

## Competition Law and Litigation

[Mauro Grinberg](#)

---

### Taxes and Competition: A Pragmatic View

CADE is not and cannot be a tax inspector; the authority has neither legal competence nor knowledge to inspect tax activities.

Since competition law has existed in Brazil, there have been questions regarding the possible interference of taxation in competition. In fact, the theme is almost the negation of taxation, or, in other words, the possibility of interference in competition or its elimination, even though partial, through non-payment of taxes. Thereby, defaulters with the tax authorities may have an unlawful competitive advantage - remembering that the payment of taxes constitutes a legal obligation and their non-payment is therefore illegal against those who fulfill their legal obligations.

This interference in competition can also occur legally through tax incentives, which allow a company to compete with its rivals in clear competitive advantage. In fact, the state or municipality that grants the tax benefit expects compensation through job creation, increasing local trade movement and by closing the circle, increasing tax collection. If a company that uses a tax benefit acts in accordance with the law, even in a position of competitive advantage due to the tax incentive, it cannot be punished by competition law, because it is acting in good faith.

It has not yet been determined whether the tax entity - State or Municipality - that established the tax exemption can be framed in Competition Law, as established in article 31 of Law 12.529/2011 (Competition Law - CL), "This law applies to natural or legal persons governed by public or private law (...)." Thus, a State or Municipality that establishes tax exemption rules may, in theory, be sued by CL for limiting or distorting competition. Obviously, the competition agency (Administrative Council for Economic Defense - CADE) must work with the hypothesis that the purpose of the exemption is the distortion of competition.

However, most of the time, tax exemptions have legitimate objectives, such as local development and opening of the labor market. Moreover, the practice is so common that it is prudent not to mention the subject, as it could interfere with the already entrenched economic policies. Of course, an exemption correction could be well received, but as long as there is not one, there is nothing else that can be done.

Another situation is when the company that is in breach of the law fails to pay taxes and can beat its competitors by having lower prices, precisely due to the breach of tax obligations. In this case, it can be punished by competition law. Yet, in theory, because CADE's jurisprudence is still faint, thus it is not well understood if CADE can or cannot sue companies that use this procedure.

Nevertheless, let's move on to what is possible and/or practical. CADE is not and cannot be a tax inspector, as it has neither legal competence, nor knowledge to be one. In other words, it is not CADE who decides whether or not there is a tax evasion practice. The practical solution may be a letter from CADE to the taxing authority to say whether or not the accused party is evading. A positive response may allow CADE to act in defense of the competition.

As a result, there are many insurgencies, both administrative and judicial, against the tax authorities, regarding taxes that the parties consider incorrect or improperly increased. In the end, it is the judiciary that decides. Imagine a situation, in which CADE sues a company for eliminating the competition through non-payment of taxes, and later it obtains, the recognition that it had no obligation to pay such taxes in the judiciary. In other words, we have a legitimate Catch 22 situation in this case.

Article 146-A of the Federal Constitution aimed to bring some direction to this problem, by establishing the following: "Complementary Law may establish special taxation criteria, with the objective of preventing competition imbalances, without prejudice to the Union's competence, by law, to establish rules of an equal objective." However, a complementary law cannot effectively solve the situation created.

Pragmatically, what can be expected is that a decision by a taxing authority that is not challenged by the debtor party or a decision favorable to the taxing authority that has become final may constitute evidence that the debtor party has failed to pay its taxes, thereby being able to practice lower prices than its competitors.

The origin of the representation will depend on the proof that (i) there was non-payment of taxes, (ii) the prices were lower due to the non-payment of taxes, and (iii) this price reduction totally or partially eliminated competition. This is not an easy task, considering that the analysis must be done on a case-by-case basis. This must be the main reason why the theme has no jurisprudence yet.

**MAURO GRINBERG** – graduated from the Law School of São Paulo University (USP) and master from the Law School of Pernambuco University (UFPE), former commissioner of CADE, and partner of Grinberg e Cordovil Advogados.