

## White Collar Crime - Brazil

### Supreme Court proactivity in tax fraud case raises serious concerns

Contributed by [Delmanto Advocacia Criminal](#)

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#### Increased Supreme Court activism Tax fraud case

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Author

**Roberto Delmanto, Jr**

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#### Increased Supreme Court activism

The Brazilian legal system - inherited from Portugal and based on Roman-Germanic law - demands the existence of formal laws to impose obligations on the one hand and rights on the other, and limits the role of jurisprudence. There is no principle of stare decisis, under which lower courts are bound by the decisions of higher courts.

Notwithstanding this civil law regime, judges are often called to interpret the law - even where it is clear - by considering the meaning of the wording, as well as sociological, historical or evolutionary and systematic factors. In interpreting the law, however, the courts clearly should not be allowed to exceed their limits. Ultimately, the courts cannot write new rules, as this would undermine the classic tripartite system for the division of power that has been adopted in many democracies (ie, legislature, executive and judiciary).

Although these arguments are irrefutable, in recent years the Supreme Court has heard several cases in which their logic has been called into question. Some of these cases resulted from inefficiencies in legislative power and unnecessary delays in the establishment of laws required under the 1988 Constitution, while in others the court encroached on the arena of public state policies. In all of these cases - involving emotive human rights issues such as native lands rights, gay rights, social inclusion and abortion - the Supreme Court effectively took the law into its own hands to ensure that constitutional rights were upheld.

These decisions paint a picture of greater Supreme Court proactivity. From one perspective, this trend may be regarded as setting a dangerous precedent that could endanger the delicate balance of federal powers, since the adoption of public policies is reserved for the executive, while the creation of law is a task for the legislature.

From another angle, however, the decisions may be seen as a legitimate response from the judiciary, which is constitutionally obliged to find a definitive solution to all disputes that come before it. Where no specific law applies to a case, the courts must ultimately consider the prime directive of safeguarding human dignity, which demands that equality, mutual respect for peoples' rights, a safe and healthy environment, consistency in human relations and the continued strengthening of freedom and individuality be maintained. A balance must be struck that grants everyone the same possibilities to succeed through their own efforts and merit.

This complex task is not easy and can be achieved only through a free press, the free flow of information, transparency and, above all, access to a judicial system that is committed to these values.

#### Tax fraud case

Against this backdrop, a decision was recently issued in a criminal tax fraud case in which the Supreme Court arguably went too far in fulfilling its constitutional task of applying the law to a specific case, literally undermining an express article of the Penal Code and exceeding the scope of its constitutional limits.

It is a basic penal concept that a material crime is considered perpetrated at the moment at which the outcome sought by the criminal is realised. If his or her action is interrupted by any external circumstance, or if the desired result is not achieved due to a situation outside his or her control, it will be considered an attempted crime (Article 14(II) of the Penal Code) and the penalty will be reduced accordingly.

However, Articles 1º(I) to (IV) of Law 8.137/90 set out a different criterion for tax fraud crimes: it cannot be proved that a tax crime has been committed unless the tax authorities effectively agree that this is the case. In other words, if the tax assessment is undergoing administrative investigation, no criminal action can be enforced before a definitive conclusion has been issued by the fiscal authorities.

Therefore, where a person fraudulently failed to pay taxes due in January 2010, the criminal prosecutor can bring charges only after the tax assessment has been defined by the administration. If such administrative investigation takes eight or 10 years to conclude, the public prosecutor cannot bring charges until 2018 or 2020, despite the tax fraud being perpetrated in January 2010. However, when attempting to bring charges in 2018 or 2020, the public prosecutor may face another obstacle: the statute of limitations.

In an attempt to resolve this problem, the Supreme Court recently issued a mandatory decision that must be observed by lower courts (Súmula Vinculante 24). However, the decision is contrary to Article 14 of the Penal Code and creates a nonsensical situation. The court stated that a 'material crime', as defined under Articles 1º(I) to (IV) of Law 8.137/90, "is not perpetrated ... before the definitive tax assessment [by the authorities]".

In other words, the Supreme Court illegally postponed the moment at which a crime is committed. The court further conditioned the determination of this moment on the speed and diligence of a third party. If the tax authority is quick to conclude its investigation in relation to the tax assessment for taxes due in January 2010, the crime will be deemed to have been committed on one date; however, if the tax authority takes 10 years to conclude its investigation, the crime will be deemed to have been committed a decade later, in January 2020. This will be the case even if the taxpayer has died in the interim.

Through its Sumula Vinculante 24 decision, the Supreme Court appears to have acted illegally by taking on the role of the legislature.

For further information on this topic please contact [Roberto Delmanto, Jr](#) at *Delmanto Advocacia Criminal* by telephone (+55 11 3887 6251), fax (+55 11 3051 6382) or email ([robertojr@delmanto.com](mailto:robertojr@delmanto.com)).

#### Endnotes

(1) For further analysis of these cases and the wider judicial trends, please visit.

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