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[Tax](#) | [Consultoria](#) > [Articles](#) > STF decides that overpaid PIS / Cofins under the tax substitution regime must be returned

## STF decides that overpaid PIS / Cofins in the tax substitution regime must be returned

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100



It is not only the ICMS that can be calculated and required under the tax substitution system, the PIS and Cofins also have a similar calculation system.

As for PIS and Cofins, there are certain products, such as vehicles and cigarettes, among others, that are subject to the tax substitution regime, by which the law assigns tax liability, to a third party to pay the contribution due by the taxpayer. indeed. In other words, tax substitution occurs in cases where the responsibility for paying contributions to PIS and Cofins rests with the company from which the product originates (manufacturer, importer). In these cases, the tax due to the retailer is collected by the industry or importer.

This regime operates with an assumed or estimated calculation base.

It happens that, as in the ICMS tax substitution regime, in the PIS and Cofins tax substitution, the estimated calculation base is sometimes higher than the one actually practiced, when reselling these products.

In view of this, some substituted companies, which are subject to this regime, filed lawsuits to request the refund / compensation of the excess paid under PIS and COFINS, through a tax substitution regime.

The topic reached the STF, which recognized the general repercussion of the constitutional issue (RE 596832 RG, Rapporteur: Marco Aurélio). The trial ended on 6/26, with the taxpayer winning.

According to Minister Marco Aurélio, rapporteur, the Public Treasury cannot appropriate a value *“that does not correspond, considering the base of incidence and the rate of contributions, as well as the collection regimes, to the tax really due.”*

He also stressed that the calculation by estimate is always provisional, and should be followed by the adjustment when the value of the legal transaction is known.

In view of this, the following thesis was established for the purpose of general repercussion:

*“The difference in contributions to the Social Integration Program - PIS and to the Social Security Financing - Cofins is due to be refunded in excess, under the tax substitution regime, if the effective calculation base of the operations is lower than assumed.”*



## Amal Nasrallah

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