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HOW BRAZILIAN ADMINISTRATIVE TAX COURT COMPONENTS THINK: AN ANALYSIS OF THE PROFILE OF ADMINISTRATIVE DECISIONS WITHIN THE SCOPE OF THE ADMINISTRATIVE TAX COURT (CARF)

COMO PENSAM OS CONSLHEIROS: UMA ANÁLISE DO PERFIL DAS DECISÕES ADMINISTRATIVAS NO ÂMBITO DO CONSELHO ADMINISTRATIVO DE RECURSOS FISCAL (CARF)

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RESUMO

Para entender os critérios utilizados na tomada de decisões administrativas, pelos colegiados do Conselho Administrativo de Recursos Fiscais (CARF), órgão competente para julgamento administrativo dos litígios tributários federais em segunda instância e em instância especial, é utilizado o arcabouço teórico de Richard Posner em "How Judges Think". Das nove teorias da decisão citadas pelo

autor, são consideradas três: a Teoria Atitudinal, a Teoria Estratégica e a Teoria Legalista; e, por analogia, a dicotomia proposta entre juízes indicados por presidente do Partido Republicano ou do Partido Democrata, é transposta para a oposição entre conselheiros representantes dos contribuintes ou da Fazenda Nacional. Em seguida, para aplicação dessa proposta teórica de classificação dos critérios decisórios, são consideradas decisões tomadas pelos colegiados do CARF, alternativamente favoráveis ao contribuinte ou à Fazenda Nacional, por unanimidade, por maioria de votos ou por voto de qualidade do presidente do Colegiado, que é representante da Fazenda Nacional. Foram consideradas as decisões do ano de 2016, por serem posteriores à vigência do atual regimento interno do órgão e anteriores à relativização do voto de qualidade, pela Lei n° 13.988, de 2020. O percentual de decisões favoráveis à Fazenda Nacional tomadas por voto de qualidade, em face do total de decisões do órgão, revela a importância da Teoria Atitudinal como critério decisório, em face da Teoria Legalista. Por fim, as informações levantadas se mostraram insuficientes para uma afirmação segura da relevância da utilização da Teoria Estratégica, na tomada de decisão.

Palavras-Chave: Critérios Decisórios. Processo Administrativo Fiscal. Colegiado Paritário.

ABSTRACT

To understand the decision criteria in brazilian administrative tax court, called CARF, this article refers Richard Posner in “how judges think”. Three of the nine teories presented by the author, are here considered the most important: the Attitudinal Theory, the Strategic Theory and the Legalist Theory; and, by analogy, the opposition between judges appointed by Democratic or Republican Presidents, is compared to the dicotomy between members of the adminstrative tax court, called advisers, appointed by the tax administration and by tax payers representative entities. To test these theories of decision criteria classification, were taken into account decisions in favour of the tax adminstration and in favor of the tax payer, considering unanimous decisions, majority decisions and decisions taken, in equality of votes, by the court´s president´s casting vote, considering that the president is allways a member appointed by the tax administration. The data survey was restricted to decisions taken in 2016, because they are posterior to the present CARF organization and previous to the

casting vote new implementation, introduced by act 13.988, 2020. The percentage of decisions in favour of the tax administration, taken by the president´s casting vote, regarding to the total amount of decisions in the period, can reveal the importance of Attitudinal Theory in decision making, in comparision to the Legalist Theory. However, the information gathered is not clear enough to demonstrate the relevance of Strategic Theory, in the decision making process.

KEYWORDS: Decision Criteria. Administrative Litigation. Parity Court.

1 INTRODUCTION

The purpose of this article is to identify possible different criteria in the decision making of the Administrative Council of Tax Appeals (CARF) by councilors from different categories in relation to controversial tax law issues dealt with in federal tax administrative proceedings.

The relevance of the issue lies in the fact that there is an ongoing debate regarding the casting vote of the presidents of CARF's collegiate body. Considering that this Council is a joint body, with collegiate bodies made up of representatives of the National Treasury and representatives of taxpayers, and that the president of the collegiate body is, under the terms of the body's internal regulations, a representative of the National Treasury, the following question arises: In the event of a tie in the judgment of an appeal, with the president's vote defining the decision, would there be a bias in favor of the National Treasury?

As a hypothesis, we propose the possibility of quantitative verification of the decisions, in order to clarify the existence, or not, and relevance of possible bias in the body's decisions.

In order to achieve this objective, the methodology used will be a procedure defined by the following steps.

Initially, from a theoretical point of view, the decision-making criteria that can be used by judges will be surveyed, based on the study by Richard Posner (2008), who identifies nine theories of decision-making by judges. As a methodological cut-off, only the three criteria considered most relevant for the purposes of this work will be considered, arising from the following theories: the Attitudinal Theory, the Strategic Theory and the Legalistic Theory. Similarly to Posner's analysis, which emphasizes the opposition between judges appointed by presidents of the Democratic and Republican parties, this paper focuses on the

dichotomy between the councilors appointed by the National Treasury and those appointed by entities representing taxpayers.

Briefly, for clarification purposes, according to the attitudinal theory, decisions would be made taking into account the maximization of the values and interests of each judge. The strategic theory, complementing the attitudinal approach, proposes that sometimes minor decisions can be made contrary to the values and interests of the judge, in order to influence the behavior of other judges in other situations. Finally, according to the legalistic theory, it is the formal system of rules that is the most important factor in decision making, here we will also consider within this theory the set of rules for assigning powers and responsibilities, which is, in more in-depth studies, dealt within the scope of organizational theory.

Next, for contextualization purposes, the structure of the Tax Administrative Process and CARF will be presented, as well as the process for selecting the body's board members, with their respective rules of operation. At this point, the different categories of board members will be identified, with emphasis on the dichotomy between board members representing the National Treasury and board members representing categories of taxpayers, which will be considered in the study. It is important to note that, as the corresponding public data is not available, subcategories will not be considered here, such as: (a) counselors representing taxpayers (i) at the beginning of their careers, with the possibility of a future legal career and (ii) university professors, with no interest in legal practice; or (b) tax counselors (i) at the beginning of their careers and (ii) at the end of their careers, with the possibility of a future legal career.

Next, a survey of data will be presented, based on the Minutes of Judgments, segregating decisions taken by unanimous vote, by majority vote or by casting vote, in different collegiate bodies. It will then be possible to compare the data collected with the theories considered, in order to identify different decision criteria.

For data selection, the following time limits were considered: (a) the publication of the current CARF Internal Regulations (RICARF), approved by MF Ordinance No. 343, of June 9th, 2015 (BRASIL, 2015), and (b) the change in the casting vote criterion, inserted by art. 28 of Law No. 13.988, of April 14th, 2020 (BRASIL, 2020). The reasons for these time limitations are practical. The current RICARF is the result of a major restructuring of the agency, which took place in

2015 as a result of the "Zelotes" operation, and it makes no sense to compare it with the previous situation.

Operation Zelotes was launched by the Brazilian Federal Police Department in March of 2015 to investigate an alleged corruption scheme at CARF. One of the effects of the investigation was the institution of new rules and procedures aimed at improving the controls of the agency.

It should be clarified that the aforementioned art. 28 of Law No. 13.988, of April 14, 2020, inserted art. 19-e into Law No. 10.522, of 2002, and, without extinguishing the casting vote, determined that, In the event of a tie in the judgment of the administrative process for determining and demanding the tax credit, the casting vote referred to in § 9 of art. 25 of the Decree No. 70.235, of March 6th, 1972, shall not apply, resolving in favor of the taxpayer.

In the end, we hope to gain an insight into the scope and limits of the use of different possible criteria by categories of councilor, contributing to the predictability of the functioning of the body and revealing its insertion in the tax administration and in the own economic and social system of the system.

We hope that this knowledge can contribute to an understanding of the dynamics of tax credit discussion in the federal administrative sphere. We believe that this understanding will be decisive in designing new organizational rules and improving existing ones, in order to achieve the goals of ensuring that everyone pays taxes according to their ability to pay, within the limits of the law, and that no one fails to pay taxes due.

2 DELIMITATION OF THE PROPOSED STUDY

This section will present the decision-making criteria to be considered in the proposed study and how CARF works. To this end, a brief presentation will first be made of the theories that explain possible decision-making criteria and the selection of those that will be considered most important for the work. Then, in order to apply this theory, the structure and functioning of CARF will be presented.

2.1 Theories of decision-making behavior

According to Richard Allen Posner (2008), there are nine theories of judicial decision-making behavior and they all have their merits, but they are incomplete, lacking a proposal that unifies them: (a) Attitudinal Theory, (b) Strategic Theory, (c) Sociological Theory, (d) Psychological Theory, (e) Economic Theory, (f)

Organizational Theory, (g) Pragmatic Theory, (h) Phenomenological Theory and (i) Legalistic Theory. As an initial approach, we will briefly comment on each of these theories and then analyze in more detail those that will be considered in this work.

According to the Attitudinal Theory, decisions are made based on the political preferences brought to the case. Thus, when the technical analysis is insufficient, the judge tends towards the position that best suits his ideology and the political spectrum with which he identifies.

According to the Strategic Theory, when making a decision, the Judge is concerned about the reaction of others, whether they are colleagues on the bench, higher courts, legislators or public opinion itself. Therefore, in some cases, the personal political spectrum can be put on the back burner, in order to guarantee, in the long term, the ideology defended, as well as the effectiveness of this and other decisions.

According to the Sociological Theory, the behavior of the Judge is strongly influenced by his dynamic relationship with the other elements of the group in which he is inserted. In this way, this theory, bringing elements of social psychology and rational choice into the discussion, tries to combine proposals from the Strategic and Attitudinal Theories.

Psychological theory focuses on analyzing the unconscious processes of the human mind when it comes to decision-making. Thus, this theory attempts to deepen the considerations of the Attitudinal Theory.

In turn, the Economic Theory proposes that it is considered rational for the Judge to always seek to maximize their benefits and interests when making a decision. This is a simplification of the Psychological and Strategic Theories, considering a standard, normally expected behavior.

According to the Organizational Theory, the structuring rules, with the attribution of powers, determination of limitations and definition of procedures for the Judges, have the power to direct the adjudicatory activity in order to guarantee coherence between the interests of the judge, who is the agent, and the State, which is the principal.

The Pragmatic Theory argues that decisions are, in fact, made by their consequences, considering their usefulness to the judge, to the detriment of a deductive process, based on premises. In this way, we would have the Attitudinal Theory taken to the extreme, and this would be the opposite of legalism.

The Phenomenological Theory tries to harmonize pragmatism and legalism, focusing on the way in which thought presents itself to the conscious mind, trying to ascertain how the decision is made in the face of the emotions and feelings it arouses in the Judge.

Finally, according to the Legalistic Theory, decisions would be determined by the sources of law, which are general, impersonal, external and pre-existing to the fact being judged. With this, personal factors would be left in the background, in order to apply the decision logically, considering (a) the normative legal system, as a major premise, (b) the facts brought to the record, as a minor premise and (c) the decision as a logical consequence of the premises.

In this work, for the purposes of simplification and practical use of the above theories, the focus will be on the Attitudinal, Strategic and Legalistic Theories. Some more in-depth considerations on these theories will follow.

2.2 Attitudinal Theory

To deal with the Attitudinal Theory, Posner (2008) starts from the hypothesis that the criteria for appointment to the Federal Court of the US points to a situation in which Judges appointed by the president of the Democratic Party tend to be more liberal in their decisions and Judges appointed by the president of the Republican Party tend to be more conservative. In addition, the author finds that the Senate, especially when it has a Republican majority, makes a big difference in the choice of judge and that the more debatable and visible the issue is, the greater the power of the political variable in the decision.

Posner admits that there are limitations to this theory, stating that the appointment criterion is imperfect and can weaken over time, and that it is ineffective in cases where there is a collision of principles, when both are important to the ideology corresponding to the judge's political spectrum. As an illustration, the author refers to the difficulty of applying the Attitudinal Theory in a case in which the constitutionality of a law prohibiting the purchase of real estate by African-Americans in white-majority neighborhoods and vice versa was judged, arguing that it was a collision between the ideas of racial discrimination and freedom of use of property, both relevant to the same political spectrum.

It should be noted that the Attitudinal Theory starts from the assumption that there is a set of pre-existing convictions, represented by the political spectrum to which the judge belongs, which influences decisions in concrete cases. This assumption could be worked out in the light of other theories, such as the

Psychological Theory, which seeks to explain these pre-existing convictions through unconscious processes in the human mind, or the Sociological Theory, which seeks to explain these convictions through the inclusion of the Judge in a social group, or the Economic Theory, which explains these convictions in a simplified way by maximizing the benefits and interests of the Judge, or the Pragmatic Theory, in which convictions are related to the consequences of decisions.

For this reason, in this work we will emphasize the Attitudinal Theory, to the detriment of the other theories mentioned in the previous paragraph, considering that it could encompass all of them.

Applying the referred premises of the Attitudinal Theory to the field of the Tax Law, considering a dispute between the State, embodied in the figure of the tax administrative authority, referred to as the tax authorities or, more broadly, the active subject, and the private individual, referred to as the taxpayer or, more broadly, the passive subject, we could have the obvious dichotomy of positions, with possible different decisions in the case of a Judge appointed by the tax authorities or a Judge appointed by the taxpayer.

However, the convictions that drive decisions can have a much deeper and more genuine aspect than the mere personal interest of the members of each group. In other words, the convictions are not just the result of the state's interest in collecting revenue or the private individual's interest in minimizing their tax burden. In fact, convictions can stem from different worldviews.

On this issue, Valcir Gassen (2016) makes it very clear that there are currently conflicting views on the relationship between property and taxation, which can shed light on the discussion about the application of the Attitudinal Theory to the tax litigation.

The author states that the institution of property as a natural right of the individual was the result of the economic and political hegemony of the bourgeoisie, due to the industrial and political revolutions that took place in England and France, respectively, in the 18th century. Before that time, the concept of property was seen as a concession from the state, referring to the concept of emphyteusis, in which the individual, called the emphytee, in order to exercise the right to use the property, had to pay the state an annual amount, the rent, and, in order to dispose of the property, another amount, called laudemium.

With the victory of the bourgeoisie, property came to be defined as an absolute right, in the terms of the Napoleonic Code or the Declaration of the Rights of Man and of the Citizen. Well, over time, this definition was naturalized and, considering property as an absolute right pre-existing the state itself, taxation would be seen as an invasion of the State over this property or, at least, a threat to it, which should be contained.

On the other hand, if we return to the idea that the right to property is conventional, i.e. that individual property should only exist because it is accepted and protected by the social group, which happens through the power of the state, through the use of law as a tool, taxation would no longer be seen as a threat to property, but, on the contrary, as a rite of legitimization and protection by the social group.

These two approaches coexist today, and their applications can be identified in discussions. Gassen mentions, for example, the discussion on the constitutionality of the Constitutional Amendment 29 of 2000, which dealt with the progressivity of the Urban Property Tax, based on use. On that occasion, Miguel Reale (2000, p. 124-125) took the view that this progressivity would be a violation of a fundamental clause of the Constitution, as it infringed on the individual rights of urban property owners. On the other hand, the Federal Supreme Court, in the judgment of the Direct Action of Unconstitutionality 2.732-DF (BRAZIL, 2015), by Justice Dias Toffoli, considered progressivity to be constitutional.

Well then, these two philosophical views of the nature of property, and consequently of taxation, have the power to generate different worldviews, which would justify ontologically different positions in the analysis of concrete problems. This is enough to highlight the importance of considering Attitudinal Theory when analyzing the criteria of the decision-making of CARF.

In fact, as an assumption, in the same way that Posner, as mentioned above, understood that Judges appointed by Presidents of the Democratic Party would have more liberal positions compared to Judges appointed by Presidents of the Republican Party, we can consider in this article that: (a) councilors coming from the ranks of civil servers of the Special Secretariat of the Federal Revenue of Brazil, tax auditors of the Federal Revenue of Brazil, would have a view of taxation as a necessary condition for the legitimization and protection of property; and (b) councilors appointed by entities representing categories of

taxpayers would tend to understand taxation as an invasion of the sphere of property of individuals, to be protected.

The psychological, sociological or pragmatic reasons for these attitudes are beyond the scope of this paper. Even so, it is important to consider that several authors agree on the existence and importance of axiological bias in decision-making, such as Joseph C. Hutcheson Jr.(1929) who states that intuition is an important factor for the Judge.

2.3 Strategic Theory

The Strategic Theory, also known as the Positive - Political Theory, does not negate the Attitudinal Theory, but merely contextualizes its applicability, admitting that a decision according to the judge's convictions would not always have the expected effect. This is because, according to the Strategic Theory, decisions must take into account the reaction of others involved, be they colleagues, higher courts, legislators or the general public. Thus, Posner (2008) admits the existence of decisions with mediated objectives, acceptance or the possibility of other decisions being made.

In this way, depending on the situation, it would be possible to make a decision contrary to the judge's convictions, for example, in situations of lesser repercussion, in order to maintain a balanced stance and, in important situations, to guarantee legitimacy for their ideological position.

In a broader sense, we can say that the Strategic Theory is an application of the Bargaining Theory to the context of decision-making by Judges. The Bargaining Theory analyzes situations in which an agreement between the parties can increase the state of satisfaction for both. The Bargaining Theory, in turn, is part of the Game Theory, which analyzes the effects of a decision on future decisions of other people.

Well then, according to Ivo Gico (2020, p 164), a bargaining situation is one in which two or more players (individuals involved) have a converging interest in cooperating, but have divergent interests in the form of cooperation. Thus, an agreement between these individuals can serve the interests of both.

For a better understanding, it should be noted that the Game Theory analyzes the consequences of the behavior of individuals in the face of the behavior of other individuals, called players. A famous example of the application of the theory is the dilemma of the prisoner, in which two suspects are arrested, with the possibility, based on the evidence known so far, of a sentence of 5 years

each, and both are granted, without the other knowing, the possibility of an agreement to increase the sentence of the other to 10 years and reduce his sentence to 6 months.

If both accept the deal, they both get 10 years each (scenario 1). If neither accepts the deal, both are still subject to a sentence of 5 years each (scenario 2). And if only one of them accepts the deal, one will be sentenced to 10 years and the other to 6 months (scenario 3). Note that, all in all, if both don't accept the deal, with each serving 5 years, the total result is 10 years. If both accept, each will serve 10 years, with a total result of 20 years. And if only one accepts the deal, the total result would be a combined sentence of 10 years and 6 months.

The second scenario, where both accept the deal, is clearly less advantageous than the third scenario, which seems to be the most interesting from an individual point of view. However, according to Game Theory, the first scenario, where both reject the agreement, is the one that leads to the best result in the long term. This is because the third scenario, although advantageous for those who accept the agreement, breaks down trust and leads to the first scenario, of acceptance of the agreement by both, in all possible subsequent situations.

Taking these ideas to the field of collegiate decision-making, it is possible to propose the existence of positions, even if contrary to the personal conviction of a particular Judge, seeking recognition of the reasonableness of two decisions and the confidence of other Judges, with the possibility of arguing the need for reasonableness on the part of others in future situations. Well, theoretically, as a hypothesis, one could propose the occurrence of situations like these in CARF. However, this would require a qualitative and quantitative survey of the outcome of decisions - by specific subjects and ranges of values and, although the subjects dealt with in the decisions are public, the ranges of values are not available.

According to Hanson (2012), Joshua Furgeson and Linda Babcock state that ideology can influence complex models of thought in the interpretation of the law, recognizing the existence of bias in the final decision, given an initial ideological response to a problem. And, confirming what has been proposed here, they refer to two different ways in which the judge defends the ideological position: (a) the attitudinal model, which has already been seen and which makes the ideological position clear, and (b) the strategic model, in which the direct defense of the ideological position is given up in the face of the need to protect

the position against reversal of the decision or even future attacks on that ideological position.

2.4 Legalistic Theory

For Posner, in the mentioned work, legalism is considered a positive theory of judicial behavior. Thus, judicial decisions would be determined by the sources of law, pre-existing and external to the Judge. In other words, decisions should be made to the detriment of personal factors such as ideology, personality and axiological baggage.

Ideally, according to the Legalistic Theory, the decision would consist of the application of a syllogism, based on the rules deriving from the sources of law, taken as the major premise, and on the facts brought to light, as the minor premise. Then, through a process of logical deduction, of subsuming the facts to the applicable rule, an unequivocal conclusion would necessarily be reached.

It should be noted that there are authors who challenge the application of the Legalistic Theory in a pure form, considering the possibility of bias, not only in the interpretation of the applicable rule, but also in the assessment of the evidence of the facts brought to the case file. In this sense, Jerome Frank (1949-1950) refers to skeptical constructivism, identifying two groups of judges: (a) those skeptical of the rules and (b) those skeptical of the facts themselves, who believe that these can also be distorted by the narrative, arguing that the idea of a mechanical operation in the resolution of disputes is not what happens in practice.

Posner himself, in his final remarks on theories of decision-making, admits that there is an ample room for an intermediate position between the Legalistic and the Attitudinal Theories.

However, there are authors who defend the centrality of the Legalistic Theory in the adjudication process, reserving a restricted and residual space for applicability for the other theories. On this subject, Ivo Gico (2020) argues that decision-making by judges is part of the activity of guaranteeing the preferences of those in power in a very large social group. Thus, judges acting as agents of the power holder, who is the principal, tend to have their freedom of action restricted as much as possible, so as to avoid establishing the preferences of the agents, judges, to the detriment of the preferences of the principal, the power holder.

In this book, Ivo Gico starts from the assumption that social groups need to be organized in order to survive, but bands of up to fifty individuals would not need hierarchical organization, a monopoly on the use of force or a formal conflict resolution mechanism. However, in tribes of up to a thousand individuals, the idea of specialization of work arises, in order to produce a surplus of food and, consequently, hierarchies and individuals with the power to determine the behavior of other members.

Then there were the leaderships, made up of thousands of people and the emergence of a monopoly on the use of force to resolve conflicts. Finally, there would be the States, with a larger number of people and the impossibility of resolving conflicts directly by the head, resulting in the institution of a group of people who, on behalf of the head, must resolve conflicts by applying the criteria that the head would apply. This would then be the relationship between agent and principal, in which the Judges, bureaucrats specialized in resolving conflicts, applying, as agents, the criteria resulting from the political decisions of those in power in the social group, would act on behalf of the latter.

The situation described in the previous paragraph reveals two aspects of the decision-making process by Judges: (a) the decision-making process stems from the need for third parties, Judges, to apply the preferences of those in power in the social group, in order to determine the behavior of the individuals in that group and (b) as a result, this process generates the possibility of preferences of Judges overriding the preferences of those in power. For this reason, impersonal and generic norms, even organizational norms, are conceived in order to direct the behavior of Judges, limiting their sphere of freedom in decision-making.

In an extremely didactic way, Ivo Gico, in the mentioned work, presents the field of application of the Legalistic Theory, which he refers to as subsumption, and the residual fields of application of the Attitudinal and the Strategic Theories, which he calls hermeneutics of choices and integration, as shown in the figure below:

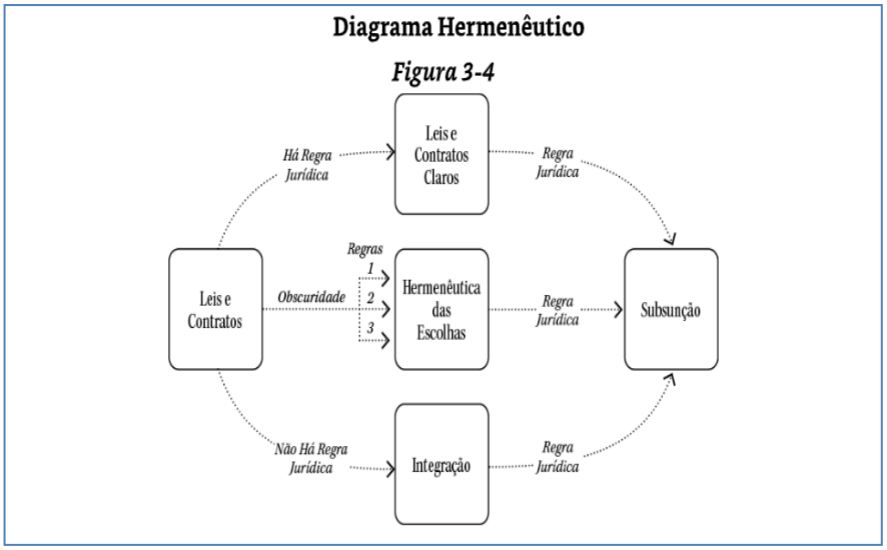

Figure 1. Hermeneutic Diagram

Source. Economic Analysis of the Civil Procedure (Gico, 2020, p. 103)

The image above mentions laws and contracts as sources of law. Well then, if there are clear laws and contracts, decisions should be made by directly subsuming the facts to the legal rule, in accordance with the Legalistic Theory. This, then, should be the normal situation.

In the same image, however, the situation of obscurity in laws and contracts is also mentioned. In this case, there is a small space of freedom to choose one of the possible interpretations of the rule. Here, then, the Attitudinal or the Strategic Theories would have their place of application.

Finally, the image shows a situation where there is no legal rule and the possibility of integration by the Judge. Here, the room for freedom in the decision is even greater, with broad applicability of the Attitudinal or the Strategic Theories.

Returning to the premise that the decision-making process must reflect the preferences of the established power, in cases of obscurity in the rule or its non-existence, if the decisions taken do not reflect these preferences, the established power, for example, through the production of new legislation, can make the rule clear and thus redirect the decision-making process towards subsumption, increasing the scope of applicability of the Legalistic Theory which, ideally, would tend to be applicable to all cases.

2.5 Profile of CARF advisors

Once the three theories of decision-making to be considered in this study are known, it is necessary to investigate the profile of the authorities vested with the

power to make the decision. Thus, at this point, the advisors of the Administrative Tax Council (CARF) will be analyzed, by presenting the history of the body itself and the process of selecting advisors to serve on the body.

2.5.1 CARF - PURPOSE, HISTORY, STRUCTURE AND OPERATION

In order to understand CARF, it is necessary to have a view of the Tax Administrative Process which, in turn, falls within the scope of the tax credit macro-process, composed, didactically, of three flows, here called: (a) spontaneous flow, (b) forced flow and (c) reverse flow, of restitution or compensation of amounts by the tax authorities to the taxpayer.

The spontaneous flow is one in which the taxpayer determines the amount due, declares its value in a document with the force of a debt confession and the nature of a self-assessment of the tax credit (DCTF - Declaration of Federal Tax Debts and Credits (Declaração de Débitos e Créditos Tributários Federais)), established by the Article 5 of the Decree-Law No. 2,124, of June 13th, 1984 (BRAZIL, 1984), and regulated by RFB Normative Instruction No. 2,005, of January 29th, 2021 (BRAZIL, 2021), and spontaneously collects this amount. It should be noted that, in this case, there is no need to talk about litigation and, consequently, there is no CARF intervention.

The forced flow is when the administrative authority, in an inspection procedure, concludes that all or part of the declaration and payment of the amount of the obligation it deems due has not taken place and, under the terms of articles 142 and 149 of the Law No. 5.172, of October 25th, 1966, the National Tax Code (BRAZIL, 1966), issues a notice of infraction, for the launch of the tax office, with the legal additions of a fine and interest. If the taxpayer does not agree with the tax assessment notice, he or she can file an appeal, initiating the litigation phase of the tax administrative process, according to articles 9 and 14 of the Decree No. 70.235, of March 6th, 1972 (BRAZIL, 1972).

Finally, in the reverse flow, the taxpayer claims to have amounts receivable from the tax authorities and makes a request for a refund or reimbursement, with or without a declaration of offsetting against other debts. The tax authorities may reject the claim in whole or in part. If the taxpayer doesn't agree with the rejection, he can file a statement of disagreement, which, as in the case of the forced flow, initiates the litigation phase of the tax administrative process, according to art. 74, caput and §§ 9 to 11, of Law No. 9430, of December 27, 1996 (BRASIL, 1996).

The tax administrative process, under the terms of the art. 25 of the Decree 70235 of March 6th, 1972, is, as a rule, composed of two instances of administrative judgment, with broad cognition: (a) the first instance, in the federal revenue offices of judgment, in the Special Secretariat of the Federal Revenue of Brazil (RFB), and (b) the second instance, in the CARF. In addition, there is a special instance trial, by the Superior Chamber of Tax Appeals (CSRF), with restricted cognition, to assess divergent case law between the CARF panels, with the aim of standardizing understandings.

The figure below illustrates the three flows mentioned above and places the litigation phase of the tax administrative process in these flows:

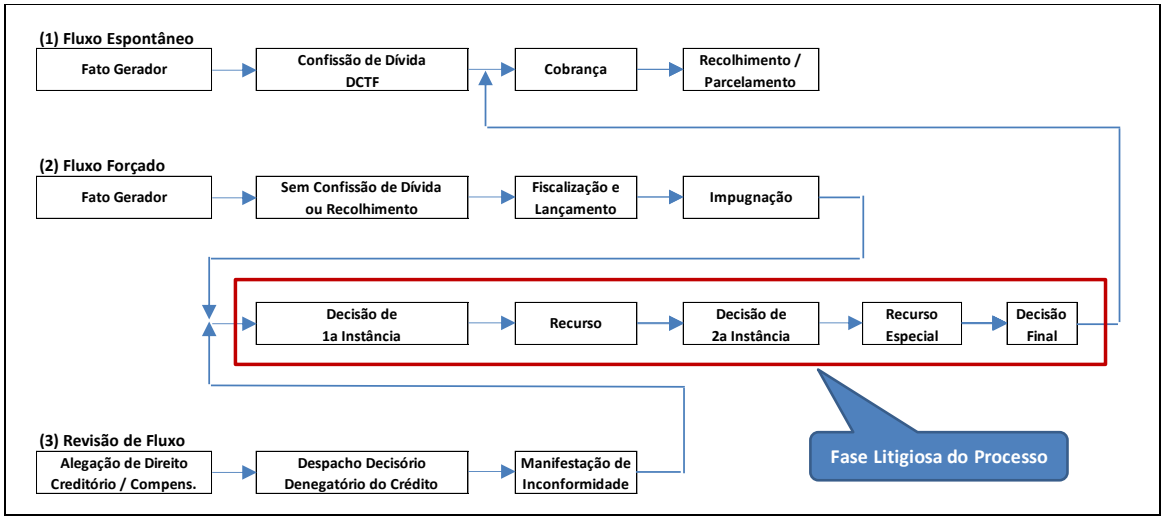

Figure 2 – Source: the Author.

Once the basic structure of the tax administrative process is known, within its context in the tax credit macro-process, it can be seen that CARF acts in situations of: (a) forced flow, resulting from an infraction or (b) flow review, resulting from an allegation of a non-existent credit right.

Considering these two situations, forced flow and flow review, presented above, according to the Decree 70.235 of 1972, the Tax Administrative Process is divided into two major phases, namely: (a) the inquisitorial phase and (b) the litigation phase. In this sense, art. 14 of the Decree No. 70.235 of 1972 states that challenging the demand initiates the litigation phase of the procedure. Art. 74 of the Law No. 9430, of 1996 (BRAZIL, 1996), extends this effect to the manifestation of non-conformity against the order denying a request for refund or reimbursement, whether or not combined with a declaration of offsetting.

In the inquisitorial phase, where there is no accusation, there is no litigation and, therefore, the duty of the parties is to collaborate in order to ascertain the effective situation of the taxpayer and verify compliance with their tax obligations. Under the terms of the Article 7 of the Decree 70.235 of 1972, the tax procedure must be carried out by a competent official, defined as the preparatory authority.

At the end of the inquisition phase, if an infraction has been verified, an infraction notice will be issued, with an ex-officio fine. Also, at the end of the inquisition phase, if the claimed credit right does not exist, a decision is issued denying the request and, if there is an amount of debt unduly offset against the claimed credit, a fine is demanded.

Once notified of the tax assessment notice or the decision order, the taxpayer has the option of agreeing with the opinion of the tax authorities and avoiding the dispute or submitting, respectively as the case may be, a challenge to the assessment or a statement of non-conformity against the decision order.

In the event of a challenge to the assessment or a statement of non-conformity against the decision, the case proceeds to judgment at first instance, which takes place within the Special Secretariat of the Federal Revenue of Brazil (RFB) itself, in internal deliberation units of a collegiate nature, called Offices of the Federal Revenue of Judgment.

Once informed of the first instance decision, the taxpayer has the option of agreeing with the judging authority, thus ending the dispute, or, under the terms of the art. 33 of the Decree 70.235 of 1972, filing a voluntary appeal against this decision. There is also provision for the judging authority itself to appeal ex officio, in the event that the decision exonerates an amount greater than the limit of the assessment.

If an appeal is lodged against the first instance decision, the case proceeds to trial in the second instance. Except in the case of a small-value case, the trial takes place at the RFB itself, at CARF, in collegiate bodies called Ordinary Panels, made up of eight equal members, four of whom are representatives of the National Treasury and four of whom are representatives of the taxpayers.

The decision of the second instance is notified to the party for whom the decision was unfavorable, the National Treasury or the taxpayer, or to both in the case of partial upholding of the appeal.

Once informed of the second instance decision, the parties have the option of agreeing with the opinion of the judging authority, thus ending the dispute or,

under the terms of the art. 37 of the Decree 70.235 of 1972, filing a special appeal if they can prove that there is a divergence in the application of the legislation between this decision and the decision of another ordinary panel or panel of the Superior Chamber of Tax Appeals.

The special appeal is judged by one of the panels of the Superior Chamber of Tax Appeals, made up of ten equal members, five of whom are CARF Chamber presidents, representing the National Treasury, and five CARF Chamber vice-presidents, representing taxpayers. The decision of the Superior Chamber of Tax Appeals, in a special instance, is final in the administrative sphere, as determined by the art. 42 of the Decree No. 70.235 of 1972.

Once informed of the decision of the special instance, it is up to the taxpayer to pay or pay in installments the tax credit maintained in the administrative sphere, and may also take the dispute to the Judiciary, in view of the provisions of the art. 5, XXV, of the Constitution of the Federative Republic of Brazil of 1998.

The following table summarizes the authorities involved in the tax administrative process:

Preparer	**Organization** – RFB **Activities** - Inspection / Notice of Infration - Analysis of Request / Decision - Contact with the Liable Party - Notification of Decisions - Receiving of Appeals
Judge of First Instance	**Organization** – RFB - Office of the RFB of Judgment – DRJ **Activity** - Decison of First Instance
Judge of Second Instance	**Organization** – RFB – Processes of Low Value - Office of the RFB of Judgment – DRJ **Activity** - Decision of Second Instance
	Organization – CARF – Other Processes - Ordinary Classes **Activity** - Decision of Second Instance
Judge in Special Instance	**Organization** – CARF

	- Superior Chamber of Tax Appeals **Activity** - Decision in Special Instance

Table 1 – Source: the author.

CARF is the body resulting from the merger of the former Councils of Taxpayers, whose creation is closely related to the institution of income tax in Brazil. Well, income tax was instituted in Brazil by the article 31 of the Law No. 4.625, of December 31st, 1922 (BRAZIL, 1922), with effective collection expected from 1924. At the time, there was a great apprehension about the tax and a fear of abuse on the part of the tax authorities in its collection. Thus, the Decree No. 16.580, of September 4th, 1924 (BRAZIL, 1924), established a Council of Taxpayers for each State and the Federal District, with competence to judge appeals related to Income Tax, whose members would be chosen from among taxpayers from commerce, industry, the liberal professions and civil servers and appointed by the Minister of Finance (BRAZIL, CARF, 2022).

Later, the Council for Consumption Tax of Taxpayers was created by the Decree No. 5.157, of January 12th, 1927 (BRAZIL, 1927). On October 30th, 1964, the Decree No. 54.767 (BRAZIL, 1964) created the 3rd Council of Taxpayers and on March 6th, 1972, the Decree No. 70.235 (BRAZIL, 1972) created the 4th Council of Taxpayers.

Subsequently, the Councils of Taxpayers were reduced to three and, currently, based on the provisions of the Law No. 11,941 of 2009 (BRAZIL, 2009), the Councils of Taxpayers have been unified into CARF. CARF is structured into three sections. Pursuant to the Article 2 of the Annex II of the MF Ordinance No. 343, of June 9th, 2015, in brief:

(i) The 1st Section of CARF is competent to judge Corporate Income Tax and Social Contribution on Net Profit;

(ii) the 2nd Section of CARF is competent to judge Individual Income Tax, Rural Land Tax and Social Security Contributions; and

(iii) the 3rd Section of CARF is competent to judge PIS/Pasep and Cofins, Tax on Industrialized Products, IOF, CIDE, Import Tax, Export Tax and other matters related to international trade.

2.5.2 THE BOARD MEMBERS OF CARF – APPOINTMENT, SELECTION AND PERFORMANCE

Having gotten to know CARF, we will now analyze the profile of its board members. To begin with, it should be considerated that its collegiate bodies are equal, but chaired by a tax advisor, who is responsible, under the terms of the Article 54 of the Annex II of the MF Ordinance No. 343 of 2015 (BRAZIL, 2015), based on the Paragraph 9 of the Article 25 of the Decree No. 70.235 of 1972, for the casting vote.[1]

Under the terms of the articles 28 and 29 of the Internal Regulations of CARF (RICARF), the nomination of a candidate for the position of board member will be made:

(a) in the case of representatives of the National Treasury, on tax auditors of the Federal Revenue of Brazil (AFRFB), in office for at least five years, appointed in a triple list by the Special Secretariat of the Federal Revenue of Brazil (RFB); and

(b) in the case of representatives of the taxpayers, natural-born or naturalized Brazilians, with a full university degree, registration with the respective professional body for at least three years, notable technical knowledge, and effective and proven exercise of activities that require knowledge in the areas of tax law, tax administrative process and federal taxes, nominated in a triple list by the confederations representing economic categories and by the trade union centers.

The Ordinance ME No. 314, of June 26th, 2019, established the Committee for Monitoring, Evaluation and Selection of Counselors within CARF, composed of a representative of CARF, the RFB, the Federal Office of Attorney of the National Treasury, the Confederations, civil society and the Brazilian Bar Association, which, among other duties, evaluates candidates for counselor.

The table below illustrates the situation on February 1st, 2022, in terms of representation, disregarding vacant or unfilled positions (BRAZIL, CARF, 2022):

Section	Chamber	Collegiate	Treasury	CNF	CNC	CNI	CNT	CNS	CNA	CUT	CSB
n/a	CSRF	1st Class	5	1	2	2					
n/a	CSRF	2nd Class	4	1	2						
n/a	CSRF	3rd Class	4	1	2	1					
1st	2nd	1st Ordinary C	4	1	1	1	1				

[1] A aplicabilidade do voto de qualidade foi restringida pelo art. 28 da Lei n° 13.988, de 14 de abril de 2020. Portanto, neste estudo, é considerado um período anterior ao da vigência do referido art. 28 da Lei n° 13.988, de 2020.

	3rd	1st Ordinary C	4			1		1			
		2nd Ordinary C	4	1	2	1					
	4th	1st Ordinary C	4		2	1			1		
		2nd Ordinary C	4		2	2					
		Alternates	5	1		2		1			
2nd	2nd	1st Ordinary C	4		1	2					
		2nd Ordinary C	4	1		2				1	
	3rd	1st Ordinary C	4		2	1					1
	4th	1st Ordinary C	4		2		1				
		2nd Ordinary C	3	1	1				1		
		Alternates	6		1	1		1	1		
3rd.	2nd	1st Ordinary C	3	1	1	2					
	3rd	1st Ordinary C	4		2				1		
		2nd Ordinary C	3		2	2					
	4th	1st Ordinary C	4	1	1	1		1			
		2nd Ordinary C	4		1	1	1				
		Alternates	6	1	2	2	1				
			87	11	29	25	4	4	4	1	1

Table 2: The author.

Subtitle:

CNF – National Confederation of Financial Institutions

CNC – National Trade Confederation

CNI – National Industry Confederation

CNT – National Transportation Confederation

CNS – National Confederation of Services

CNA – National Confederation of Agriculture

CUT – Unique Central of Workers

CSB – Central of Brazilian Syndicates

Under the terms of the article 40 of the Internal Regulations of CARF, the term of office of a board member is two years, with two reappointments allowed, totaling six years on the body.

Thus, by hypothesis, in this study, it will be considered that, in the collegiate decision-making process, in cases where the subsumption of the text of the law is ambiguous or the text is vague, there would be one part of the board members with a world view that would tend to interpret the legal system in favor of the

need for taxation, and another part, with a world view that would tend to interpret the legal system as a protection against taxation.

3 DATA COLLECTION AND ANALYSIS

In this section, having learned about the theories of decision-making and the structure of CARF, the body in which decisions are made, we will move on to data analysis. To this end, we will consider decisions actually taken by the collegiate bodies of the body, in the light of these theories.

3.1 DATA COLLECTION

The data used to prepare this article was made public by CARF, in the Report of Decisions Rendered from January to December 2016 (BRAZIL, CARF 2022); therefore: (a) after the implementation of the current structure of the body, as a result of the governance and integrity measures, applied in 2015 and (b) before the relativization of the casting vote, by the art. 28 of the Law No. 11.988, of 2020. This report, based on data from the system used to support judgment activities[2] and the minutes of the trial sessions of the collegiate bodies during the period, as well as the full content of the respective judgments[3], provides quantitative information and some qualitative information on decisions.

From a quantitative point of view, the profile of decisions by appellant, type of appeal and type of decision is presented. This information will form the basis of the analysis proposed in this article.

From a qualitative point of view, references are made to the issues discussed, especially those decided by casting vote. In this article, this qualitative information will not be analyzed, as it requires the presentation of considerations on the technical aspects of each tax infraction in dispute.

Finally, it is important to note that no data has been published on the amount of the tax discussed in each case, due to the tax secrecy provisions of the Article 198 of the Law No. 5,172 of 1966. Therefore, it will not be possible here to analyze the relative importance of each decision, which hinders the visualization of the importance of the Strategic Theory in decision-making.

Well then, in the report, 7,821 appeals were considered, according to the competence of CARF: (a) voluntary appeals, (b) ex-officio appeals, (c) special

[2] Sistema denominado e-processo.
[3] Disponíveis no sítio INTERNET do órgão: www.carf.economia.gov.br.

appeals by the prosecutor, (d) special appeals by the taxpayer and (e) motions for clarification against the aforementioned appeals, as long as they were granted with infringing effects.

However, for the purposes of the report, 1,646 decisions handed down under the system provided for in paragraphs 1 and 2 of the article 47 of the Internal Regulations of CARF were not taken into account. This system establishes the batch judgment of similar appeals, applying to all the same decision made in the judgment of a single appeal, considered as paradigm, of equivalent content. The purpose of this exclusion was to avoid statistical distortions.

The following criteria were adopted for the presentation of information:

(a) in the case of a discussion on both the merits of the appeal, for statistical purposes, the decision on the merits was considered;

(b) regarding appeals of taxpayers: (i) a decision favorable to the taxpayer was considered to be one that fully or partially granted the appeal and (ii) in other cases, where the appeal was not heard or was denied, the decision was considered to be favorable to the National Treasury;

(c) regarding appeals by the National Treasury: (i) a decision favorable to the National Treasury was considered to be one that fully or partially granted the appeal and (ii) in other cases, where the appeal was not heard or was denied, the decision was considered to be favorable to the taxpayer.

Three tables are presented below, with: (a) the number of appeals judged, by type and result; (b) the distribution of appeals favorable to the taxpayer or the National Treasury, by type of appeal and (c) the distribution of appeals favorable to the taxpayer or the National Treasury, by type of vote.

Recorrente / Resultado do Recurso	Quantidade
Contribuinte	**6.126**
Recurso Voluntário Não Conhecido	384
Recurso Voluntário Negado	2.151
Recurso Voluntário Provido	1.434
Recurso Voluntário Provido em Parte	1.555
Recurso Especial do Contribuinte Não Conhecido	103
Recurso Especial do Contribuinte Negado	324
Recurso Especial do Contribuinte Provido	95
Recurso Especial do Contribuinte Provido em Parte	80
Fazenda	**1.695**
Recurso de Ofício Não Conhecido	35
Recurso de Ofício Negado	414
Recurso de Ofício Provido	32
Recurso de Ofício Provido em Parte	40
Recurso Especial do Procurador Não Conhecido	163
Recurso Especial do Procurador Negado	321
Recurso Especial do Procurador Provido	563
Recurso Especial do Procurador Provido em Parte	127
Total Geral	**7.821**

Appellant / Result of the Appeal

Taxpayer / Quantity – 6.126

Voluntary Appeal Not Known – 384

Voluntary Appeal Denied – 2.151

Voluntary Appeal Provided in Part – 1.555

Special Appeal of the Not Known Taxpayer – 103

Special Appeal of the Denied Taxpayer – 324

Special Appeal of the Provided Taxpayer – 95

Special Appeal of the Taxpayer Provided in Part – 80

Treasury – 1.695

Appeal Not Known – 35

Denied Appeal – 414

Provided Appeal – 32

Appeal Provided in Part – 40

Special Appeal by the Public Prosecutor Unkown – 163

Special Appeal by The Public Prosecutor Denied – 321

Special Appeal by the Public Prosecutor Provided – 563

Special Appeal by the Public Prosecutor Provided in Part – 127

Total – 7.821

Table 3 – Number of appeals judged, by type and result

Source: CARF website, Report of Decisions Rendered from January to December 2016.

Recorrente / Recurso	Favorecido		Total Geral
	Contribuinte	Fazenda	
Contribuinte	**3.164**	**2.962**	**6.126**
Recurso Voluntário	2.989	2.535	5.524
Recurso Especial	175	427	602
Fazenda	**933**	**762**	**1.695**
Recurso de Ofício	449	72	521
Recurso Especial	484	690	1.174
Total Geral	**4.097**	**3.724**	**7.821**

Appellant / Appeal / Favored – Taxpayer – 3.164 / Treasury – 2.962 / Total – 6.126

Taxpayer – Voluntary Appeal / Taxpayer – 2.989 / Treasury – 2.535 / Total – 5.524

Special Appeal / Taxpayer – 175 / Treasury – 427 / Total – 602

Treasury – Taxpayer – 933 / Treasury – 762 / Total – 1.695

Officio Appeal / Taxpayer – 449 / Treasury – 72 / Total – 521

Special Appeal / Taxpayer – 484 / Treasury – 690 / Total – 1.174

Total – Taxpayer – 4.097 / Treasury – 3.724 / Total – 7.821

Table 4 – Distribution of appeals favorable to the taxpayer or the National Treasury, by type of appeal

Source: CARF website, Report of Decisions Rendered from January to December

2016

Votação	Favorecido		Total Geral	%
	Contribuinte	Fazenda		
Unanimidade	2.786	2.401	5.187	66,3
Maioria	1.137	927	2.064	26,4
Qualidade	174	396	570	7,3
Total Geral	**4.097**	**3.724**	**7.821**	**100,0**

Voting / Favored – Taxpayer / Treasury / Total / %

Unanimity – Taxpayer – 2.786 / Treasury – 2.401 / Total – 5.187 / % – 66,3

Majority – Taxpayer – 1.137 / Treasury – 927 / Total – 2.064 / % – 26,4

Quality – Taxpayer – 174 / Treasury – 396 / Total – 570 / % – 7,3

Total – Taxpayer – 4.097 / Treasury – 3.724 / Total – 7.821 / % – 100,0

Table 5 – Distribution of appeals favorable to the taxpayer or the National Treasury, by type of vote

Source: CARF website, Report of Decisions Rendered from January to December 2016

3.2 ANALYSIS OF THE DATA COLLECTED

The data in the tables above shows a balance between decisions in favor of the taxpayer and decisions in favor of the National Treasury, with a slight difference in favor of the taxpayer, at 4.77%, according to the calculation below:

		Taxpayer	Treasury	Difference
( )	**Favored**	4.097	3.724	
(/)	**Total**	7.821	7.821	
(=)	**Percentage**	52,38%	47,62%	4,77%

Table 6 – Percentage difference between decisions in favor of the taxpayer or the National Treasury.

Source: the author.

This balance is not sufficient for us to reach definitive conclusions, as it would allow us to infer, alternatively, that bias is of little relevance in the decisions, tending towards the Legalistic Theory, or the balance in the application of bias, by the different advisors, whether they are from the tax authorities or the taxpayer, pointing towards the application of the Attitudinal Theory. Therefore, in order to reach any practical conclusion, it is necessary to investigate the type of vote.

Table 5 above shows that of the decisions of CARF, 66.3% were taken by unanimous vote and 26.4% by majority vote. With these two categories totaling 92.7% of the decisions, it is perfectly possible to state that, in these cases, the origin of the advisor was not relevant, pointing to a prevalence of the applicability of the Legalistic Theory over the Attitudinal Theory.

However, what seems most relevant to us is the analysis of the decisions taken by casting vote, which accounted for only 7.3% of the decisions of the body in the period. In fact, it can be seen that the decisions taken by casting vote are not all favorable to the National Treasury, despite the fact that the casting vote falls to the president of the collegiate body, who is a councilor appointed by the National

Treasury. In fact, 30.53%, or almost a third of the decisions taken by casting vote are in favor of the taxpayer, according to the calculation below:

		Taxpayer	Tresury
( )	**Favored**	174	396
(/)	**Total**	570	570
(=)	**Percentage**	30,53%	69,47%
(*)	**% Quality V.**	7,30%	7,30%
(=)	**% Favorable**	2,23%	5,07%

Table 7 - Relevance of the casting vote in favor of the National Treasury.

Source: the author.

It should be noted that in order for a decision to be made by a casting vote in favor of the taxpayer, at least one of the advisors of taxpayers must vote in favor of the National Treasury, eliminating the dichotomy between the advisors of taxpayers and the advisors of the Treasury in decision-making. Thus, considering the decisions favorable to the National Treasury taken by casting vote, in view of all the decisions, we arrive at a percentage of only 5.07%, as space for the application of the Attitudinal Theory, in decision making, with tax advisors voting in one direction, and taxpayers' advisors in another.

4 CONCLUSION

The data collected points to a restricted applicability of the Attitudinal Theory in decision-making by board members of CARF in approximately 5% of the cases.

On the other hand, the remaining cases, reaching a percentage of almost 95%, point to a convergence of understanding between councilors appointed by the National Treasury and councilors appointed by entities representing taxpayers. This, in an initial view, would corroborate the understanding that the Legalistic Theory would explain the decision-making pattern of the body.

However, it is essential to consider that, as mentioned earlier in this article, for reasons of tax secrecy, it was not possible to collect the values of the cases that were the subject of the decisions, in order to cross-check the values, subjects dealt with and type of decision. We believe that only in this way would it be possible to identify cases on the same subject, with a different type of decision, pointing to the use of Strategic Theory in decision-making.

Therefore, the possibility remains open that at least part of the 95% of the decisions of CARF were not made only on the basis of the Legalistic Theory, but also on the basis of the Strategic Theory.

To clarify this issue, it would be interesting to analyze a set of data that takes into account, in addition to the quantitative aspects dealt with here, the qualitative aspects of the matter discussed and the value of the case. However, this would require extracting this data from the automated systems of CARF, protecting the identity of those involved, which is not available at the moment.

Therefore, in conclusion, we can say that the Attitudinal Theory had residual applicability in CARF in 2016, the Legalistic Theory seems to have prevailed and the importance of the Strategic Theory still requires future research.

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