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THE TAXATION OF E-COMMERCE IN THE DIGITAL ERA: COMMON AND CIVIL LAW

A TRIBUTAÇÃO DO COMÉRCIO ELETRÔNICO NA ERA DIGITAL: COMMON E CIVIL LAW

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Abstract: The purpose of this article is to study and compare taxation systems related to e-commerce, and to consider the rules for taxation on destination or origin in Europe, in the United States of America and in Brazil. The article focuses not only on the standards for taxation proposed by the European Commission for a new Value Added Tax (VAT) in the Digital Era, but also on the guidelines of the Organization for Economic Co-operation and Development (OECD), including the Base Erosion and Profit Shifting Project (BEPS). The role of the American Supreme Court, as a Common Law Court, will also be studied, considering the recent decisions upon the criteria used to establish where the taxation should be paid as well as the nexus between the place of payment and the activities of the enterprise. Finally, the role of the Brazilian Supreme Court will also be studied, with a focus on the influence it had upon the definition of the actual model of taxation, which led to an amendment in the Brazilian Constitution.

Key words: Electronic commerce, origin, destination, VAT, sales tax, ICMS.

Resumo: O objetivo do presente artigo é estudar e comparar o tratamento que diferentes sistemas tributários conferem ao comércio eletrônico, considerando-se as regras de tributação na origem e no destino na Europa, nos Estados Unidos e no Brasil. O artigo concentra-se não apenas nos standards para tributação propostos pela Comissão Europeia para um novo imposto sobre o valor agregado (IVA) na era digital, mas também nas diretrizes da Organização para a Cooperação e Desenvolvimento Econômico (OCDE), incluindo o projeto BEPS. O papel da Suprema Corte americana, como uma Corte de Common Law, também é estudado, tendo em vista as recentes decisões acerca dos

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critérios para se estabelecer onde o tributo deve ser pago, assim como o nexo entre o lugar de pagamento e as atividades desempenhadas pela empresa. Finalmente, também se estuda o papel do Supremo Tribunal Federal (STF), enfatizando-se a influência que as decisões do STF produziram sobre o atual modelo de tributação, o que levou a uma emenda na Constituição brasileira.

Palavras-Chave: Comércio eletrônico, origem, destino, IVA, sales tax, ICMS.

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1. INTRODUCTION

The growing computerization of social and economic transactions has raised several questions, both technical and legal. The Internet Age has brought with it the progressive overcoming of borders between nations and states, bringing people closer together in all parts of the world and promoting closer economic relations between different countries.

This is a recent phenomenon and, as a result, it has generated a number of controversies, which are still pending a response. In the field of taxation, one of the main challenges is to identify the country or the state that has the ability to enforce and collect taxes, given the intensification of electronic commerce, with the corresponding deterritorialization of commercial relations.

The taxation of the digital economy and, more specifically, electronic commerce, from the precedents that will be referred to in this article, illustrate the difference between the minimalist regime of action of the Supreme Courts of Common Law, in contrast to the maximalist performance of the Courts of Civil

Law. They both focus on the role that these Courts have to play for the effectiveness of the taxation in the context of Internet technologies.

In order to illustrate the extent to which it is stated, there is no right to appeal to the United Kingdom Supreme Court, which was a decision that was made since 1934, when the House of Lords employed the requirement of 'leave to appeal', nowadays known as 'permission' and it is unlikely to hear more than eighty appeals a year. In effect, the Supreme Court was established by the Constitutional Reform Act 2005, replacing the Appellate Committee of the House of Lords and sat for the first time in October 2009.¹

On the other hand, Courts of Civil Law examine several processes every year, because they do not have institutes such as the 'permission'. Due to this large number of processes, some courts, such as the Italian Court, are known for their delays in judging, which is considered to be in breach of the European Convention of Human Rights.²

The whole of the Common and Civil Laws Courts have been and will certainly be in evidence regarding some conflicts involving the taxation of electronic commerce, especially the dispute involving the principles of origin and destination, as some decisions of American and Brazilian Supreme Courts illustrate.

The European Union has ruled the e-commerce with a series of legal instruments, such as the Directive 2000/31/EC (Directive on electronic commerce), the Directive 2015/1535, and the general directives for VAT. In addition to that,

¹ Neil Andrews, *The United Kingdom Supreme Court: A Final Appellate Court Created in Haste and Without Manifest Need*, 22 Quaderni del Dipartimento di Giurisprudenza dell'Università di Torino 107, 108-110 (Chiara Besso & Sergio Chiarloni eds., 2012).

² Serge Guinchard et al., *Droit processuel: Droits fondamentaux du procès*, 1001 (6th ed., Dalloz 2011).

Europe is trying to build a new VAT system, which will progressively come into force by 2021, whose main purposes are to simplify VAT rules for start-ups, micro-businesses and small and medium-sized enterprises SMEs, creating one easy-to-use online portal to allow companies to deal with their VAT obligations and addressing the problem of fraud caused by misused exemptions. The VAT will also be paid in the member state of the final consumer (principle of destination), leading to a fairer distribution of tax revenues among the countries.³

In effect, the taxation of e-commerce poses national and transnational challenges, that shall be implemented with the communion of forces of all powers involved, including the Judiciary, whose role will be studied in items 3 and 4 of this article.

2. THE EUROPEAN UNION MODEL OF TAXATION: THE CHALLENGE FOR THE NEW VAT IN THE DIGITAL ECONOMY ERA

2.1 The New VAT: A New Frontier Imposed by Technology

The common VAT, as a consumption tax applicable to the supply of goods and services and to the importation of goods, plays an important role in Europe's Single Market. The main aim of the first VAT directive was 67/227/EEC, of 11 April 1967, was the harmonization of legislation and it was established that Member States should replace their systems of turnover taxes by the common system of VAT. This Directive was followed by Directive 77/388/EEC and its amendments, Council Directive 2006/112/EC (which is the current directive) and many others.

The modernization of VAT rules is necessary as the latest VAT Directives were agreed before the rise of the Internet. These new measures, which are

³ European Commission, *VAT: Commission Welcomes Agreement on Simpler and More Efficient Rules for Businesses that Sell Goods Online* (2017), http://europa.eu/rapid/press-release_IP-17-4404_en.htm (accessed 10 July 2018).

planned to come into force in 2021, will be part of the Digital Single Market strategy, which will be relevant in the digital economy when a physical presence is no longer necessary, leading to an increase in compliance rates, helping prevent fraud in e-commerce⁴ and reducing the administrative burden on businesses arising from different VAT regimes.⁵

The action plan on VAT is intended to make the legislation more efficient by exploiting the opportunities of digital technology and reducing the costs of revenue collection. According to the Final Report of the Action Plan, the European Commission intends to present a legislative proposal to put in place a definitive VAT system, which would be based on the principle of taxation in the country of destination of the goods.

The Commission also agrees that, in order to tackle fraud in e-commerce many different ways of cooperation must be improved, not only between Member States but also with non-EU Members. In addition, the challenges posed by digital markets require new approaches to tax collection, such as new reporting and auditing tools.⁶

⁴ European Commission, *Modernising VAT for E-Commerce: Question and Answer* (2017), http://europa.eu/rapid/press-release_MEMO-16-3746_en.htm (accessed 10 July 2018). According to the European Commission, Member States lose €5 billion in VAT revenues every year in the e-commerce sector, which involves sellers taking advantage of differentials in VAT rates between Member States or not charging any VAT at all. The VAT Gap is even bigger if the whole range of economic activities are considered and this gap was about € 152 billion in 2015. European Commission, *VAT Gap: EU Countries Lose €152 Billion in 2015, Showing Urgent Need for VAT Reform* (2017), http://europa.eu/rapid/press-release_IP-17-3441_en.htm (accessed 10 July 2018).

⁵ European Commission, *A Digital Single Market for Europe* (2016), https://ec.europa.eu/commission/sites/beta-political/files/2-years-on-dsm_en_0.pdf (accessed 10 July 2018).

⁶ European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: On an Action Plan on VAT Towards a Single EU VAT Area - Time to Decide* (2016), https://ec.europa.eu/taxation_customs/sites/taxation/files/com_2016_148_en.pdf (accessed 10 July 2018).

The change from origin to destination in the taxation of VAT⁷ follows the recommendation of the Parliament resolution of 2011,⁸ the Council conclusions of May 2012⁹ and the guidelines on neutrality from the OECD, approved in 2011. The OECD remarks that according to the destination principle, exports are exempt from VAT whilst imports are taxed on the same basis and with the same rates as local supplies, leading to neutrality in international trade. Nonetheless, the OECD also states that applying the destination principal to supplies of services and intangible products is more difficult, because there is no border control.¹⁰

Considering these difficulties, the action plan of the European Commission of 2017 highlighted the need to establish structured public-private cooperation with tax administrations, logistics companies and internet platforms, as well as with payment service providers. In addition, the Commission also enabled Member States to apply the same VAT rate to e-publications as for their printed equivalents, in order to remove tax obstacles to the development of the e-publications market.

The Commission also stated that the implementation of the destination principle will be carried out in two stages. Firstly, the VAT treatment of intra European Union Business to Business (B2B) supplies of goods will be settled and, in order to implement this, the Commission will adopt a set of proposals,

⁷ The rules based on origin can be found on Art. 281, Dir. 77/388/EEC and on Art. 402, Dir. 2006/112/EC, and were supposed to be transitional.

⁸ European Parliament, *Resolution of 13 October 2011 on the Future of VAT (2011/2082(INI))* (2011), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0436> (accessed 11 July 2018).

⁹ Council of the European Union, *Council Conclusions on the Future of VAT* (2012), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/130257.pdf (accessed 11 July 2018).

¹⁰ OECD, *International VAT/GST Guidelines: Guidelines on Neutrality* (2011), <http://www.oecd.org/tax/consumption/guidelinesneutrality2011.pdf> (accessed 11 July 2018).

especially the introduction of a wider one stop shop (OSS) than the one that already exists for telecommunication, broadcasting and electronic services.

The main aim of the OSS is to let the supplier pay the tax to the country where the goods are consumed (with the VAT rate of the destination), in their member state of establishment.¹¹ In other words, the aim of the OSS is the simplification of the process of taxation, so that businesses will need to register only in the member state where they are established.

At the second stage of implementing the destination principle, the new VAT treatment will be extended to all the supplies, including services, so that domestic and cross-border supplies can be treated the same way. The European Commission, through these measures, is aiming for a definitive taxation for VAT to be achieved.¹²

The European Commission's measures seem to follow the challenges identified by OECD in recent years, especially in the Action 1 of BEPS, from 2015, and in the Tax Challenges Arising from Digitalization, from 2018, as will be described in the topic below.

2.2 The Influence of OECD's Guidelines on the New VAT Proposed by the European Commission

The BEPS Project was idealized as a means of tackling aggressive fiscal planning, which happens when the only purpose is the simulation of the abstract

¹¹ At the first step, as an exception for the B2B principle, if the customer is a certified taxable person by its tax administration, this customer will be responsible to pay the VAT.

¹² European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: On the Follow-Up to the Action Plan on VAT Towards a Single EU VAT Area - Time to Act* (2017), https://ec.europa.eu/taxation_customs/sites/taxation/files/communication_-_towards_a_single_vat_area_en.pdf (accessed 11 July 2018).

taxable event.¹³ In effect, in recent years, there has been a great change in the standards of International Tax Law. In the past, the main purpose of treaties was to avoid double taxation, whereas in the Digital Era, one of the main challenges is tackling the double non-taxation.¹⁴

Due to these challenges, the BEPS project was structured into three pillars, which were: (1) the introduction of coherence in the domestic rules that affect cross-border activities; (2) reinforcing substance in the international standards as well as transparency¹⁵ and (3) focusing on the importance of multilateralism, consensus and cooperation in taxation.¹⁶

In this context, the digital economy represented the first OECD action plan, due to the increasing use of intangibles, the massive use of data, including personal information, the expressive existence of multilateral business models and the difficulty of determining the jurisdiction in which business is created.¹⁷ BEPS Action one had its first public discussion draft published in March 2014 and its report published in September of the same year.

In these documents and in the Final Report of 2015, OECD identified neutrality, efficiency, flexibility, certainty and simplicity, effectiveness and fairness as well-recognized principles that must be considered in the taxation of e-commerce and which have been recognized as relevant principles since the 1998

¹³ Marcus Lívio Gomes, *La Línea entre la Planificación Fiscal y la Elusión Abusiva: 1er. Foro Latinoamericano de Jueces Tributarios*, 6 Encuentro Regional Latinoamericano - Memoria 501, 501 (2014).

¹⁴ Aristóteles Moreira Filho, *O rei está nu: a falência do modelo OCDE, o BEPS e o retorno à territorialidade*, 1 Revista Tributaristas 11, 11-12 (2013).

¹⁵ OECD, *OECD and G20* (2018), <http://www.oecd.org/g20/topics/taxation> (accessed 11 July 2018).

¹⁶ OECD, *Action Plan on Base Erosion and Profit Shifting* (2013), 11, http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/action-plan-on-base-erosion-and-profit-shifting_9789264202719-en (accessed 11 July 2018).

¹⁷ *Ibid.*

Ottawa Ministerial Conference. Nonetheless, the OECD points out that equity also plays an important role for the design of tax policy.

The OECD emphasizes that not only must the traditional elements of horizontal and vertical equity be considered in the Digital Era, but also the concept of inter-nation equity, which is concerned with the allocation of national gain and loss in international commerce and aims to ensure that each country receives an equitable share of tax revenues from cross-border transactions.

The Final Report states that e-commerce has increased over the last decade, due to the functionality and availability of the Internet. Although in the past, the vast majority of e-commerce consisted of transactions in which a business sells products or services to another business (B2B), there has been a significant growth not only in sales from businesses to consumers (B2C) but also from a consumer to another consumer (C2C). Moreover, in order to maintain the fiscal sovereignty of countries, it is necessary to achieve a fair sharing of the tax base from e-commerce between them.¹⁸

It is necessary to point out that the OECD, through different documents, and in accordance with the standards of the World Trade Organization (WTO) recognizes that taxation must be imposed by the jurisdiction of destination, as a way of implementing the principle of neutrality in international trade, because there would be no fiscal advantage for a company in transferring its establishment for states with exemptions or lower taxation.

Nevertheless, the Final Report also recommends that the principle of destination shall be studied carefully regarding the consumption of services and intangibles. According to the OECD, in such a hypothesis, the rules upon taxation

¹⁸ OECD, *Addressing the Tax Challenges of the Digital Economy: Action 1 - 2015 Final Report* (2015), 20, 55-56, http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_9789264241046-en (accessed 12 July 2018).

might depend on whether the supply of services and intangibles are physically performed at a readily identifiable place or are ordinarily consumed at the same time and place where they are physically performed. The rules might also depend on whether the consumer bears any necessary relationship to the location in which the supply is performed.

Considering this background, the OECD suggests that, in the relations between suppliers and final consumers, the VAT should be collected, as a rule, in the jurisdiction where the consumer is located, with a simplified compliance regime. As an exception, the Final Report considers the possibility for taxation on the place of performance (on-the-spot supplies).¹⁹

Although there is still much to be done, the measures taken by the European Commission for a new VAT seem to have taken into account some of the OECD's guidelines, especially the need for a destination principle and the adoption of the one stop shop, as was recognized by the OECD in the 2018 Report on Tax Challenges Arising from Digitalization. The 2018 report also states that the OECD International VAT Guidelines from 2017 have been signed by over one hundred countries, jurisdictions and international organizations.²⁰

The OECD also emphasizes that it would be difficult, if not impossible, to ring fence the digital economy from the rest of the economy for tax purposes²¹

¹⁹ *Ibid.*, at 243.

²⁰ OECD, *Tax Challenges Arising from Digitalization - Interim Report 2018: Inclusive Framework on BEPS* (2018), 91,102-105, <http://dx.doi.org/10.1787/9789264293083-en> (accessed 12 July 2018).

²¹ For a critical analysis on the introduction of specific digital taxes and acknowledging that it is a good solution, not only from a perspective of international justice, but also from an economic perspective see Ana Paula Dourado, *Digital Taxation Opens the Pandora Box: The OECD Interim Report and the European Commission Proposals*, 46 (6/7) *Intertax* 565, 568 (2018).

and reinforces the idea that VAT rules should be framed in such a way that they are not the primary influence on business decisions.²²

Despite the progress that has already been made, there are still many challenges that European countries may face. One of them is the taxation impact of the United Kingdom withdrawal from the European Union. Until the United Kingdom finally leaves the European Union, many VAT laws are European laws, not British at all, and much of the case law is that of the Court of Justice of the European Communities (CJEU).²³ That is why the measures to implement Brexit must consider taxation's impact on the economy and might follow some kind of agreement with the European Union.²⁴

The European future brings much uncertainty but there is no doubt that part of the way has already been covered by the edition of the new Directives for a new VAT, following the destination principle.

3. AMERICAN SALES TAX: ONLINE SALES AND THE SUPREME COURT DECISIONS

3.1 An Overview of American Taxation on Consumption

In the USA, there is not a value added tax, as in European countries, but a sales or use tax. The difference between them is that, while VAT is collected through a staged process, the sales or use tax is charged only once at the final point of sale. With the increase of e-commerce, many questions regarding the limits and possibilities for taxation have been raised.

²² OECD, *International VAT/GST Guidelines* (2017), 31, <http://dx.doi.org/10.1787/9789264271401-en> (accessed 12 July 2018).

²³ Geoffrey Morse, David Williams & Sandra Eden, *Davies: Principles of Tax Law*, 29 (8th ed., Thomson Reuters 2016).

²⁴ The United Kingdom can follow one the three models already existing between the European Union and other countries (the Norwegian model, the Swiss model and the World Trade Organization Model) or can make another sort of agreement. KPMG, *Impact of Brexit on Tax* (2016), <https://home.kpmg.com/uk/en/home/insights/2016/09/impact-of-brex-it-on-tax.html> (accessed 12 July 2018).

In the US model, the subnational entities, such as states and cities, have the right to determine their own taxes, tax rates and administrative procedures. There is even the possibility that these entities tax the same bases of federal jurisdiction.²⁵ Despite this autonomy and competition between the states, the federal government has approved the *Internet Tax Freedom Act*,²⁶ in order to stimulate e-commerce transactions, with an initial period of three years, that has been subject to successive extensions. The *Internet Tax Freedom Act* aims to avoid the imposition of new taxes, but does not exempt sales from the Internet, which will continue to be targeted on the same basis as physical sales.²⁷

On the other side, due to the complexity of the tax system, some states are trying to standardize the rules upon the sales tax, through the *Streamlined Sales Tax Agreement*. This project seeks to achieve tax simplification through uniform tax definitions, simpler and more uniform taxation and collection, simplification of tax rates and state financing of administrative costs.²⁸

In this context, it is necessary to understand both the meaning of the commerce clause,²⁹ whose aim is to preserve the free-flow of interstate commerce, and the due process clause,³⁰ which aims to protect citizens from the

²⁵ Leonardo Alcântara Ribeiro, *A guerra fiscal do ICMS sob uma perspectiva comparada de competição tributária* (2010), 17, <http://invente.com.br/nef/files/upload/2011/05/16/5-1-a-guerra-fiscal-do-icms-sob-uma-perspectiva-comparada-de-competicao-tributaria-rev-1.pdf> (accessed 10 Oct. 2015).

²⁶ Heleno Taveira Torres, *Direito Tributário das Telecomunicações e Satélites*, 434 (Quartier Latin 2007).

²⁷ Internet Tax Freedom Act, Pub. L. No. 105-277, § 101, 112 Stat. 2681, 719 (1998).

²⁸ Alcântara, *supra* n. 25, at 21.

²⁹ “The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”. U.S. Const. art. I, § 8, cl. 3.

³⁰ “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”. U.S. Const. amend. XIV, § 1.

arbitrary exercise of government powers, not restricted by principles established by Private Law nor by distributive justice.³¹

The interpretation for the *commerce clause* made by the Supreme Court was that, if a state wanted to impose the sales tax, it was necessary that the sale had a *nexus*³² with the state. In both *Quill Corp. v. North Dakota* and *National Bellas Hess v. Illinois Department of Revenue*, this *nexus* was understood as a physical presence in the state. Nonetheless, in *South Dakota v. Wayfair Inc.*, also called “the case of the millennium”, the Supreme Court overruled both *Quill* and *North Dakota* and stated that the physical presence rule is unsound and incorrect.

Moreover, although the Supreme Court has denied the *writ of certiorari*³³ both in *Amazon.com, LLC v. New York State Department of Taxation and Finance*³⁴ and *Overstock.com, Inc v. New York State Department of Taxation and Finance*,³⁵ in such leading cases, the decisions of the Court of Appeals of New York have prevailed, deciding that the enterprises should pay the sales tax for New York, despite no physical presence in the state and assuming that the commerce and due process clauses were not violated in the hypothesis.

The rule of the American Supreme Court in determining the criteria for e-commerce taxation will be studied next.

³¹ Thomas Cooley, *Princípios gerais de direito constitucional nos Estados Unidos da América* 219 (Ricardo Rodrigues Gama trans., Russel 2002).

³² For an overview on the nexus principle in the taxation of income see Stjepan Gadzo, *The Principle of ‘Nexus’ or ‘Genuine Link’ as a Keystone of International Income Tax Law: A Reappraisal*, 46 (3) *Intertax* 194 (2018).

³³ The *writ of certiorari* is not a right, but a judicial discretion. Sup. Ct. R. 10.

³⁴ *Amazon.com, LLC v. New York State Department of Taxation and Finance*, <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/13-259.htm> (accessed 14 July 2018).

³⁵ *Overstock.com, Inc. v. New York State Department of Taxation and Finance*, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-252.htm> (accessed 14 July 2018).

3.2 The Role of the American Supreme Court in the Taxation of E-Commerce

As a Common Law Court, the American Supreme Court judges very few cases every year, in comparison to the Civil Law Courts. While the former assumes that the Supreme Court must act on a small number of cases, the latter usually works in the opposite way to the Common Law Courts, understanding that in order to achieve uniformity, the court should be able to review a large number of decisions.

Therefore, they are two different routes with the goal of achieving uniformity. However, the former can be seen as an academic committee, which limits its participation to issues that arouse widespread interest, while the latter functions as a factory, reviewing a large number of cases, albeit superficially.³⁶

In addition to that, under the Common Law, the parties have no right to have their petitions judged by the Supreme Court, which has the discretion to choose what is going to be judged.³⁷ Considering these assumptions, it is important to point out that the role of the Supreme Court in judging taxation has not been exactly the same over the years.

The first precedent regarding the matter was *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, which was judged on May 8, 1967.³⁸ *National Bellas Hess* was an order house with its principle place of business in Missouri, which had no proprieties in Illinois and which made no advertisement on radio, television or in any magazines in the state.

Nevertheless, it mailed catalogues twice a year to customers throughout the United States, including Illinois. The orders for merchandise were mailed to

³⁶ Pablo Bravo-Hurtado, *Recursos ante las Cortes Supremas en el Civil Law y en el Common Law: Dos vías a la Uniformidad*, 2 Int'l J. Procedural L. 323, 332-334 (2012).

³⁷ Michele Taruffo, *Processo Civil Comparado: Ensaios* 124 (2013).

³⁸ *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967).

the enterprise's plant and goods were sent to consumers, by mail or common carrier. According to Illinois legislation, Bellas Hess was classified as a retailer who maintained his business location in the state and who should collect the use tax for Illinois.

The Illinois Supreme Court held state taxation to be valid, which led Bellas Hess to appeal to the US Supreme Court, alleging violation of the due process clause and unconstitutional restriction on interstate commerce. The Supreme Court, in response to *National's* requests, ruled that:

The Constitution requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.... But the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.³⁹

The Supreme Court decided that the *commerce clause* has the main purpose to ensure a national economy free from unjustifiable local entanglements. In addition to that, the Supreme Court stated that, if Illinois could impose such restrictions on trade, then any other state, as well as any other national political subdivision could also do so, creating obligations in favor of local jurisdictions, but without such legitimacy.

Finally, it was pointed out that *National* already has an obligation to collect the sales tax in Alabama, Kansas and Mississippi, since it has stores in those locations. On the other hand, it was considered that eleven other states, other than Illinois, created tax obligations similar to the contested legislation.

Reporting to a judgment made by the Supreme Court of Alabama, the US Supreme Court noted that sales tax - which in many states is supplemented by a

³⁹ *Ibid.*

use tax - was charged at that time by 2.300 different locations. Thus, if the disputed legislation were to be maintained, the consequence would be that vendors should administer rules that differ from one state to another, which would require knowledge of remote and uncertain rules to the level of precision required by the system.

The second leading case was *Quill Corp. v. North Dakota*, which was judged on May 26, 1992.⁴⁰ *Quill* was a society from Delaware with offices and warehouses in Illinois, California and Georgia. None of its employees worked or resided in North Dakota and it had an insignificant or non-existent number of properties in this state. *Quill* sold office equipment and supplies, advertising its business through catalogs, newspapers and phone calls. Some of its sales were made by consumers in North Dakota, who received their orders through the mail and carriers.

North Dakota legislation declared that any retailer holding a business location in the state should collect the tax from the consumer and remit it to the state. Since 1987, however, the legislation has been amended to provide that the term "retailer" would include any person who endeavors to regulate or systematically attract consumer markets in the state. At the same time, it was understood that the phrase "regular or systematic attraction of the market" meant three or more advertisements within a period of twelve months. According to this legislation, *Quill* started to be taxed in North Dakota, though it had no properties or jobs in the state.

The North Dakota Supreme Court decided that changes in both the economy and the law made it inappropriate to pursue *Bellas Hess*, concluding that physical presence was no longer necessary to satisfy the commerce clause

⁴⁰ *Quill Corp. v. North Dakota*, <https://www.law.cornell.edu/supct/html/91-0194.ZO.html> (accessed 14 July 2018).

and to establish the nexus required by the due process clause. Nevertheless, the US Supreme Court reversed the State Supreme Court and stated that *Bellas Hess* still had to be followed.

Moreover, the US Supreme Court decided that, despite new judgments were made after the *Bellas Hess*, in which a different dividing line was adopted from the so-called physical presence, this was done in relation to other taxes, other than sales and use tax. In relation to these, the precedent signed in the *Bellas Hess* case would continue to apply. Indeed, the US Supreme Court pointed out that Congress could change this interpretation of the commerce clause, overruling *Bellas Hess*, because it had the power to do so.

The third leading cases are *Amazon.com, LLC v. New York State Department of Taxation and Finance*⁴¹ and *Overstock.com, Inc v. New York State Department of Taxation and Finance*,⁴² judged on March 28, 2013. These cases resulted from a change in the legislation of New York, also known as the *Internet Tax*, that amended the Tax Law in the State of New York⁴³ and established that the *sales and use tax* would be due to out-of-state sellers who used residents located in New York State to enter sales links or banners on their websites. The legislation admitted proof to the contrary.⁴⁴

⁴¹ *Amazon.com, LLC v. New York State Department of Taxation and Finance*, <http://www.nycourts.gov/ctapps/Decisions/2013/Mar13/33-34opn13-Ddecision.pdf> (accessed 14 July 2018).

⁴² *Overstock.com, Inc v. New York State Department of Taxation and Finance*, http://www.courts.state.ny.us/reporter/3dseries/2013/2013_02102.htm (accessed 14 July 2018).

⁴³ "... a person making sales of tangible personal property or services taxable under this article ('seller') shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods ...". N.Y. Tax Law § 1101(b)(8)(vi).

⁴⁴ "This presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy

Like *Amazon*, the company *Overstock* questioned the mentioned legislative amendment before the Court of Appeals, because both enterprises did not have any employees or offices in New York and the products purchased online are sent to customers directly via e-mail or by ordinary transport.⁴⁵

Both companies have developed an association program, using third parties located around the world, which put in their own sites links which, when clicked, allow the redirection to the sites of purchases of those companies. Affiliates receive commissions from sales, which consist of a percentage of the profit earned when consumers purchase from links or banners on their sites. It should be noted that there is no dependency or employment relationship between the associated companies and *Amazon* or *Overstock*.

Both *Amazon* and *Overstock* argued that New York legislation violated the commerce clause and the due process clause, imposing a taxation for entities located out of the state with no substantial *nexus* with the state of New York. Moreover, the companies argued that the legislation created a presumption that would be irrebuttable on the grounds that it would be extremely difficult to prove that none of the affiliates are encouraging customers to consume in the name and interest of the seller.

However, the New York Supreme Court dismissed the claims made by Amazon and Overstock and upheld the defense filed by the Department of Taxation and Finance, judging New York law as constitutional. Although the Court asserts that there is a parallel between mail and online business, since both business activities are carried out without the requirement of physical presence, there are some peculiarities in Internet commerce.

the nexus requirement of the United States constitution during the four quarterly periods in question". *Ibid.*

⁴⁵ Fernando Aurélio Zilveti, *A Tributação Sobre o Comércio Eletrônico: O Caso Amazon*, 26 Revista Direito Tributário Atual 231, 235 (2011).

It has been found that many websites are directed predominantly to local audiences, such as radio stations, religious institutions and colleges, so that the physical presence of the site owner becomes relevant to the analysis of the Commerce Clause. Thus, the agreements between Amazon and its affiliates, which establish sales links for that company in New York State, satisfy the substantial nexus required by the commerce clause, making Amazon a true in-state sales force. On the other hand, as regards the argument that the presumption would be irrebuttable, the New York Supreme Court rejected it, pointing out that the state Finance Department developed a method (contractual prohibition and annual certification) by which it was possible to rebut the presumption.

There was a divergent vote, which understood that the placement of links on the websites of residents in New York consisted of mere advertising, and it was not possible to equip them with sales agents. However, by a 4-1 majority, the New York Court's decision was that state law respected both the Commerce Clause and Due Process Clause.

Subsequently, appeals were filed before the United States Supreme Court. However, the Supreme Court denied the *writ of certiorari*, without justifying so. In effect, as it was already stated in item 3.1 of the present article, the Rule 10 of the Rules of the Supreme Court is expressed in the sense that, even in the hypotheses described in the Rule 10, the discretion of the Supreme Court to grant the *writ of certiorari* is not removed. Therefore, in the Amazon case, despite the decision of the New York Court of Appeals conflicting with the understanding of other state courts, the Supreme Court had ample freedom to reject Amazon's appeal, as it did.

The fourth and most recent precedent is also known as "the case of the millennium" because of its impact on the sales taxation of electronic commerce.

In *South Dakota v. Wayfair Inc.*,⁴⁶ which was judged on June 21, 2018, the Supreme Court overruled *Bellas Hess* and *Quill* and decided that the requirement of physical presence is an incorrect interpretation of the Commerce Clause.

In 2016, South Dakota imposed an act by which out-of-state sellers should collect and remit sales tax as if the seller had a physical presence in the state, under certain conditions,⁴⁷ because the Legislature found that the inability to collect the sales and use tax from remote sellers was eroding the sales tax base and causing revenue losses and because South Dakota does not have an income tax.⁴⁸

In order to obtain the recognition of the constitutionality of the law, South Dakota filed a declaratory judgment action and an injunction. The South Dakota Supreme Court stated that *Quill* has not been overruled and remains as a precedent on the issue of the Commerce Clause.

Nevertheless, recognizing that the Internet has changed the dynamics of the economy, the US Supreme Court decided that state taxes are valid as long as they "(1) apply to an activity with a substantial *nexus* with the taxing State, (2) are

⁴⁶ *South Dakota v. Wayfair Inc.*, https://www.supremecourt.gov/opinions/17pdf/17-494_j4el.pdf (accessed 19 July 2018).

⁴⁷ Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year:

(1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or (2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions. SL 2016, ch. 70, § 1, eff. May 1, 2016.

⁴⁸ SL 2016, ch. 70, § 8, eff. May 1, 2016.

http://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=StatuteChapter&Statute=10-64

fairly apportioned, (3) do not discriminate against interstate commerce, and (4) are fairly related to the services the State provides”.

In addition to this, the Supreme Court pointed out that the physical presence rule gave an advantage to out-of-state sellers, leading to a market distortion and creating an arbitrary distinction between online retailers and competitors who collect state sales taxes. Following these arguments, the Supreme Court decided that it was unnecessary to wait for a measure from the Congress.

South Dakota v. Wayfair inc will play an important role in taxation, not only for American enterprises, but also for non-US businesses that have no physical presence in the USA but sells products over there, considering they might be subject to collect and remit the sales and use tax on a state-by-state basis and the USA does not have a one stop shop, like the European one.⁴⁹

4. THE BRAZILIAN MODEL OF TAXATION

4.1 The Taxation on Consumption and the ICMS

In Brazil, the taxation on consumption and services is divided into the three federative bodies. The Federal Union is responsible for the IPI (a tax over industrialized products), the states are responsible for the ICMS (tax on the movement of goods and services) and the cities for the ISS (tax over services). This division poses lots of uncertainties in taxation, which has led many jurists to propose replacing these three taxes with a single VAT, as other Latin American

⁴⁹ The author also remarks that the decision of the American Supreme Court doesn't follow the OECD guidelines, considering that the OECD VAT/GST Guidelines recommend that, regarding indirect taxes, the country in which the customer has its residence has the taxing rights over B2C supplies (as stated in item 2 of the present article), irrespective of any physical presence. Aleksandra Bal, *South Dakota v. Wayfair: The Tax Case of the Millennium*, <http://www.taxsutra.com/experts/column?sid=974> (accessed 16 July 2018).

countries do.⁵⁰ Nonetheless, until any political change is made, the division into three different taxes still exists.

Given that the great majority of e-commerce transactions are taxed by the ICMS and that the rules upon the ICMS and the ISS are not the same, this article will focus on the discussions regarding the ICMS, which is a state tax, whose origins come from the French Law of 1954.⁵¹ Although it was outlined by the 1988 constituent as a state tax, the ICMS has a clear national vocation to such an extent that it is possible to affirm that its main problems concern the context of Brazilian federalism and not structural and economic aspects.⁵²

In this sense, the Constitution broadly regulated the ICMS legal regime, disciplining a complex legal framework in order to avoid the so-called fiscal war, or in other words, the competition among the states for the revenue of the ICMS. The fiscal war can lead to alterations in the legislation, through which the states create incentives or exemptions, in order to attract the investments made by enterprises.

Moreover, the Constitution gave the Federal Senate the power, through resolution, to establish the rates applicable to interstate and export operations, as well as to establish the minimum and maximum rates in internal operations. The Constitution also granted to the complementary law the prerogative of disciplining the various aspects of the tribute,⁵³ with emphasis on the need for exemptions, incentives and tax benefits to be granted and revoked through the

⁵⁰ Adilson Rodrigues Pires, *A Guerra Fiscal e a Proposta de Criação do IVA*, 22 Revista de Direito da Associação dos Procuradores do Novo Estado do Rio de Janeiro 355, 368-370 (Marcos Bueno Brandão da Penha & Nicola Tutungi Junior eds., 2014).

⁵¹ Ricardo Lobo Torres, *Tratado de Direito Constitucional Financeiro e Tributário* vol. 4, 230 (Renovar 2007).

⁵² Rubens Gomes de Souza, *Os Impostos Sobre o Valor Acrescido no Sistema Tributário*, 110 Revista de Direito Administrativo 17, 24-25 (1972).

⁵³ Braz. Const. art. 155, § 2, XII.

deliberation of the States and the Federal District within the National Tax Authority Council.⁵⁴

The Brazilian Federal Constitution stated, until the amendment 87 of April 16, 2015, that, in interstate operations, the ICMS should be paid to the state of origin. According to the Constitution, tax rates could vary depending on whether the addressee was a taxpayer or not, but, in both cases, the ICMS should be paid to the state of origin⁵⁵ and the destination state would only receive a differential tax rate, if the addressee were a taxpayer.⁵⁶

Given this scenario and the growing increase in non-presence sales, such as the internet, telemarketing and showrooms, several states of the federation - notably those in the North, Northeast and Central-West regions - have begun to wage a battle for the collection of tax revenue from ICMS. It should be noted that the distribution centers of most of the companies that operate in e-commerce are located in the South and Southeast regions, which, according to the origin rule, would concentrate the collection of ICMS in these states.⁵⁷

Consequently, many states of the federation have begun to mobilize, which led to the amendment of the state legislation of several of them, instituting the collection of ICMS in the destination. One of the pioneers to do so was the state of Bahia, through State Decree 12.534 of December 23, 2010, which was followed by several states of the federation.

4.2 The Protocol 21 and the Taxation of E-Commerce in Brazil

⁵⁴ Braz. Const. art. 155, § 2, XII (g) and Complementary Law 24, from January 7, 1975.

⁵⁵ Braz. Const. art. 155, § 2, VII.

⁵⁶ Braz. Const. art. 155, § 2, VIII.

⁵⁷ Ana Clarissa Masuko dos Santos Araújo, *ICMS no E-Commerce e o Protocolo ICMS 21/2011: Permanecem as Inconstitucionalidades*, 193 *Revista Dialética de Direito Tributário* 7, 7 (2011).

In the meantime, Protocol 21/2011 was signed by 18 states in the North, Northeast and Midwest of the country, in addition to Espírito Santo, with the main purpose of fair distribution of ICMS on non-presence transactions.⁵⁸ The protocol rules that, regarding e-commerce, the ICMS must be divided into the states of the origin and destination, inclusive for non-signatory states.⁵⁹

The measure caused numerous setbacks to taxpayers, since the States of origin that did not sign the Protocol would not fail to demand their internal rate in the operations carried out in a virtual environment. Therefore, in the case of sales made from a non-signatory State of the Protocol to a State signatory, the taxpayer should collect ICMS at the origin, at the internal rate of the sending state, in addition to ICMS at destination, by the differential rate between the internal rate of the recipient state and the interstate rate. If the state of origin is also a signatory to the Protocol, it would be entitled to the interstate rate.⁶⁰

Faced with the sensitive change in the ICMS normative framework, several doctrinal sectors began to defend the unconstitutionality of ICMS Protocol 21, whether from a formal point of view or from a material point of view.

Regarding the formal unconstitutionality, it has been argued that it would not be for a protocol to establish new limits on the distribution of ICMS revenue among states. In addition, the role of an ICMS Protocol should be to establish common tax procedures among the signatories, not to establish norms that in any way increase the tax burden.⁶¹

⁵⁸ Alessandro Mendes Cardoso & Simone Bento Martins, *ICMS e o Comércio Eletrônico: Nova Feição do Conflito Federativo em Matéria Fiscal*, in *Estado Federal e Guerra Fiscal no Brasil* vol. 3, at 229, 236 (Misabel Abreu Machado Derzi, Onofre Alves Batista Júnior & André Mendes Moreira eds., 2015).

⁵⁹ Protocol 21, of April 1, 2011.

⁶⁰ *Ibid.*, cl. 3.

⁶¹ Antônio Reinaldo Rabelo Filho & Ana Carolina Magliano Ribeiro Romano, *A Guerra Fiscal: Causas e Consequências*, in *Estado Federal e Guerra Fiscal no Brasil* vol. 3, *supra* n. 58, at 191, 200.

It was further alleged that Protocol 21 implied a violation of the principle of legality, as set forth in Article 150, I, of the Brazilian Constitution, since it provides that no citizen's behavior can be demanded without a law establishing it, and the protocol is precisely to demand the imposition of a tax burden without any legal support.⁶² At the same time, there was a violation of the federal jurisdiction to create residual taxes, according to the provisions of Article 154, I, of the Brazilian Constitution.⁶³

Regarding material unconstitutionality, the most flagrant one is the subversion to the normative framework outlined in the Constitution, because the signatory states of the protocol mitigated the principle of origin, in direct violation of the Constitutional Text. In fact, any change in the constitutional systematic should be done by an amendment, not by a protocol.

The doctrine also argued that there was a breach of the principle of non-discrimination, provided for in Articles 150, II and 152, of the Brazilian Constitution, which prohibit states from discriminating against taxation by reason of their origin or destination, because the taxation would be different whether the sale was online or physical and whether the state was or was not a part of the protocol. In addition to that, another alleged unconstitutionality was double taxation, because the signatory States would be invading the proper competence of the federated units of origin, leading to a taxation both in origin and in destination.⁶⁴

⁶² Ariane Bini de Oliveira, Betina Treiger Grubenmacher & Giovana Treiger Grubenmacher, *Guerra Fiscal do Comércio Eletrônico*, in *Estado Federal e Guerra Fiscal no Brasil* vol. 3, *supra* n. 58, at 213, 219.

⁶³ Maurício Barros, *O ICMS no Comércio Eletrônico e a Inconstitucionalidade do Protocolo ICMS 21/2011*, 193 *Revista Dialética de Direito Tributário* 93, 102-104 (2011).

⁶⁴ Alessandro Mendes Cardoso & Simone Bento Martins, *ICMS e o Comércio Eletrônico: Nova Feição do Conflito Federativo em Matéria Fiscal*, in *Estado Federal e Guerra Fiscal no Brasil* vol. 3, *supra* n. 58, at 229, 243-244.

Due to this scenario, a number of lawsuits have been filed before the Federal Supreme Court, both of concentrated and diffuse control of constitutionality, in which the validity of Protocol 21 and several state legislations, similar in content to the protocol, has been questioned.

4.3 Actions Before the Federal Supreme Court

The two main actions in which the Protocol 21 was questioned were the direct action of constitutionality 4.628 (also known as ADI 4.628/DF)⁶⁵ and the appeal to the Federal Supreme Court 680.089/SE (also known as RE 680.089/SE).⁶⁶

In ADI 4628/DF, the unanimity of the Justices decided that the protocols are aimed at regulating the provision of mutual assistance in the field of fiscalization of taxes and exchange of information, being vehicles intended to take care of administrative matters, which is not reserved to agreements. Still in the formal aspect, the Justices agreed that it would be up to the Federal Senate to decide on the maximum and minimum ICMS rates.

They also stated, following the opinion of Justice Luiz Fux, who was the judge-rapporteur, that the Brazilian Constitution adopted the rule of origin regarding the taxation of ICMS, so that if some States wanted to regulate the matter in a different way, this would subvert the system of taxing power. In this way, the Justices argued that the correction of existing distortions in the ICMS system could only be done by promulgating a constitutional amendment, rather than by editing any other normative species.

Demonstrating that the main losers with the rules set out in Protocol 21 would be consumers, the prevailing opinion indicated that the protocol violated

⁶⁵ ADI 4.628/DF, rel. Min. Luiz Fux, Tribunal Pleno, Julgamento 17/09/2014, DJe 24/11/2014.

⁶⁶ RE 680089/SE, rel. Min. Gilmar Mendes, Tribunal Pleno, Julgamento 17/09/2014, DJe 03/12/2014.

the principle of non-confiscation, free trade in persons, as well as the federative pact and separation of powers. Finally, by a majority, the effects of the decision were modulated, except for the actions that were already pending.

On the same date, the RE 680.089/SE was judged. In this extraordinary appeal, the State of Sergipe, which was a signer of Protocol 21, challenged one decision from the state court, which prevented the collection of ICMS on goods purchased in virtual form and addressed to the state.

On the merits, the rapporteur, Justice Gilmar Mendes, emphasized that, while the purposes of Protocol 21 are virtuous in promoting a fairer distribution of ICMS revenue sharing among the states of origin and destination, this would run counter to the rule of the ICMS stipulated in the 1988 Constitution, as well as producing adverse effects on taxpayers, in the case of sales from states not signatories to the protocol.

Thus, in accordance to what was decided in ADI 4628/DF, the Federal Supreme Court decided that only a constitutional amendment could make such a change in the ICMS system, noting that, at that moment, there were several draft constitutional amendments being processed in the National Congress. There has also been a modulation of effects in the decision, with the exception of the actions in pendency.

Finally, due to the Federal Supreme Court decisions, Congress has approved the Amendment 87, of 16 April 2015, which established a new model of ICMS revenue sharing. Through this new system, it has been widely predicted that in interstate operations, both for taxpayers and non-taxpayers, the state of destination will receive the percentage of ICMS related to the difference between the interstate rate and its internal rate. The state of origin, in turn, will be the amount of ICMS corresponding to the application of the interstate rate. Consequently, the Brazilian model does not adopt the rule of the origin or

destination, but a mixture of both, as a consequence of the increase in the debate over the sharing of taxation in e-commerce transactions.

The promulgation of the Amendment 87 represented, paradoxically, the victory of Protocol 21, since, although it was declared unconstitutional, the discussion underlying its edition resulted in a change in the ICMS revenue sharing structure, which, since the drafting originating in the Constitution, was centered on the principle of origin.

5. CONCLUSIONS

In view of the above, it is possible to conclude that the taxation of e-commerce represents a new frontier in European, American and Brazilian Tax Law, for all the powers involved. In other words, the effectiveness of Internet sales taxation needs the cooperation of the Executive Branch, national and transnational legislators and also the Judiciary, in both Common and Civil Law models.

Regarding indirect taxation, the OECD has therefore edited a series of documents, such as BEPS Final Report, VAT Guidelines and the Report on Tax Challenges Arising from Digitalization, recommending that countries adopt the taxation on the destiny, as a way of implementing the principle of neutrality in international trade.

European countries have been following the guidelines from the OECD, through a series of directives and resolutions, edited by both European Commission and European Parliament, that aim to impose the taxation of the VAT on the destination as well as to implement some measures to simplify tax obligations, in order to increase compliance rates, auditing tools, help prevent fraud in e-commerce and reduce the VAT Gap. The European Commission also

highlights the need for cooperation, not only between Member States but also with non-EU members.

The challenges imposed by the taxation of e-commerce and the role of the Common and Civil Law can be studied in both the United States of America and in Brazil. The American Supreme Court, which is a Common Law Court, has judged a series of actions regarding the taxation of remote selling since *National Bellas Hess, Inc. v. Department of Revenue of Illinois*.

Although in *Amazon.com, LLC v. New York State Department of Taxation and Finance* and *Overstock.com, Inc v. New York State Department of Taxation and Finance*, the Supreme Court denied the *writ of certiorari* and did not reason the decision, in *South Dakota v. Wayfair Inc.*, the Court overruled *Bellas Hess* and *Quill* and decided that the taxation of e-commerce does not require any physical presence. Considering that Internet has changed the dynamics of the national economy, the Supreme Court pointed out that the physical presence imposed by *Quill* would give online retailers an arbitrary advantage.

On the other hand, in Brazil, the Federal Supreme Court, which is a Civil Law court, has also played an important role in the debate on the distribution of ICMS revenues between the states of origin and destination. Although Protocol 21 has been declared unconstitutional, the reasons underlying its edition have led to a series of discussions that resulted in the approval of the Amendment 87, which changed the regime of ICMS revenue sharing.

Consequently, despite the significant differences regarding Common and Civil Law Courts, which were described under item 3 of the present article, both the American Supreme Court and Brazilian Federal Supreme Court were important actors in the process of establishing the rules upon the taxation of e-commerce.

Although European, American and Brazilian models are different from each other, as was shown and described in the items above, they all illustrate that the taxation of the digital economy, and e-commerce in particular, is a permanent challenge that can only be overcome with the cooperation of all powers involved as well as with the recognition that the Internet has changed the economic and legal paradigms.