restricted concept of “juridical norms”, in which they are identified only with the prescriptions. The excess of attention given to normative prescriptions that impose duties, backed by threats of sanctions, obscures the analysis of other categories that are as important as such prescriptions, for the regulation of human behavior. It is time to give the appropriate relief to the study of other kinds of norms, reviewing some assumptions with which the Brazilian Tax Law scholars have been working.

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