



ALERT

**Brazilian Supreme
Court Forms Majority
in Favor of ITBI Tax
Immunity on Real
Estate Contributions
to Share Capital**

SOUZAKAWA

Alert

Brazilian Supreme Court Forms Majority in Favor of ITBI Tax Immunity on Real Estate Contributions to Share Capital

The Brazilian Supreme Court (STF) has formed a majority in the judgment of General Repercussion Theme No. 1,348 (Extraordinary Appeal No. 1,495,108/SP), recognizing that ITBI tax immunity applicable to transfers of real estate made for purposes of contributing assets to a company's share capital does not depend on the company's predominant business activity.

Following the opinion issued by Justice Alexandre de Moraes, the vote now stands at 6 to 2 in favor of the position adopted by the Reporting Justice, Edson Fachin. According to the majority view, the exception set forth in Article 156, paragraph 2, item I, of the Brazilian Federal Constitution for companies predominantly engaged in the purchase and sale, leasing or rental of real estate does not apply to transactions involving contributions to share capital. This restriction would apply only to the second category provided for in the constitutional provision, namely transfers resulting from mergers, consolidations, spin-offs or the dissolution of legal entities.

In practical terms, if this position is confirmed upon conclusion of the judgment, transfers of real estate made to contribute to the share capital of asset-holding companies, real estate developers, property management companies, leasing companies and other entities engaged in real estate activities may qualify for ITBI tax immunity even where real estate activities constitute their predominant business.

The immunity, however, is not unlimited. The STF's precedent under Theme No. 796 remains applicable, according to which the immunity does not extend to the portion of the value of the contributed assets that exceeds the amount of share capital actually being paid in. The Reporting Justice's opinion also expressly preserves the authority of Municipalities to establish the existence of sham transactions or fraud aimed at improperly obtaining the tax immunity.

There is also an important discussion concerning the practical application of Theme No. 796. Municipalities have sought to levy ITBI on differences between the value attributed to the property in the corporate transaction and the value assessed by the tax authorities, including situations in which the entire declared amount was allocated to share capital. This issue remains subject to separate legal controversy.

The judgment has not yet been concluded. Extraordinary Appeal No. 1,495,108 has been scheduled for a virtual session of the STF Plenary Court to take place from October 9 to October 19, 2026, when the final outcome, the wording of the binding legal thesis and any potential discussion concerning modulation of effects are expected to be determined.

Confirmation of this interpretation is expected to reduce the cost of transactions involving contributions of real estate to share capital and to increase legal certainty for structures used by asset-holding companies, special purpose entities (SPEs), real estate developers, property management companies and leasing companies.

The decision may also affect transactions already completed, particularly where ITBI was paid solely because of the company's predominant real estate activity, potentially creating opportunities to assess claims for the recovery of amounts previously paid.

At this stage, the main point to monitor is the final wording of the legal thesis and any potential modulation of effects, which may define the temporal scope of the decision and its consequences for both past and future transactions.

If the STF adopts a modulation of effects, its recent practice has often been to preserve claims brought in court before the date of the judgment. Accordingly, taxpayers that paid ITBI within the past five years due to the company's predominant real estate activity should consider, at this stage, whether judicial measures may be appropriate to preserve potential refund claims.

More generally, companies that use real estate assets in capitalization structures or asset reorganizations should closely monitor the conclusion of the judgment and review both recent transactions and transactions currently being structured in light of the position ultimately adopted by the STF.

