

The gap that comes at a cost: IBS (Tax on Goods and Services), CBS (Contribution on Goods and Services) and the litigation on the horizon

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The Brazilian Tax Reform promised neutrality, simplicity, and legal certainty, but a gap in Complementary Law No. 214/2025 may give rise to the first major dispute of the post-reform era. The statute prevents IBS and CBS from being included in their own tax bases, but does not expressly prohibit their inclusion in the ICMS (Brazilian state VAT) and ISS (Tax on Services) tax bases during the transition period. State tax rulings have already indicated that such inclusion may occur as of 2027, when the new taxes begin to be effectively collected. The absence of a clear rule threatens to recreate, indirectly, the cascading taxation that the reform sought to eliminate. Legislative action to fill this gap is essential to preserve the legal certainty promised by the reform.

The Brazilian Tax Reform was presented to the country as a project grounded in neutrality, simplicity, and legal certainty. Constitutional Amendment No. 132/2023 and Complementary Law No. 214/2025, by establishing IBS and CBS as the pillars of the new consumption tax model, promised to eliminate historical distortions in the system — including cascading taxation. However, a technical omission in Complementary Law No. 214/2025, silent yet potentially involving billions of Reais in consequences, threatens to turn the transition period into the birthplace of the first major tax dispute of the post-reform era.

The legislature was precise in one direction, but remained silent in the other. Article 12 of Complementary Law No. 214/2025 provides that IBS and CBS are not included in their own tax bases¹, thereby protecting the internal neutrality of the new system. What that same legislature did not do — and should have done — was expressly prohibit IBS and CBS from forming part of the ICMS and ISS tax bases during the period in which the two systems coexist. This silence is not harmless: in practice, it is the triggering event for the entire controversy now taking shape. It is worth noting that, during the legislative process of Proposed Constitutional Amendment No. 45/2019, there was an

¹ “Article 12. The tax base of IBS and CBS is the value of the transaction, unless otherwise provided in this Complementary Law. (...) Paragraph 2. The following are not included in the tax base of IBS and CBS: I – the amount of IBS and CBS levied on the transaction;”

express provision establishing this reciprocal exclusion. That provision was removed from the final text without any clear technical justification — which makes the statutory silence not merely an omission, but a qualified omission whose consequences are already foreseeable.

The lack of an express rule has opened the door for state tax authorities to issue convergent and revealing statements about the tax future. The State of São Paulo, in SEFAZ/SP Response to Consultation No. 32303/2025², stated that *“IBS and CBS, when effectively due, must form part of the value of the transaction or service for ICMS purposes and, consequently, of the tax base of the state tax”*, while excluding such inclusion specifically for 2026. States such as Pernambuco, the Federal District, Santa Catarina, Espírito Santo, and Piauí have followed a similar line, all tying the exclusion to the non-onerous nature of the test year. Although this convergence offers relief for 2026, it clearly signals that inclusion will become the rule once the taxes begin to be effectively charged. The result is a convergence that provides relief for 2026, but points to a structural increase in the tax burden as of 2027, forcing taxpayers to treat the test period as a critical window for preparation — a scenario that turns temporary neutrality into strategic urgency.

The convergence of these administrative statements, however, does not eliminate the central legal problem. ICMS and ISS have their tax bases defined by their own legislation, and the inclusion of IBS and CBS within that field of taxation would require express legal authorization, especially during a transition period marked by the coexistence of two distinct tax models. In the absence of such a provision, cross-inclusion is no longer presented as a mere consequence of the system, but rather as an indirect expansion of the taxable base without specific legal support.

It is at this point that the argument of strict legality becomes particularly significant. The Kandir Law, Complementary Law No. 87/1996, defines in Article 13 the elements that are exhaustively included in the ICMS tax base, and any inclusion of IBS and CBS in that base would require a specific legislative amendment, which does not currently exist. This is confirmed by the fact that Article 13 of

² “ICMS – Tax base – Inclusion of IBS and CBS.

I. The ICMS tax base, pursuant to Article 13 of Complementary Law No. 87/1996, is the value of the transaction or service, encompassing all taxes that make up the total price charged to the purchaser.

II. IBS and CBS, when effectively due, must form part of the value of the transaction or service for ICMS purposes and, consequently, of the tax base of the state tax.

III. During the 2026 fiscal year, the amounts corresponding to IBS and CBS will not be included in the ICMS tax base, considering that the PIS contribution and COFINS will be included in the state tax base at their full rate.

(...)

Therefore, IBS and CBS form part of the transaction value for ICMS purposes and must be included in the tax base of the state tax when effectively due.

With respect to the 2026 fiscal year, Articles 343 and 346, together with Article 348, item III, all of Complementary Law No. 214/2025, provide that the test rates for IBS and CBS will be 0.1% and 0.9%, respectively, and Article 348, paragraph 1, waives the payment of these taxes for taxpayers who properly comply with ancillary obligations. Item I of Article 348 further provides that, even where payment is made, the amounts paid must be offset through a corresponding reduction in the PIS contribution and COFINS.

Accordingly, specifically in 2026, there will be no increase in the taxpayer’s tax burden in relation to IBS or CBS, regardless of whether or not these taxes are paid. Consequently, the amounts corresponding to IBS and CBS will not be included in the ICMS tax base during that period, considering that the PIS contribution and COFINS will be included in the state tax base at their full rate.”

Complementary Law No. 87/1996 was recently amended by Complementary Law No. 227/2026 precisely to state that, *“as of January 1, 2027, the amount corresponding to the Selective Tax”* will be included in the ICMS tax base. The same reasoning applies to ISS, governed by Complementary Law No. 116/2003.

The regulatory gap becomes even more relevant because it arises precisely at a moment when the system should inspire greater predictability. The transition was designed to allow a gradual shift toward a model guided by neutrality and transparency. Allowing, in this context, the new taxes to form part of the bases of the taxes being phased out would mean indirectly reintroducing the same logic of tax overlap that the reform sought to overcome. Instead of simplification, there would be added complexity. Instead of neutrality, a potential increase in the tax burden.

Unsurprisingly, the National Congress has received Complementary Bill No. 16/2025, which proposes expressly excluding IBS and CBS from the tax bases of ICMS, ISS, and IPI (Excise Tax) through amendments to Complementary Law No. 87/1996 and Complementary Law No. 214/2025 itself. The justification is legally sound: allowing inclusion would be equivalent to reinstating the cascading taxation that the reform was designed to eliminate. The problem is that Complementary Bill No. 16/2025 is still awaiting deliberation — and, while it remains pending, the gap persists. Each month of legislative inertia is a month in which taxpayers operate under uncertainty, tax authorities build their positions, and litigation quietly takes shape.

The combination of these factors — regulatory omission, convergent administrative guidance, and a potential increase in the tax burden as of 2027 — makes the filing of lawsuits practically inevitable. The controversy is likely to arise not only from the effective collection of the new taxes, but also from taxpayers’ perception that the absence of a clear rule will allow tax authorities, during the transition, to capture a broader taxable base than the one legitimately authorized by the legal system. In this context, preventive action will be decisive, since waiting for an assessment notice before reacting means bearing the burden of litigation under unfavorable conditions.

The tax reform cannot begin by transferring the cost of legislative ambiguity to taxpayers. The gap left by Complementary Law No. 214/2025 must be filled by statute, expressly and consistently with the constitutional architecture of the new system. Ultimately, the neutrality and simplicity promised by the reform will only have real value if accompanied by what taxpayers most need in order to reorganize their activities: legal certainty.