Freedom of Establishment and Location of the Company: Notes to the Brazilian Law*

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1. Introduction

Major issue in Tax Law concerns the freedom of establishment of the taxpayer and its influence on the location of the company, reason why I am grateful to Professor Adriano Di Pietro and to all those part of the *Scuola Europea di Alti Studi Tributari* for their invitation to address this subject with focus on the Brazilian practice in the event to be held in Bologna to compare the dynamics of Latin American countries to that one of the European Union.

In Brazil, the subject matter of freedom of establishment is not very often discussed, at least not so much as in countries that are part of a community or bloc of international law which endorses such freedom, as consequence to the principles of free trade/free movement of goods, free competition, equal treatment and non-discrimination. Nevertheless, this issue, considered in the Brazilian case, is approachable in three different manners. The first of these concerns MERCOSUR and the freedom of establishment within the bloc. The second relates to the freedom of the taxpayer to choose their tax domicile, where they will establish their relations with the tax administration services.

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And, finally, the third, and perhaps more relevant focus, is related to the freedom of establishment and the location of the company within the Brazilian territory. In the following lines, these three aspects will be briefly examined.

2. Freedom of establishment and business location. Rationale and relevance

The principle of freedom of establishment and free choice of company location is a consequence to the principle that ensures the free exercise of economic activities, unfolding or branching from the general freedom as a distinctive feature of the human being, protected to a greater or lesser extent by a number of legal frameworks. In fact, one may even say that freedom is the very condition of existence to the rule of law[2], which is universally applicable within a certain jurisdiction[3].

However, this is not all. Freedom of establishment also stems from the principle of free competition and equal treatment, as well as non-discrimination, the latter ones being the reason why all economic agents that find themselves under the same system of norms (Constitution or Treaty[4]) must have *equal freedom* to carry out economic activities in any part of the corresponding territory.

Thus, as consequence to freedom of establishment, a State, or a Union of States – where there are rules of international or Community law agreed between them – must not interfere in the choice of those engaged in economic activities, impelling them, directly or indirectly, to establish themselves in places different from those they would choose if there was no such interference. The purpose is to avoid the creation of barriers to trade and to the practice of economic activities within the community or the Union

[2] It is precisely because freedom consists in the possibility of the human being expanding and realizing its potentialities, which are *infinite*, that nothing apart from the promotion of liberties, including other peoples, justifies the sacrifice of freedom. Hence the poem of William Cowper quoted by Amartya Sen: "*Freedom has a thousand charms to show / That slaves, howe'er contented, never know.*" SEN, Amartya. Desenvolvimento como liberdade. Translated by Laura Teixeira Motta. São Paulo: Companhia das Letras, 2000, p. 337

[3] Arnaldo Vasconcelos teaches "if freedom is not shared, there will be no possible exercise of freedom. It exists only on the condition of being limited to each, for the benefit of all. Absolute freedom is also the absolute impossibility of its exercise. It follows that, since freedom is a relational term, no one can be free alone. "VASCONCELOS, Arnaldo. *Direito e força*: uma visão pluridimensional da coação jurídica. Sao Paulo: Dialética, 2001, p. 54.

[4] This is the case of art. 49 of the Treaty on European Union.

of States or, in the case of a Federal State such as Brazil, to persons located in different States and Municipalities (Federal Constitution of Brazil 1988, art. 150, V, 151, I and 152).

The point is that freedom of establishment, like any freedom, is eventually restricted, either to be reconciled with other freedoms or in order to promote other values equally important to the legal system. To be valid, these limitations must be proportionate, that is, justified in the light of the need to implement other values equally dear to the corresponding legal system, with which the general freedom must be reconciled. When the restriction is not justified on such terms, there is violation to the principle that safeguards it[5].

In the following lines, as explained, the consequences of the freedom of establishment in the scope of MERCOSUR, and internally in Brazil, will be specifically addressed.

3. Freedom of establishment in MERCOSUR

The preservation of the freedom of establishment, as with any other freedom, must be provided for in the internal legal system or through an international treaty celebrated by the National States in which such freedom will be exercised. It is not a matter of adopting a positivist standpoint on the subject, but one of recognizing the impossibility of a State guaranteeing the exercise of a freedom beyond the limits of its territory. On the other hand, due to their inherent sovereignty, the States are entitled to control the entry and the exercise of economic activities by foreign nationals, situation which finds its regulation and limits precisely in the celebration of international treaties or agreements.

Regarding MERCOSUR, which was created by the Treaty of Asunción[6] in 1991, notwithstanding its purpose to form a *common market*, with the "free movement of goods and services between the countries, through, inter alia,

[5] As Karl Larenz recalls, "we must find a compromise on the conflict which allows the subsistence of each of the rights with the maximum possible content. This means that no right is to retreat more than necessary in order not to supress another in a way it is no longer exigible." LARENZ, *Derecho justo – fundamentos de etica jurídica*. Translated to Portuguese by Luis Díez-Picazo. Madrid: Civitas, 2001, p. 63.

[6] Mercosur was created in 1991 by the Treaty of Asuncion, comprehending Paraguay, Uruguay, Argentina and Brazil as its parties. In 2012, Venezuela joined, and Bolivia is in the process of accession. The other South American countries are not signatory members, but instead, associated parties.

the elimination of customs duties, non-tariff restrictions to the circulation of goods and any other measures with equivalent effect", it is not yet possible to cogitate of freedom of establishment to those carrying out economic activities in the signatory countries. There may be freedom of establishment in each of the signatory States in respect to companies established under their domestic law, but not yet amongst community countries, as the legal structure created results only on a customs community, with the elimination of tax on commerce between member states and the adoption of a common overseas tariff.

To allow the existence of freedom of establishment, much progress should be made in the way MERCOSUR is perceived and regulated by its member states, which, notwhistanding, through their tax administration policies, adopt practices that ultimately sabotage or subvert the purposes of the treaty, as in the case of fees and fines charged in the event of formal irrelevant errors in documentation of the imports from other member states. There seems to be no actual interest, from the signatory countries, to enforce the norms agreed upon internationally.

As an example, university degrees obtained in a MERCOSUR member state are not automatically effective in another, demanding the degree holder to undergo validation procedures equal to those applicable to degrees obtained in non-signatory countries. Thus, lawyers, doctors and dentists, for example, do not have their freedom of establishment recognized. An Argentine lawyer, for example, is not free to choose to settle in Argentina or Brazil according to his wishes, as, in Brazil, he will be demanded similar requirements to those made to other foreigners, and vice versa. Concerning legal entities, it would be necessary to move towards the harmonization of corporate legislation in addition to eliminating restrictions imposed by signatory countries to companies headquartered in a different member state, which are, generally, subjected to the same ruling awarded to any other foreign company[7].

For all that, one can not yet consider a principle of freedom of establishment within the MERCOSUR, although the provisions of the Treaty of Asunción

[7] Cf. MACHADO SEGUNDO, Hugo de Brito. Diverencia en la clasificación aduanera e importación proveniente de país firmante de mercosur. In: Daniela Mesquita Leutchuk de Cademartori; Germana de Oliveira Moraes; Raquel Coelho Lenz Cesar; Sergio Urquhart de Cademartori. (Org*.). La construcción juridica de la UNASUR*. 1ed.Florianópolis: Gedai/UFSC, 2013, v. 1, p. 361-374.

could be understood as pointing towards the need to adopt measures to that end.

4. Freedom of election of the tax domicile

A subject not to be confused with that of freedom of establishment, although in some ways related to it, concerns the freedom of choice of the tax domicile by the taxpayer, meaning the place informed by the taxpayer to the Treasury for communication purposes.

The article 127 of the Brazilian National Tax Code provides that (free translation):

Article 127. In the absence of election, by the taxpayer or responsible person, of a tax domicile, it is to be considered, according to the applicable legislation, as such:

I - with respect to natural persons, their place of residence, or, in case it is uncertain or unknown, their usual place of activity;

II - with respect to legal entities governed by private law or individual companies, the place of their headquarters or, in relation to the acts or facts giving rise to the legal obligation, that of each branch;

III - with respect to legal entities governed by public law, any and each of their offices in the territory of the entity responsible for the taxation.

§ 1º when the application of the rules set forth in any of the items of this article does not fit, the taxpayer's or taxable domicile shall be considered as the location of the assets or of the occurrence of the acts or facts giving rise to the obligation.

§ 2º the administrative authority may refuse the elected domicile, when it renders the tax collection or control procedure difficult or impossible, in which case the rule in the previous paragraph shall apply.

The article refers to the "absence of election by the taxpayer" as a condition for the application of the rules on its sections; therefore, the conclusion is that the choice lies with the taxpayer.

However, as previously explained, the aforementioned article does not relate specifically to the location of the taxpayer, but to those situations in which a company has several branches in the country, or a natural person has several addresses, in which case it is up to them to choose the address to be provided

to the Treasury for the purposes of registration, correspondence, summons or fiscal inspections.

It is also noticed that even though the taxpayer is free to choose, such freedom must be exercised without abuse or misuse of purpose. The art. 127, § 2 establishes, on the matter, that the authority may refuse the domicile elected "when it renders the tax collection or control procedure difficult or impossible", in which case the rule where the domicile "shall be considered as the location of the assets or of the occurrence of the acts or facts giving rise to the obligation" applies.

Thus, since it is the taxpayer's right to elect his domicile, the tax authorities can only refuse it in case of impossibility or difficulty in collecting and controlling the tax dues, and they cannot, for example, serve notice to the taxpayer in a place other than the one he indicated as his domicile or the summons could be deemed null and void. That is how Brazilian courts have been deciding[8].

It should be noticed that, in addition to the cases of difficulty or impossibility of tax collection and control, the Brazilian courts have also admitted the rejection of taxpayer´s elected domicile by the tax administration authority when there is obvious abuse in that right of choice. This was the case, for example, in a situation where a natural person taxpayer was resident in the "A" municipality, where a legal entity of which he was a partner also operated, but, nevertheless, chose as his tax domicile (natural person), for the purpose of relationship with the Federal Revenue, the Municipality "B". In this case, the Superior Court of Justice found that there was an obvious intention of embarrassing the tax control, and it was lawful for the Federal Revenue to disregard the domicile elected in the municipality "B" to relate to the taxpayer at his address in the municipality "A"[9].

5. Freedom of establishment in the Brazilian territory

5.1. Introduction. The freedom of establishment in the Brazilian Constitution

[8] BRAZIL. Superior Court of Justice. 2ª T., REsp 33.837 / MG, Rel. Min. Antônio de Pádua Ribeiro, j. 4/3/1996, DJ, 25/3/1996, p. 8,560.

[9] BRAZIL, Superior Court of Justice. 1ª T., REsp 437,383 / MG, Rel. Min. José Delgado, j. 08/27/2002, DJ of 10/21/2002, p. 301.

Domestically, in Brazil, the right to freedom of establishment derives from a number of provisions in the Federal Constitution enacted in 1988, which consecrates, in several articles, the right to free enterprise. Article 5º, section XIII, specifically, stipulates that "any trade, craft or profession shall be free, provided that professional qualifications established by law are observed".

Being free, in this case, means not only that one can engage in any activity, but also that this activity can be performed in any part of the national territory. The technical requirements and limitations may be regulated by law, and, in this case, will be related to the freedom of enterprise and to the enjoyment of other fundamental rights by third parties. This is the case of municipal rules prohibiting the existence of a concert venue next to a hospital or organizing the urban space in commercial or residential areas, etc.

In its art. 150, which addresses the limitations to the taxation powers and is applicable to all federation public entities (Federal Union, Member States, Federal District and Municipalities), the Constitution establishes, in section V, that it is forbidden "to establish limitations to the free movement of persons or goods, by means of inter-state or inter-municipal taxes, except for toll collection on the roads maintained by the Public Power", which mainly prevents States and Municipalities from imposing additional taxes on products or services from other States and Municipalities, thus violating the principle of freedom of establishment. Regarding peripheral entities, this limitation also appears in art. 152, according to which "it is forbidden to the States, the Federal District and the Municipalities to establish tax compensation between goods and services by reason of their origin or destination."

In addressing the limitations applicable specifically to the Federal Union, in its art. 151, I, the Brazilian Constitution establishes that it is forbidden to "create a tax that is not uniform throughout the national territory or that implies distinction or preference in relation to a State, the Federal District or a Municipality to the detriment of another, except for tax incentives designed to promote the balance in socio-economic development of different regions of the country."

It is not possible, therefore, with the use of taxes, to create restrictions on where the taxpayers' freely choose to establish their commercial businesses and to carry out their economic activities.

The problem arising, in this case, concerns the subject mentioned in the final part of art. 151, I of the Constitution, which allows the Federal Union to establish exceptions designed "to promote the balance in socio-economic development of different regions of the country." It is the concession of tax incentives or benefits, with the extra-fiscal purpose of bringing taxpayers to establish themselves in the poorest regions of the country. By themselves, such incentives do not affect freedom of establishment, as they work only as an encouragement to entrepreneurs, in case they wish, to establish themselves in a less developed region. The point is that, since the enactment of the 1988 Constitution, the Federal Union has hardly used this power. This has led poorer states and municipalities to provide, by themselves, incentives on state and municipal taxes, leading the richer states and municipalities, on their turn, to retaliate against taxpayers who choose to settle in the former. This scenario, dubbed in Brazil as the "fiscal war" (harmful tax competition), has brought some difficulties to the exercise of freedom of establishment and the location choice of the companies, be them sellers of goods, or, like most cases, service providers.

5.2. The fiscal war (harmful tax competition) in the scope of the Brazilian federation and the freedom of establishment

Whilst the Brazilian Constitution authorizes the Federal Union (central government) to grant fiscal incentives (in relation to federal taxes) to promote the development of poorer regions, it, conversely, provides mechanisms to limit that possibility to member states with regards to their Tax on Circulation of Goods and the Provision of Interstate and Intermunicipal Transportation Services and Communication – the ICMS [10], a tax corresponding to the European Value Added Tax (VAT). The granting of exemptions or other reductions or incentives, on this tax, by the member states or the Federal District, must be, according to the Constitution, regulated by a *national supplementary bill of law*, which must establish conditions, limits, etc. The subject was regulated by the Supplementary Bill of Law No. 24/75 - LC 24/75, which imposes very strict requirements to the granting of such incentives. One of them is the unanimous approval by the

[10] CF / 88, Art. 150, §6º and art. 155, §2º, XII, "g".

National Council for Finance Policy - CONFAZ, a body made up of the Secretaries of Finance of all member states and the Federal District, allowing the veto even to those member states whose representative in the Council did not attend the voting session[11]. As a result, it is practically impossible for member states to obtain approval from CONFAZ to use ICMS as an instrument of fiscal policy, aimed to attract industries and promote the consequent development of the local economy.

The Federal Union, on its turn, does not resort to federal taxes, which could be of much help, such as the Tax on Manufactured Products – IPI and the Income Tax, to promote this purpose, despite the clarity of the constitutional provisions indicating the use of taxation as an instrument to reduce regional inequalities[12].

This is the scenario where member states, regardless of the legal limits imposed by LC 24/75 and the CONFAZ, have been, for some decades, granting tax or financial incentives to taxpayers who bring new enterprises to their territory, in exchange for requirements such as the generation of a certain number of jobs, the investment of certain sums of money in infrastructure, the engagement on activities related to specific areas or sectors of the economy, etc. This is the so called the "fiscal war"[13], expression used to identify this kind of harmful tax competition between states or municipalities.

One must admit that such incentives have led to an evident growth in the economy of poorer member states, especially those in the northeast region. It is not the intention, however, to discuss the aspects (which are not only of economy, public finance or fiscal policy, but also of a *legal perspective* to the matter) related to the benefits or harms of such policies. Nor should we question the validity of the provisions of LC 24/75, which on the pretext of regulating a faculty provided for in the Constitution, renders it virtually impossible to exercise it. What is under analysis, strictly speaking, concerns

[11] LC 24, art. 2º, §2º and art. 4º, §2º.

[12] CF / 88, e.g., art. 3º, III, and art. 151, I. On the subject see MACHADO, Hugo de Brito. Proibição da Guerra Fiscal e a Redução das Desigualdades Regionais. In: ROCHA, Valdir de Oliveira (Coord.). *Grandes Questões Atuais do Direito Tributário* – 15.º volume. São Paulo: Dialética, 2011, p. 125 et seq.

[13] Cf. MACHADO, Hugo de Brito. *Aspectos Fundamentais do ICMS*. 2.ed. São Paulo: Dialética, 1999, p. 219.

the discussion on the effects of the freedom of location of the taxpayer's establishment in Brazil, with focus on the ICMS.

Accordingly, the member states opposed to the granting of such incentives will prevent their taxpayers (those established in their territory) from using input tax as credit on the purchases they make from taxpayers established in member states that grant the fiscal benefits. This means that, in practice, the taxpayer established in poorer states is indirectly punished, since other states will punish (directly) those who buy their products, just as if there was an internal, interstate customs frontier in the Brazilian territory.

It could be argued that if the tax incentive was granted irregularly, the action of the member state in which the buyer of the goods is established would be correct, that is, to prohibit the credit of the ICMS (*input tax*). Not so, however. If the incentive grant was irregular, the State who granted it must itself levy the tax on the taxpayer who would otherwise benefit from it. Under no circumstances may the member state where the purchaser taxpayer is located punish him for carrying out business with a taxpayer from another State, as the former has no jurisdiction or taxation powers to levy or claim the tax waived by the latter. The Brazilian Federal Supreme Court, on the one hand, has restrained the granting of unconstitutional fiscal incentives, but, on the other, has also prevented member states from retaliating against taxpayers who buy products from those established in member states that grant incentives, which, somehow, solves the matter, but not without the need for legal action.

The situation becomes more serious and affects the freedom of establishment more directly, however, when it comes to the ISS – Tax on Services, charged by the Brazilian Municipalities of those who provide services (doctors, lawyers, hospitals, builders, etc.).

Poorer municipalities have started practising lower ISS rates as a way of attracting service providers to their territory. Thus, if in a large capital, such as São Paulo, the ISS rate is 5%, smaller towns in the State established rates of 2% or 3% as a way of attracting to their territories some service provider companies.

The issue is that, given the immaterial nature of "service", it is often difficult to establish *where* it was actually provided. When, for example, a lawyer acts in a judicial case that is processed by several instances (court levels), where

(in which Municipality) was the service rendered? What about research services, hired by a candidate to President of the country, whereby people are interviewed in the most diverse municipalities?

To tackle de issue, in observance to the provisions of art. 146, I, of the FC/88, the legislator chose to elect the place of establishment of the service provider as the criteria to define which municipality is competent to claim the corresponding tax (see DL nº 406/68, Article 12).

The problem then arose when taxpayers, taking advantage of this provision, begun to establish themselves *formally* in smaller towns, which were setting lower rates for the Tax on Services (ISS), despite maintaining their operations structure in the larger cities where they were effectively providing their services.

Instead of acknowledging the fraud and considering as *establishment* the place where the structure necessary for the provision of the services was effectively maintained (as opposed to the place formally indicated on the articles of incorporation), the Judiciary Power, through decision of the Superior Court of Justice, preferred to ignore the rule of the art. 12 of Decree-Law nº 406/68, thus ruling that the tax would be due at the place where the service was actually provided:

Although the legislation regards as the place of the provision of the service the location of its providers formal establishment (art. 12 of Decree-Law nº 3406/68), it actually intends that the ISS tax belongs to the Municipality where the taxable event occurred. It is the local of the provision of the service that indicates which Municipality should levy the tax (ISS), so that the implicit constitutional principle that provides (to the municipality) the taxation powers over its territory is not violated. The municipal law cannot be endowed with extraterritoriality in order to radiate effects on a taxable event occurred in the territory of another municipality where it has no jurisdiction [...][14].

With this ruling, the Brazilian Judiciary tried to tackle that one issue, but ended up giving rise to another one, as its bad decision resulted quite harmful to freedom of establishment in Brazil. The effect was the creation of a scenario where the same event could give rise to double, sometimes triple

[14] BRAZIL, Superior Court of Justice. 1a T., REsp 41.867-4 / RS, Rel. Min. Democrito Reinaldo, DJ, 25/4/1994.

taxation, with clear offense to the right of the service provider taxpayer to settle where it suits them best. On the subject, Hugo de Brito Machado observes that

The Superior Court of Justice, on the pretext of avoiding fraudulent practices, has been deciding that the Municipality where the provision of the service occurs is responsible for levying the ISS, regardless of where the establishment is located. It would be better, however, to identify the fraud in each case. Making a rule of the understanding contrary to the norm of the art. 12 of Decree-Law no. 406/68 implies asserting its unconstitutionality, which is incorrect, since such norm solves, very well, the conflict of jurisdiction between the Municipalities. The issue lies in finding out what is the service provider establishment. The mistake is considering as such the place formally designated by the taxpayer. Establishment is actually the place where the equipment and instruments essential to the provision of the service are located, the place where the administration of this service is carried out. Once this understanding is embraced, fraudulent situations can be corrected, without the need to disregard the rule of art. 12 of Decree-Law No 406/68[15]*.*

Currently the subject is disciplined in Complementary Law nº 116/2003, which outlines "general rules" regarding the ISS within the Brazilian federation, in order to standardize the legislation of the various municipalities and avoid conflicts of jurisdiction. It establishes (art. 3º), *contradicting the ruling of the Superior Court of Justice* - that the criteria to define the place of occurrence of the taxing event is the place of the establishment providing the service. This complementary law, thus, makes two important changes. First, it defines what should be considered establishment, for the purposes of defining the location in which the ISS is due, providing that:

Art. 4º Establishment is the place where the taxpayer undertakes the activity of rendering services, either permanently or temporarily, and which hosts their economic or professional unit, regardless of the title of headquarters, branch, agency, service post, branch office, representation office, contact office or any other denomination that may be used.

Therefore, this concept should be used to avoid fraudulent practices such as incorporating a legal entity to provide services with official headquarters in a

[15] MACHADO, Hugo de Brito. *Curso de Direito Tributário*. 13. ed. São Paulo: Malheiros, p. 293.

smaller Municipality, but with its establishment, "de facto", in a larger city, where it provides the services. As explained in note to the art. 3º, even before the aforementioned law, the expression establishment provider could have been be so understood for the purpose of interpretation of art. 12 of DL No. 408/68. Misabel Abreu Machado Derzi, by the way, before the LC nº 116/200, already offered this exact definition of establishment, in terms quite similar to those now embodied in the law:

Service provider establishment is the complex of something, such as the economic unit of the company that configures a habitual nucleus of the exercise of the activity, assuming minimum administration and management activities, apt to the execution of the service. So much can be the headquarters, main office, branch or agency, being irrelevant the denomination of the establishment and the centralization or not of the tax books of the entity. The location of each economic unit – thus understood as that of the establishment providing the service – will attract the incidence of the respective municipal norm[16]*.*

In addition to clarifying what should be understood as establishment, Complementary Law 116/2003 addresses several exceptions to the rule that the tax is due at the place of the establishment. DL No. 406/68 only provided for exceptions with regards to construction companies, while the new law contemplates all the exceptions in the 22 sections of its art.3º, being that all services in respect of which it is possible to define the place of provision (cleaning services, manpower leasing, storage of goods, etc.).

Thus, with the clarification provided by LC 116/2003, after some hesitation, the position of the Superior Court of Justice was rectified, and the Court reached the understanding that the prevailing criteria to define the jurisdiction to collect the ISS is the place of the establishment of the taxpayer. The Court decided that "the interpretation of the legal rule leads to the conclusion that the legal security of the taxpayer has been privileged, so as to avoid doubts and double taxation, granted that any fraud (such as the maintenance of fictitious offices) must be dealt with through supervision and not by setting aside the legal norm, which would represent a true breach of the principle of tax legality." Therefore, after "LC 116/2003 came into force,

[16] DERZI, Misabel Abreu Machado. Update Notes. In: BALEEIRO, Aliomar. *Direito Tributário Brasileiro.* 11. ed. Rio de Janeiro: Forense, 1999, p. 509.

it can be stated that, if there is an economic or professional unit of the provider establishment in the Municipality where the service is rendered, that is, where the taxing event occurred, that Municipality should be responsible for levying the tax[17]."

The harmful effect caused by the "fiscal war" (*harmful tax competition*) between municipalities to the freedom of establishment in Brazil, with respect to service providers, was, therefore, overcome. If an establishment was in fact located within the limits of a Municipality, that public entity would be entitled to levy the tax and other municipalities could no longer argue the right to double tax the event under the reasoning that the service taker or the payment responsible are established in their territory.

With the advent of Complementary Law 157/2016, the problem of knowing in which Municipality is due the service tax was again reopened, but from another angle, since the 2016 law establishes that some services (such as credit card administration) are to be taxed in the Municipality where the *service taker* is domiciled, and not the establishment provider. The same applies when, in relation to any service, the Municipality of the establishment practises a tax rate below to 2%. These changes, nevertheless, do not affect the principle of freedom of establishment, since they do not lead to double taxation, nor, in theory, aggravate the tax burden according to the location chosen, but, on the contrary, seek to equalize this burden regardless of the location of the service provider. There are other issues raised by the amendment, which fall out of the scope of this article, relating to the obligation (to fulfil ancillary obligations) of the taxpayer who has clients in thousands of different Brazilian municipalities to know and apply the legislation of all of them, situation that has already been submitted to the appreciation of the Federal Supreme Court, which suspended the effectiveness of some articles of said law[18].

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[17] BRAZIL, Superior Tribunal de Justiça. 1ª S., REsp 1.060.210/SC, Rel. Min. Napoleão Nunes Maia Filho, *DJe* of 5/3/2013.

[18] "Unlike the previous model, which stipulated, for the services under analysis, the tax incidence at the location of the establishment providing the service, the new legal rule provides for the incidence of the tax at the domicile of the service provider. This change requires that the new normative discipline clearly indicate the concept of "service taker", under penalty of serious legal uncertainty and possible double taxation, or even the occurrence of incorrect tax incidence. The absence of this definition and the existence of several conflicting municipal laws, decrees and municipal acts already in force or about to come into force will eventually generate difficulties in the application of the Federal Complementary Law, increasing conflicts of jurisdiction between federated units and resulting a strong unsettlement in the constitutional

6. Conclusion

In general terms, one can say that the principle of freedom of establishment stems from the principles which protect free enterprise and free competition and which ensure equality and prohibit discrimination. As a result, restrictions on freedom of establishment must be justified by the proportional implementation of other values equally dear to the legal order without being unreasonable or discriminatory for taxpayers in equivalent situation.

Accordingly, from what has been exposed in this modest study, the principle of freedom of establishment and free location of the company in Brazil can be examined from three perspectives.

In the first one, related to Mercosur, it has been pointed out that there is still no implementation of the principle, since there is, for the time being, only a customs union, with the elimination of customs taxes between signatory countries and the adoption of common external tariffs, but with no regulation to allow the actual free establishment of business entities of one signatory country in another.

The second regards the freedom of domicile choice by the taxpayer, who will choose where they would like to establish their relations with the Treasury, and which can only be set aside in case of abuse, when the domicile elected renders the tax collection or control procedure difficult or impossible. It applies mainly when the taxpayer has several establishments, or several residences, and can choose, especially before the Federal Tax Office, in which one they wish to receive their correspondence, notifications, subpoenas, etc.

Finally, the third outlook relates to the freedom of establishment in the Brazilian territory, which, from a domestic law perspective, fully takes place, as result of the constitutional text. The restrictions it may suffer, mostly regarding tax matters, arise from the harmful tax competition (known in Brazil as "fiscal war") between member states and between municipalities, where some public entities may offer favourable treatments to taxpayers, an

principle of legal certainty, undermining the regularity of economic activity, with consequent disrespect for the very reason of existence of Article 146 of the Federal Constitution. In a similar hypothesis, this SUPREME COURT had the opportunity to invalidate a general rule of tax law, based on the difficulty of its application, which would have fomented conflicts of jurisdiction between federated units "(Brazilian Supreme Court of Justice - STF, ADI 5835, Rel. Alexandre de Moraes, March 23rd 2018).

issue that has been addressed, revisited and gradually revised by the legislation and the Brazilian courts of law.