Publicação: 30 de Abril de 2023

Digital Object Identifier https://doi.org/10.33911/singularsh.v1i4.144

CRYPTOACTIVES TAXATION AND LEGAL LIMITATIONS OF THE ECONOMIC POWER

MARIANA BARBOZA BAETA NEVES MATSUSHITA.

ABSTRACT - This paper has as its goal to analyze taxation of cryptoactives and the legal limits of the economic power. The paper proposition consists in pointing out the main questions about this problematic, aiming to pin point how the lack of regulation on cryptoactives can undermine the rule of law, as well as legality, neutrality and tax equality. Therefore, in the first topic, are regarded a bundle of decisions from the regulatory agencies, namely, the Economy Ministry – Ministério da Economia - branches, as well as the Central Bank – Banco Central - from the legal perspective to extract concrete and objective definitions. In the second topic, an exposition about the rationale of the Federal Revenue Office of Brazil – Receita Federal- about the topic was made, in order to highlight that despite the lack of regulation, Cryptoactives have a tax outcome defined by this Economy Ministry branch. In the third topic, two academic manifestations about Cryptoactives taxation are analyzed, showing the schism between the legal dogmatic and the rationale built by the Federal Revenue Office. Finally, in the fourth topic, is shown that the lack of legal definitions suited for cryptoactives can be harmful both for the State and tax payers.

KEYWORDS - Cryptoactives; Taxation; Legal-limits-of-economic-power.

I. INTRODUCTION

In order to shed light upon the correct cryptoactives taxation, its needed to delimitate precisely its legal nature. Thus, the legal delimitation of cryptoactives must regard the way in which the legal system addresses this subject. It's important to highlight, that there is a scarce legislation about this specific subject, therefore, doctrine, jurisprudence and the public administration, within the limits imposed by the legal system itself, sometimes fit cryptoactives within pre-existent concepts.

This paper, given this context, has the precise goal of situating the debate within the realm of tax Law, indicating how tax legislation currently rule economic operations regarding this new phenomenon.

It must be highlighted that intention of this goal is to delimitate the legal limitations of the economic power, especially regarding actives and virtual currencies, taking in mind that the object of research, is the unchained use of this new phenomenon within the national market, which is harming economic agents and undermining warranties of a Democratic State of Law based upon equity and the rule of law.

In the first topic, the text will approach the legal discipline of cryptoactives in the Brazilian legal system, while appointing the way regulatory branches should approach the theme. It will be analyzes as well the scarce legislation that predicts some regulation to the cryptoactives.

In the second topic, regarding the field of tax law, will be presented the rationales given by the Tax Administration (within all federative circuits) about the cryptoactives taxation. Such analysis is fundamental to understand the guidelines given by the doctrine along with the administrative regulation of the subject, exposing the points of convergence and divergence between the academic production and the taxation practice.

In the third topic, will be exposed the guidelines about the correct application of tax rules within cryptoactives operations, regarding previous academic works and doctrinaire rationale about cryptoactives taxation in Brazil.

It is natural that the text does not intent to make a complete bibliographic review, since this is not the main goal of this paper, but it will present some legal and normative directions pointed out by the Brazilian tax doctrine.

Finally, in the fourth topic, the text will analyze how tax rules can serve as a stepping stone for rule of law and equity violations, highlighting, by one hand, how the use of unmeasured and untamed cryptoactives operations can be highly harmful to the Democratic State of Law and, by the other hand, how taxation without a previous normative subtract can affect directly legality and rule of law principles.

Meanwhile, its relevant to highlight that the term "cryptoactive" can apply to both "cryptocurrencies", commonly used as payment methods, as "Non-fungible tokens" (NFT's), "stablecoins", and others.

The use of the term cryptoactive within this paper will indicate, therefore, that the goal is an holistic analysis of

cryptoactives, regarding that any framing could lead to conclusions that could be inapplicable to other cryptoactives as the first topic will show.

II. A LEGAL DISCILPLINE OF CRYPTOACTIVES IN THE BRAZILIAN LEGAL SYSTEM

Cryptoactives have their origin in the paper "Bitcoin: A Peer-to-Peer Electronic Cash System", written in 2008 by Satoshi Nakamoto, in which the guidelines for this new phenomenon were traced. In this paper, Nakamoto has structured in detail the functioning of the cryptoactives "Bitcoin", which initially had the goal of substitution of the traditional fiduciary currencies emitted by countries [7]. Nakamoto, after the financial crisis of 2008, has understood that the international monetary system, based upon the centralization of monetary emissions through state branches was doomed to fail, taking in account that the demand for paper cash was controlled by the governments and not by a market-based demand.

Through this reasoning, "Bitcoin" would serve as a trusting mechanism for substituting paper-based cash emitted by State, especially due to its decentralized distribution and scarcity. Bitcoin value would be freely established by the market, without any state intervention that could alter its pricing system.

The creation of "Bitcoin" has represented a breakthrough for the global monetary policy, since after 2008 the market has perceived that traditional fiduciary currencies were not the only way of making payments within a monetary policy.

Since then, new cryptoactives have emerged, varying their shapes and functioning. There are cryptoactives that resembles "Bitcoin", such as "Ethereum", "Tether", "Litcoin" etc. Nevertheless, there are cryptoactives that are aimed for another purposes that are not to serve as means of payment, that is the case, for instance of NFT's which represent digital unique goods, which their value is intrinsic to the good itself and has an economic role akin to a work of art [1].

Therefore, the legal regulation must consider the specificity of each kind of cryptoactives, regarding that each of them acts in a specific way within the market and society. The same applies to their taxation.

In this context, can be highlighted a few manifestations from regulating branches that dealt with cryptoactives in different ways. Taking in consideration their functioning and structure. According to the Mobiliary Values Commission – CVM, for instance, they must be subjected to an "Initial Coin Offering" ruled by the movables market that may depend on the nature of the cryptoactives to be offered to the market. In 11^{th} October 2017, a note about the "Initial Coin Offering", affirmed that the public offering of cryptoactives "depending on the economic context of their emission and rights given to their investors, may represent movable values, in the terms of art. 2º, of Lei 6.385/76" [4].

According to the note, the "Initial Coin Offerings" can be comprehended as "public acquisition of resources" which have "as countermeasures the emission of virtual actives (...) among the investor public" [4]. Therefore, the branch comprehends that cryptoactives offered in countermeasure can, depending on the economic context and its market functioning, be subjected to immovable values rules, according to art. 2º Lei nº 6.385/1976 [3].

It can be observed, therefore, that the CVM, whose role is to discipline and survey the applicable rules to movables, has established a rationale that the cryptoactives may perform a function identical of the movable values, representing some rights and warranties to their owners.

In this context, CVM has asserted that certain operations of Initial Coin Offering can be featured as operations of movables that have already a legislation and specific regulation, therefore, subjected to the applicable rules.

The situation is similar to companies (public or not) and other suppliers who take resources through an Initial Coin Offering, in operations in which the economic function corresponds to the emission and negotiation of movable values.

The Central Bank of Brazil ("BACEN") by the other hand, in the document "Questions and answers about virtual currencies" [6], states that it doesn't emit, rule or secure any virtual currency from the monetary regulation point of view.

BACEN states that

> The so called "crypto currencies" or "cryptographic currencies" are digital representations of value, which spans out of the trust embedded into their functioning rules and in the participants chain. They are not emitted by the Central Bank, thus they are not to be confused with any Real monetary pattern, of enforced flow, or with any other monetary authority pattern.

By the other hand, the Economy Ministry, through the Circular Memorandum SEO n 4081/2020/ME, has authorized the use of cryptoactive transfers in the capital constitution of firms. At that time, the Debureaucratization, Management and Digital Govern Special Secretariat was questioned by São Paulo's Trade Board (i) about the legal nature of cryptocurrencies, (ii) if any legal prohibition could deter the social capital constitution through cryptocurrencies, and (iii) which formalities the Trade Board should observe in case of firm capital constitution through cryptocurrencies.

According to the Economy Ministry, the legal nature of cryptocurrencies is the same of financial actives, which means they have a intangible good nature "which has a pecuniary valuation, are negotiable and can be used in different ways (investment, product purchase, service access, etc.)" [5]. In addition, the Economy Ministry states that there is not any legal prohibition to the use of cryptocurrencies to social capital constitution on limit liability companies, since the III, of article 997, of the 2002 Civil Code, predicts the possibility of using "any species of goods, that may be valuable" [5] to constitute the social capital.

Adding to the infra-legal rules emitted by regulatory branches, the National Congress has developed Law Propositions which aim to regulate the cryptoactive subject in Brazil.

Within this context, we highlight, (i) the Law Proposition 4.401/2021, which its scope has the intention of including

virtual currencies and air miles reward programs as payment agreements, submitted to the supervision of BACEN; (ii) Law Proposition n 3.825/2019, which its scope has the intention of regulate services regarding to operations with cryptoactives within electronic platforms; and (iii) Law Proposition n 3.949/2019, which has as it scope the intention of discipline transaction involving virtual currencies and functioning of cryptoactive exchange.

It can be observed, therefore, that the regulation of cryptoactives in Brazil is realy scarce, there are only sub-legal rules, made by regulatory branches as well as Law Propositions. The scarcity of rules implies in two immediate effects, which are: (i) a broad freedom for economic agents to act within the market trough cryptoactives, escaping the state control and adopting economic structures without a legal backing, and (ii) a lack of legal support undermining the economic agents security in cryptoactive operations and giving a margin for scams, frauds and other abuses of economic power.

Thus, it can be pinpointed the need of incorporation to the legal system within the infra-constitutional rules, control mechanisms, as well as supervision, discipline and regulation and legal conception of cryptoactives.

III. CRYPTACTIVES TAXATION WITHIN THE TAX ADMINISTRATION POINT OF VIEW

Even though it lacks within the regulatory point of view a precise definition about the legal nature of cryptoactives, tax authorities have manifests themselves about the subject, fixating some fundamental balances and creating tax rules regarding straightly in cryptoactive operations, despite of any legal qualification about these active exist.

In this context, the Federal Revenue Office has fixed a rationale about its tax nature and applicable taxing regime, through the "Questions and Answers about the Income Tax over Natural Persons" from 2017, when, within the answers 447 and 607, has brought a scrutiny about the way of declaring cryptocurrencies. Within answer 447, the Income Office has affirmed that virtual currencies "must be declared within the Goods and Rights file as 'other goods, since they can be compared to a financial active'". In answer 607, the branch has affirmed that the income obtained through the virtual currency selling must be taxed through the gain of capital system, given that the monthly alienation is superior to R$ 35.000,00.

In 2019, was published the Normative Instruction n 1.888/2019, that institutes and rules, currently, the "mandatory presentation of relevant information from operations made with cryptoactives to the Special Secretariat of the Brazilian Income Office". It may be observed from the content of the referred normative instruction, that the national tax authority has established a series of concepts about the elements that comprehend the cryptoactive market. Among these concepts, the notion of cryptoactives itself can be highlighted, which according to the Federal Income Office consists in a "digital representation of the value attributed by its own account unity, in which the price can be expressed in a sovereign local or foreign currency" and can be electronically operated, through cryptography and other registration means. In addition, the Federal Income Office has informed that cryptoactives can serve as an instrument of investment, as well as, value transferring and services access mean, but cannot be considered a fiduciary currency.

While this broad definition allow a conceptual overture of cryptoactives that gives to the Federal Revenue Office the power of taxing with little caution any operation of the crypto market. Which is the same as saying that the broadness of the cryptoactive semantics is only possible due to the lack of regulation about the subject on legislation. The Federal Revenue Office is not the competent branch to determine the legal content of these actives, and it does so, only due to the lack of any legal delimitation within the regulatory and private legal realms.

According to the Normative Instruction n 1.888/2019 there are a series of accessory obligations imposed upon the cryptoactive owners and crypto exchanges, aiming to enable the information from cryptoactive transactions within the country transmission. The items that must be transmitted to the Federal Revenue Office are (article nº 7 of the Normative Instruction n 1.888/2019): (i) the transaction date, (ii) the kind of transaction, (iii) transaction parties, (iv) kind of cryptoactive transitioned, (v) the amount negotiated, until the tenth decimal code, (vi) amount of the transaction in Reais, excluded services taxes paid for the concretization of the business (vii) amount of other taxes, whenever necessary. In addition, if the operation has been made in "exchange", the Brazilian party must inform the name of the "exchange" to the Federal Revenue Office.

Roughly, these channels (Questions and Answers of 2017 and the Normative Instruction n 1.888/2019) have uniformed cryptoactive legal regulation from the federal taxation point of view, imposing to crypto currencies market operators the main obligations (income tax about the capital surplus) and the accessory ones (transactions informational disclosure).

Regarding the income tax about the capital surplus, the taxation is made upon the following context (art. 21 of Lei nº 8.981/95): (i) earned gains until R$ 35.000,00 are exempt; (ii) 15% of a profit share equal or superior to R$ 35.000,00 that do not surpass R$ 5.000.000,00; (iii) 17,5% upon the profit share that exceeds R$ 5.000.000,00 and does not surpass R$ 10.000.000,00; (iv) 20% upon the profit share that exceeds R$ 10.000.000,00 and does not surpass R$ 30.000.000,00; and (v) 22,5% upon the profit share that surpass R$ 30.000.000,00.

Regarding the accessory obligations, the Federal Revenue Office has determined that the information about cryptoactives must be transmitted through a digital certification, from 2020 on. In the advent of tax payers not comply this demand, they are subjected to impositions predicted in article 113 of the National Taxation Code, which are the infraction registration and fine payment (§ 3º of the aforementioned article).

In this normative context, the Federal Revenue of Bra-

zil has published two consult solutions that present, in a systematic way, its rationale about the tax treatment of the cryptoactives. In the consult solution of the general-management of taxation (*COSIT*) nº 214 of 2021, the tax authority highlighted the incidence of the income tax in the capital earnings from the transaction with cryptoactives with a value superior to R$ 35.000,00. It may be observed that the incidence of income tax does not depend on the fulfillment, in current currency, of the value attributed to the cryptoactive. Thus the exchange of different cryptoactives, that generates a surplus, even if incomplete, of property will be taxed in this way. At that time, the tax payer which has demanded the office questioned if the use of a cryptoactive (bitcoin) to acquire another cryptoactive (stablecoin) would be subjected to taxation as a capital surplus. In this scenario, the Federal Revenue Office has decided that the use of a cryptocurrency in the acquisition of another is framed as alienation of goods or rights", in such a a way that the transaction is subjected to income tax for capital earning, highlighting that "not converting the good or right acquired into fiduciary currency does not alter the incidence of income tax upon the capital earning emerged from the exchange". The other solution of consulting that has approached the subject (Consulting Solution *DISIT/SRRF* 06 nº 6.008/2022) has attached the answer given to the Consulting Solution of *COSIT* nº 214/2021, with the same rationale.

In the state level, the Treasury Secretariat from States have been considering that the operations regarding cryptoactives are out of the scope of the tax upon operations of goods transportation and services as inter-state and inter-municipal transportation and communications, even though the operations and services originated from the foreign lands (*ICMS*). In this sense, the answer to consulting nº 22.841/2020 is highlighted, which was published by the Treasury Secretariat of the State of São Paulo, in which the state level authority affirms that

> Despite the fact of a given lack of definition about the legal nature of cryptocurrencies, what can be affirmed is that: (i) they are not destined to consumption, and therefore, are not subjected to merchandising; and (ii) their transactions do not represent circulation operations. Thus, they cannot be considered as goods and, being the operations regarding them pure financial transactions, they are not subjected to *ICMS* taxation.

Due to that, there are not so many discussions regarding the incidence of state level taxation about cryptoactives.

Finally, in the municipal level, can be highlighted that many mean-activities that are made with cryptoactives can be subject of *ISS*. About the subject, may be quoted that cryptoactives configure two kinds of activities: (i) the so called mining, in which computers are dedicated to calculate the transactions cryptography, rewarding the miner with other cryptoactives; and (ii) the activity of acquisition and selling of these virtual actives broking.

The mining activity may be framed as a service, which could allow taxation from performing services of any nature tax (*ISSQN*). This is purely theoretical, since cryptoactive mining is not listed in the annex of Complementary Law nº 116/2003 and therefore, there is no prediction that could back crypto mining taxation. Nevertheless, the intermediation, according to § 4th of article 1st of Complementary Law nº 116/2003 states that *ISSQN's* incidence does not depend on the name given to the service performed. Thus, the broadness of the legal text could allow the framing of cryptoactive broking within item 10.05 of the aforementioned list.

Nonetheless, being a recent innovation, mining services of exchanging broking are not effectively listed within the annex of Complementary Law nº 116/2003. In fact, many services akin to it are listed but nothing that may frame it with precision. It must be said that the exchange services are new and not previously predicted, which is why the extension of the item 10.05 could only be possible thorough analogy, which is strictly forbidden by § 1^{st} of article 108, of the National Taxation Code. In this sense, it has not found any manifestation of the municipal authorities about the possibility of taxation of exchanges through *ISSQN*.

IV. CRYPTOACTIVE TAXATION WITHIN THE TAX DOGMATIC

About the hermeneutic constructions formulated by the Federal Revenue Office of Brazil and other tax authorities, the tax dogmatic has developed some considerations about the incidence of taxes upon cryptoactives. Such considerations are of special importance to delimitate the scope of the subject proposed by this paper, reason why we are now exposing the main aspects of the dogmatic discussion about the topic. It must be highlighted, priory that it's not the intention of this work to fill all the blanks on the dogmatic subject, neither to approach every manifestation about cryptoactives, regarding that this is not this study goal. Nevertheless, to calibrate an analysis about cryptoactive taxation and the legal limitations on the economic power, it's fundamental to expose, even if partially, dogmatic manifestations about the subject.

In this context, it was verified the existence of seven papers published in reviews and annual journals that approached the subject of cryptoactives. Within this list, two works were selected to represent the main questions about the dogmatic of cryptoactive taxation. The works, along with bring pioneers about the subject, were made based upon concrete data and the traditional doctrine, which justified their election.

The first work to be analyzed is the paper "Cryptocurrencies and the possible tax outcomes from the national legislation" from Tathiane Piscitelli. The text makes, initially, a brief exposition about data. After the delimitation of the subject, the author approaches the ways of cryptocurrencies acquisition and highlights three forms: "mining, exchanging a currency for another or purchasing" [9].

About the first form f cryptoactive acquisition (mining), the author highlights that the article 43 of the National Taxation Code specifies that the income tax has as a generator

factor the "acquisition of economic and legal availability" of income, originated from work, capital or combination of these two economic factors, or earnings from any nature, comprehended as ways of property additions which are not originated from work of capital [9].

About the subject, the work points out that, considering the inexistence of elements that configure capital earnings and the inexistence of any work, understood as human efforts, the first framing possibility of the generator factor of income tax would not be applicable to cryptoactive mining. In the same sense, regarding that for the configuration of earning of any nature,

> is necessary the existence of "property additions" which are not encompassed by the concept of income. The verification of earning presupposes the existence of a prior property situation that incorporates itself to a new one. In this case, as cryptocurrencies are generated by a system, there is no prior good that justifies the property addition effectively and, therefore, income tax taxation [9].

Thus, from the income tax point of view, cryptoactives would not be framed into the incidence field of the tax rule, given the lack of typical elements of capital rewarding, any king of labor or prior property situation that may sustain the existence of a property addition [9].

Nevertheless, the author says that, if the miner charges taxes for the operation or activity acceleration, there will be incidence of income tax, given that a contractual legal relation (if the miner is hired, through a payment beyond the acquisition of only new cryptoactive by a third party). In this specific situation, its framed the remuneration for the activity of mining, which would provoke the income tax incidence [9].

Regarding the *ISSQN* incidence upon mining, the author quotes two items from the annex list of Complementary Law n 116/2003: (i) 10.02, which is about the broking of values and (ii) 1.03, about services of data processing [9]. Considering that the values broking depends, necessarily on the existence of two interested parties aside the broker himself, which are (i) the buyer and (ii) the seller, it is evident that mining cannot be qualified as a service described on item 10.02. According to the author, mining of new cryptoactives does not imply that there are two parties interested into an operation.

Nevertheless, the text adverts that, whenever verified an additional payment for the speed of mining enhancement, the incidence of *ISSQN* may be effective, if the essential criteria for its incidence are verified [9].

About the second and third forms of acquisition of cryptoactives (purchasing and exchange), the text highlights that the acquisition itself through payment with fiduciary currency could not me questioned by any tax authority for taxation purposes, given that the definition of cryptoactives are regarded as financial actives, and therefore, cannot be taxed in their purchasing [9].

Concerning the exchange, situation in which a owner of a cryptoactive exchanges it for another cryptoactive from another nature, the author states that we are facing a situation akin to a permute. In this context, highlights that the figure of permute is very known within Brazilian tax law, which recognizes the incidence of income tax upon the capital earning if the permuted goods have different declared acquisition values [9].

Upon the conclusion of the analysis of possible ways of taxation of cryptoactives in Brazil, the text brings a topic dedicated to identifying the possible ways for the subject evolution,

> Other many questions deserve further reflection and may constitute na agenda of research on cryptocurrencies taxation; as how the evaluate with caution, the acquisition value, especially when a wallet grows from repeated operations? A possible hypothesis is that the rules regarding taxation on income tax give answers through analogy. By the other hand, how to bet on this alternative given the lack of definition about the regulation of virtual currencies? [9].

The author adds important questions that must be faced by the scholars about the possibilities of cryptoactive taxation. From the analyzed text, may be inferred that a few answers could be given at the time about the fundamental question: how cryptoactives must be taxed in Brazil?

Despite the herculean effort of the author to approach the subject, it's verified that the presented answers were not considered to the formation of the rationale given by the tax authorities, specially the Federal Revenue Office.

The second work analyzed was the paper "Taxation of Investments in Bitcoins and Other Virtual Currencies: International Trends and the Brazilian Approach", from Flávio Rubinstein and Gustavo Vettori [10].

The authors begin the text with the delimitation of the subject and the state of art of cryptoactive taxing worldwide and within Brazil. After a brief explanation, the text braces the regulatory and tax challenges inherent to the cryptoactive market, specially focusing on international trends of the subject.

From the regulatory point of view, the text highlights that Japan was the first country to recognize bitcoin and other cryptoactives as fiduciary currencies (mandatory flow currency), through the "Virtual Currency Act" published in 2017. By the other hand, highlighted countries that banished operations with cryptoactives such as Argelia, Bolivia, Kyrgysztan and Nigeria. The text highlighted that there is still a tendency on regulatory branches on questioning the nature of mandatory flow currency on cryptoactives, publishing official notes about the risks and deficiencies on the use of these goods as currencies.

From the taxation point of view, the text also highlights that many countries, including Brazil, as shown in the second topic, have guides to shed light into tax payers about the ways tax authorities understand the tax incidence and the correct

information about cryptoactives. In addition, the authors refer that:

> Tax scholars have even highlighted the risk of virtual currencies replacing tax havens as the weapon of choice for tax evaders. Since their operation is not dependent on traditional financial institutions, such currencies may be used in an attempt to circumvent the international transparency and reporting standards currently in place, such as the Foreign Account Tax Compliance Act (FATCA) and Common Reporting Standard (CRS). This concern has been shared by the US Secretary of Treasury, who stated that his department is working with its G-20 counterparts "in making sure that cryptocurrencies don't become the modern version of the Swiss numbered bank accounts" [10].

After the considerations about international trends, the text has passed to approach the many possible ways of coping with cryptoactive taxation according with the Brazilian legal system, making identical conclusions as the ones made by Thatiane Piscitelli.

It is acknowledged in this context, that the tax dogmatic about cryptoactive has adopted a conservative posture, despite the hermeneutic boldness of the Federal Revenue Office of Brazil. In fact, as will be shown in the next topic, cryptoactive taxation demands a more acute legal action, especially on the regulatory level.

V. A CRYPTOACTIVE TAXATION AND THE LIMITS OF THE ECONOMIC POWER

Taxation is the mean throughout the State can capture the income needed to sustain the bureaucratic machine. Tax law, nevertheless, is the way the tax payer protects himself from the State collection rampages. It's through the limitations of taxing powers and the competence partition between the federated entities pointing the hypothesis of tax incidence that the Federal Constitution of 1988 delimitated the field of state action within the taxing realm. It is fundamental, therefore, the statement that the State cannot, without legal backing, make a tax incident upon an economic fact without a prior legislation that gives origin to the tax incidence.

This posture is fruit of legality, the constitutional value given by II of article 5th and regarding the tax subject, I of article 150, both from the Federal Constitution of 1988. About legality content, Luís Eduardo Schoueri states that:

> The content of Legality principal is: the legislator does not contempt himself in demand that the tribute may be generically predicted by law, its not also enough that the definition of the tax hypothesis is given by law: also the normative consequence must be in it, which is in and the quantum debeatur, represented by the definition of the passive subject of the calculation base and the rating, all must be predicted by law. Must be said, both the antecedent (hipothesis) as the legal consequence of taxing are law subject. In other words (. . .), its demanded that every *matrix of tax incidence rule* is a subject of law [11].

Nevertheless, the tax Law must obey the neutrality principle, here understood as "tax neutrality regarding the free competition, aiming to guarantee a equal in competitive conditions market, reflex of the competitive neutrality of the State" [11], as well as the principle of equality, which its content determined the equal approach to whoever is in an inequality position, given the level of inequality one bares.

From the shock of these three normative elements, can be inferred the taxation concerning cryptoactives must, necessarily be sustained in a constitutional and legal backing, and cannot be allowed that some economic structures may be formed with the intent of escaping taxation, using cryptoactives as a way of subsiding tax evasion.

Tax Law, in addition to order the way in which the State acquires funds for its maintenance and protect tax payers against abuses, must also, as an instrument of limitation of economic power, take other forms that may be more and more complex.

Cryptoactives, in this context, consist in more than one way of economic agents acting in the market, reason why they must be regulated by the legislation and taxed by the State, in the exact terms predicted by the Federal Constitution of 1988.

The problematic takes concerning contours, when the lack of an effective regulation makes the Federal Revenue Office to establish, without a legal backing needed for that, guide lines about tax Law in normative instruments that are not competent for such. As must be reminded, predictions I, II and III from the *caput* of article146 of the Federal Constitution of 1988, its subject of Complementary Law to deal with competence conflicts between federated entities, regulating constitutional limitations for taxation power and therefore, establishing general guidelines to tax subjects. This triad of competences given to Complementary Law cannot be casted aside without violating the constitutional predictions.

On this subject, the lack of rules within bank, financial or private Law that deals with cryptoactive deter tax Law from giving the correct orientation about the matter. Its needed to remind the valuable lesson of Mariz de Oliveira, in which

> In fact, business relations, in which lies tax obligations, are regulated by private Law norms, throughout property if constituted and can be altered by an infinity of legal business, some typified by the legal system and others possible by the exercise of the freedom of hiring (Civil Code, art. 412, according to, "*the freedom of hiring will be exerted by and in the limits of the social function of the contract*").
>
> That's why even the National Taxation Code (CTN) preserves the regency of private Law about the acts of civil life and gives to the tax Law the function (goal) to discipline the respective tax effects, prediction that declared in the art. 109

through the clear command that "*the general principle of private law are used to research the definition of the content and reach of their institutes, concepts and forms but not to delimitate the respective taxing effects*".

In the phenomenology of tax incidences, this is a pillar o four legal system, for the essential reason of that taxation concerns the economic subtract from the person activity, upon the contributory capacity that one may have due to be a owner or property rights or making an economic content business [8].

It may be highlighted that cryptoactives have raised drastically the complexity and sophistication of structures of money laundry, due to the possibility of transactions without any proof of origin, destiny or persons bounded, in a way that the lack of a suitable regulation deter the monitoring of this activity in an effective way.

The Federal Revenue Office actuation with the demand for information disclosure on cryptoactive transactions, can be highlighted as a mean of deterrence of economic structures used for illicit means, but is insufficient and can be taken as unsuited for the branch's finality.

VI. FINAL REMARKS

Due to the theoretical construction aforementioned, can be inferred that Brazil need to advance, in its regulation, about the due legal management of cryptoactives. In this context, the lack of rules that delimitate and conceptualize the notion of cryptoactives generates, out of questioning, a taxation pastiche, especially regarding the lack of balance by rules for an effective actuation of the Federal Revenue Office.

On this subject, the tax authority adopts a bold posture, taking cryptoactives as another investment form, even though the notable peculiarities of this active. Within the dogmatic, the rationale inverts itself: a excessively conservative notion does not consider the economic content of the operations regarding cryptoactives.

Therefore, its imperious the need for regulation and the establishing, through the Law, in a strict sense, general rules about cryptoactives, to secure the rule of law, legality, equality and tax neutrality. Beyond an instrument of income acquisition and defense of tax payers, tax law must be also a legal limitation of the economic power.

Referências

[1] ABRUSIO, Juliana; FILHO, Marcelo de Castro Cunha; RODRIGUES, Juliana Martins. Itens colecionáveis no blockchain e as relíquias digitais do futuro. Exame. 15 de abril de 2022. Disponível em: https://exame.com/future-of-money/itens-colecionaveis-no-blockchain-e-as-reliquias-digitais-do-futuro/. Acesso em: 18 ago. 2022.

[2] BRASIL. Lei nº 10.406, de 10 de janeiro de 2002. Institui o Código Civil. Diário Oficial da União: seção 1, Brasília, DF, ano 139, n. 8, p. 1-74, 11 jan. 2002.

[3] BRASIL. Lei nº 6.385, de 07 de dezembro de 1976. Dispõe sobre o mercado de valores mobiliários e cria a Comissão de Valores Mobiliários. Diário Oficial da República Federativa do Brasil, Brasília, DF, 07 dez. 1976. Disponível em: http://www.planalto.gov.br/ccivil_03/leis/l6385.htm. Acesso em 07 de agosto de 2022.

[4] BRASIL. Nota sobre Initial Coin Offering (ICO), de 11 de outubro de 2017. Disponível em: https://www.gov.br/cvm/pt-br/assuntos/noticias/initial-coin-offering–ico–a0e4b1d10e5a47aa907191d5b6ce5714. Acesso em 07 de agosto de 2022.

[5] BRASIL. Ofício Circular SEI nº 4081/2020/ME. Consulta acerca da integralização de capital com criptomoedas ou moedas digitais. Brasília, DF, 1º de dezembro de 2020. Disponível em: https://www.gov.br/economia/pt-br/assuntos/drei/legislacao/arquivos/OficioCircular4081criptomoedas.pdf. Acesso em 18 de agosto de 2022.

[6] BRASIL. Perguntas e respostas do Banco Central – moedas virtuais. Brasília, DF, março de 2022. Disponível em: https://www.bcb.gov.br/acessoinformacao/perguntasfrequentes-respostas/faq_moedasvirtuais. Acesso em 18 de agosto de 2022.

[7] NAKAMOTO, Satoshi. Bitcoin: A Peer-to-Peer Electronic Cash System. 2008. Disponível em: https://bitcoin.org/bitcoin.pdf. Acesso em 07 de agosto de 2022.

[8] OLIVEIRA, Ricardo Mariz de. Incorporação de Ações no Direito Tributário. 1. ed. São Paulo: Quartier Latin, 2019. p. 39.

[9] PISCITELLI, Tathiane. Criptomoedas e os possíveis encaminhamentos tributários à luz da legislação nacional. In Revista Direito Tributário Atual, n.40, p. 572- 590- 2018. Disponível em: https://ibdt.org.br/RDTA/wp-content/uploads/2018/11/Tathiane-Piscitelli.pdf. Acesso em 18 de agosto de 2022.

[10] RUBISTEIN, Flavio; e VETTORI, Gustavo G. Taxation of investments in Bitcoins and other virtual currencies: international trends and the Brazilian approach. 2018. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3135580. Acesso em 15 de agosto de 2022.

[11] SCHOUERI, Luís Eduardo. Direito tributário. 8. ed. São Paulo: Saraiva, 2018. p. 306.

MARIANA BARBOZA BAETA NEVES MATSUSHITA

Professora do Programa de Pós-Graduação em Direito Político e Econômico (Mestrado e Doutorado) e Coordenadora de Educação Continuada da Faculdade de Direito da Universidade Presbiteriana Mackenzie- UPM - São Paulo/SP; Doutora e Mestre pela PUC/SP ambos com bolsa de estudos, pela CAPES e CNPq respectivamente; DEA - Diploma de Estudios Avanzados pela Universidad de Barcelona - España; Posgrado en Derecho Tributario Internacional - Universidad de Barcelona - España ; MILE - Master in International Law and Economics - World Trade Institut - Bern Universität - Switzerland;Advogada.