



Analysis of the application of the principle of taxable capacity to taxes

Analysis of the application of the principle of contributory capacity to taxes

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SUMMARY

This paper addresses the application of the ability to pay principle to taxes. It aims to study this principle in the Brazilian legal system, its importance for compliance with constitutional norms, and how it is applied to taxes. In this sense, the paper delves deeper into the concept and implications of taxes as a tax type, highlighting cases of exaction. Next, a study of tax principles is conducted, particularly the ability to pay principle. Finally, regarding the analysis of the ability to pay principle's application to this tax type, the paper examines the provisions of the Federal Constitution, the National Tax Code, national legal scholars, and the case law of the Supreme Federal Court to assess its effective application in these cases. Finally, considerations are made regarding the current Brazilian scenario regarding the application of the ability to pay principle to taxes and the encouragement of its application as a guarantor of equality.

Keywords: Taxes; Principle of taxable capacity; constitutional principles; equality.

ABSTRACT

This paper addresses the application of the ability to pay principle to taxes. It aims to study this principle in the Brazilian legal system, its importance for compliance with constitutional norms, and how it is applied to taxes. In this sense, the paper delves deeper into the concept and implications of taxes as a tax type, highlighting cases of exaction. Next, a study of tax principles is conducted, particularly the ability to pay principle. Finally, regarding the analysis of the ability to pay principle's application to this tax type, the paper examines the provisions of the Federal Constitution, the National Tax Code, national legal scholars, and the case law of the Supreme Federal Court to assess its effective application in these cases. Finally, considerations are made regarding the current Brazilian scenario regarding the application of the ability to pay principle to taxes and the encouragement of its application as a guarantor of equality.

Keywords: Taxes; Principle of chargeable capacity; constitutional principles; equality.

1. INTRODUCTION

The 1988 Federal Constitution, a landmark of the Brazilian Democratic Rule of Law and the provision of fundamental rights, guaranteed equality to all people, applying referred principle especially in Tax Law in order to achieve tax justice.

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In view of this, this work shows its importance in analyzing the possibility of application of the constitutional principle of taxable capacity to taxes, considering the state limitation on the power to tax and the need for compliance due to the principle basis of equality.

To this end, the concept and implications of fees as a species will be addressed. tax, covering the definition of taxes with special attention to the principle of equality and contributory capacity, analyzing the application of this to rates through the national doctrine and jurisprudential research.

The text was developed through exploratory research, through the election of doctrines, articles and dissertations on the subject. Furthermore, the scientific method used was deductive, consulted the Federal Constitution, National Tax Code, as well as case law on the topic.

2. STUDY OF FEES AS A TAX TYPE

Tax Law is a branch of public law whose basic principles are: supremacy of public interest over private interest and the unavailability of public interest. Thus, the obligation to pay tax arises as a result of the law, without there being any manifestation of the taxpayer, in addition to the prerogatives that the State has to enforce such obligations.

In this sense, applying the pentapartite theory regarding the classification of species tax, we have as species taxes, fees, improvement contributions, loans compulsory and special contributions.

The Federal Constitution provides that all federated entities (Union, States, District Federal and Municipalities) may establish fees, due to the exercise of police power or by effective or potential use of specific and divisible public services provided to the taxpayer or made available to him ².

Thus, the entity that provides the service or exercises the police power is the competent one to establish and collect the fee. Furthermore, fees are taxes with a retributive or counter-performance, as they cannot be charged without the State effectively exercising the power

2 BRAZIL. Constitution (1988). **Federal Constitution of 1988**. Brasília, Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Accessed on: June 28, 2022.

police or provides or makes available to the taxpayer a specific public service and divisible³.

In this way, the fee is due because someone has caused an expense for the State, must reciprocate the service or diligence performed on their behalf. As this is a service that benefits the person as an individual, should not be a financial burden for society as a whole, but rather charged individually to the beneficiary⁴.

It should be noted that charging a fee for services that are the responsibility of the State and the right of all, such as health and safety, which cannot be remunerated.

As Ricardo Alexandre teaches, the State has two facts that can give rise to charging fees:

- a) the regular exercise of police power, which legitimizes the collection of the police fee; and
- b) the effective or potential use of specific and divisible public services, provided to the taxpayer or made available to him, which makes it possible to collect a service fee.⁵

This reasoning can be inferred from Article 77 of the National Tax Code:

Art. 77. The fees charged by the Union, the States, the Federal District or the Municipalities, within the scope of their respective attributions, have as a generating fact the regular exercise of the police power, or the use, effective or potential, of a specific and divisible public service, provided to the taxpayer or made available to him.
Sole paragraph. The rate cannot have a calculation basis or triggering event identical to those corresponding to tax, nor be calculated based on the capital of the companies.⁶

Thus, the CTN also explains concepts related to types of fees, which are fees charged for the exercise of police powers and those charged for the provision of public services.

2.1 Police fee

The police fee is covered in Article 78 of the CTN, which defines its legal concept:

Art. 78. Police power is considered to be an activity of public administration that, by limiting or disciplining rights, interests or freedoms, regulates the practice of an act or abstention from action, due to public interest concerning safety, hygiene, order, customs,

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³ ALEXANDRE, Ricardo. **Tax Law Outlined**. Rio de Janeiro: Forense, 2016, p. 52.

⁴ SCHOUERI, Luís Eduardo. **Tax Law**. São Paulo: Saraiva, 2019, p. 183.

⁵ ALEXANDRE, Ricardo. **Tax Law Outlined**. Rio de Janeiro: Forense, 2016, p. 53.

⁶ BRAZIL. **Law No. 5,172** of October 25, 1966. Brasília, Available at: http://www.planalto.gov.br/ccivil_03/leis/l5172compilado.htm. Accessed on: June 25, 2022.

discipline of production and the market, the exercise of economic activities dependent on concession or authorization from the Public Authority, public tranquility or respect for property and individual or collective rights. (As amended by Complementary Act No. 31 of 1966)

Sole paragraph. The exercise of police power shall be considered regular when performed by the competent body within the limits of the applicable law, in compliance with due process and, in the case of an activity that the law considers discretionary, without abuse or misuse of power.⁷

In this sense, the fees arising from the police power have as a triggering event the exercise regular of such power, based on the principle of the supremacy of the public interest over the private interest, which arises from all public law. In this way, the common good and the general public interest that justifies restrictions or conditions on the exercise of individual rights.⁸

It is important to highlight that for the charging of fees to be permitted, the exercise of the power Police action must be regular, in accordance with the law and obeying the principles of due process and without abuse or misuse of power.⁹

2.2 Public service fee

On the other hand, it also gives rise to charging fees for specific public services and divisible, provided or made available to the taxpayer. In this sense, there is art. 79 of the CTN.

Art. 79. The public services referred to in Article 77 are considered:

I - used by the taxpayer:

- a) effectively, when enjoyed by him in any capacity;
- b) potentially, when, being of compulsory use, they are made available through administrative activity in effective operation;

II - specific, when they can be highlighted in autonomous units of intervention, utility, or public needs;

III - divisible, when capable of being used separately by each of its users.¹⁰

As Ricardo Alexandre teaches, "Services are specific when they can be highlighted in autonomous units of intervention, utility or public need;

⁷ BRAZIL. **Law No. 5,172**, of October 25, 1966. Brasília, Available at: http://www.planalto.gov.br/ccivil_03/leis/l5172compilado.htm. Accessed on: June 25, 2022.

⁸ ALEXANDRE, Ricardo. **Tax Law Outlined**. Rio de Janeiro: Forense, 2016, p. 53.

⁹ ALEXANDRE, Ricardo. **Tax Law Outlined**. Rio de Janeiro: Forense, 2016, p. 53.

¹⁰ BRAZIL. **Law No. 5,172** of October 25, 1966. Brasília, Available at: http://www.planalto.gov.br/ccivil_03/leis/l5172compilado.htm. Accessed on: June 25, 2022.

are divisible when capable of being used separately by each of their users”.¹¹

Thus, it can be inferred from such teaching that public service is remunerated by rate when the taxpayer knows exactly what service he is paying for and, on the other hand, the State can identify who the users of the service are who are to be paid for.

An example of this is the so-called “garbage tax”, which gave rise to the Binding Summary No. 19: “The fee charged exclusively for public collection, removal and waste services treatment or disposal of garbage or waste from properties does not violate article 145, II, of the Federal Constitution”¹². In this case, the garbage from the properties can be identification as a user of the service of the owners of such property, but does not include charges street cleaning, as it is intended for the entire community.

In this type of collection, its possibility should be highlighted by the mere use potential by the taxpayer, even if he does not actually use the service. This occurs in reason why the taxpayer does not use it out of his/her generosity, even though the definition of the service is consider by law as compulsory use and made available through activity effective administrative.

3. PRINCIPLE OF CONTRIBUTIVE CAPACITY

In general, the principles indicate values to be followed and promoted, imposing certain conduct depending on the specific circumstances of the specific case.

Regarding tax law, the Federal Constitution presents general principles to from art. 145, but may arise from the express text or from the globalized reading of the constitution as a whole, especially guaranteeing limitations on the power to tax.

In addition to the general principles that permeate the entire Brazilian legal system, There are also constitutional principles specifically applied in the tax sphere, such as case of the principle of tax capacity, legal certainty, practicability of taxation, etc.¹³

Regarding the principle of contributory capacity, the object of this study, it must be said that refers to a basic reference standard for determining the weight of the tax burden on the

¹¹ ALEXANDRE, Ricardo. **Tax Law Outlined**. Rio de Janeiro: Forense, 2016, p. 53.

¹² STF, **Binding Precedent No. 19** – “The fee charged exclusively for public services of collection, removal and treatment or disposal of garbage or waste from properties does not violate article 145, II, of the Federal Constitution.”

¹³ PAULSEN, Leandro. **Complete Tax Law Course**. São Paulo: Saraiva, 2020, p. 98.

taxpayer. It is also considered an extension of the principle of equality and arises from the principle of solidarity, since each taxpayer will bear what he can for the good of all.

The principle of equality is expressed in Article 5 of the Federal Constitution, which states “All are equal before the law, without distinction of any nature”¹⁴, in addition to other mentions of him during the paragraphs of the same article. Among all the manifestations of equality in constitution, it is important to highlight its relevance in ensuring tax equality. In this sense,

art. 150, II of the Federal Constitution:

Art. 150. Without prejudice to other guarantees assured to the taxpayer, the Union is prohibited, to the States, the Federal District and the Municipalities: [...]

II - establish unequal treatment between taxpayers who are in a situation equivalent, any distinction based on professional occupation or function is prohibited exercised, regardless of the legal name of the income, titles or rights; [...]¹⁵

In this way, there is a distinction between those who have and those who do not have the capacity contribution, providing a criterion for comparison between taxpayers. Thus, it is not just a criterion of tax justice, but a principle to guide all taxation.¹⁶

This principle is expressly addressed in Article 145, sole paragraph of the Constitution. Federal regarding taxes, however it is understood that its application occurs in all tax species. In this sense, the lessons of Leandro Paulsen:

Although the constitutional text affirms the principle of contributory capacity in its provisions in which only taxes are mentioned – which should, whenever possible, be personal and graduated according to the taxpayer's economic capacity (art. 145, sole paragraph, of the CF) –, this is a fundamental principle of taxation applicable to all types taxes, although in different ways depending on the characteristics of each one.¹⁷

¹⁴ BRAZIL. Constitution (1988). **Federal Constitution of 1988**. Brasília, Available at: http://www.planalto.gov.br/ccivil_03/constitucao/constitucao.htm. Accessed on: July 1, 2022.

¹⁵ BRAZIL. Constitution (1988). **Federal Constitution of 1988**. Brasília, Available at: http://www.planalto.gov.br/ccivil_03/constitucao/constitucao.htm. Accessed on: July 1, 2022.

¹⁶ PAULSEN, Leandro. **Complete Tax Law Course**. São Paulo: Saraiva, 2020, p. 99.

¹⁷ PAULSEN, Leandro. **Complete Tax Law Course**. São Paulo: Saraiva, 2020, p. 99.



Therefore, it is not possible to demand values from those who only have resources for their own subsistence, while at the same time, abusive values should not be demanded taxpayers with greater economic capacity to the point where their wealth is confiscated.

It should be noted here that the contributory capacity can take two forms: absolute and relative, as can be seen from the teachings of Luís Eduardo Schoueri:

The ability to pay can be: (i) a limit or criterion for the graduation of taxation; or (ii) a parameter for distinguishing between taxable and non-taxable situations. In the former case, we speak of relative or subjective ability to pay; in the latter, of absolute or objective ability to pay. This will be "the existence of wealth eligible for taxation (ability to pay as a prerequisite for taxation)," while in the subjective sense, it will be "the portion of this wealth that will be subject to taxation in light of individual conditions (ability to pay as a criterion for graduation and tax limit)."¹⁸

Thus, we seek to achieve tax justice through people's collaboration with public expenditure and expenses to the extent of their capacity and financial possibilities.

4. APPLICATION OF THE PRINCIPLE OF CONTRIBUTIVE CAPACITY TO RATES

There is much discussion about the application of the taxable capacity to taxes, and part of the doctrine understands that it is not applicable to this tax species, since it is a tax with fact linked generator and is already founded on the criterion of commutative justice.

For Leandro Paulsen, people who use public services must bear their own costs. financial burden, since the reimbursement of the value of state activity itself already meets the ideal of tax justice, there being no need to talk about a situation revealing wealth for it to be compared the taxpayers.

However, when analyzing the principle in its subjective ideal, considering that the minimum existential and confiscation are the parameters of the contributory capacity, it is understood about its possibility of reception.

Therefore, in cases where the taxpayer does not have the minimum for his survival, there is no fees may be charged, even if you have actually used the service, ensuring the effectiveness of the principle through exemption or progressivity, for example. Furthermore, it would not be appropriate to apply it with a value higher than the effective value for the service, since that cannot violate property in order to confiscate it.

¹⁸ SCHOUERI, Luís Eduardo. **Tax Law**. São Paulo: Saraiva, 2019, p. 345.

It turns out that further investigation is necessary to conclude on the possibility application of the principle of tax capacity to rates, in absolute and relative aspects.

Author Sacha Calmon Navarro Coêlho takes the position that the rates are subject to the principle of tax capacity:

It is wrong to assume that, since the tax is a tribute that has as its legal fact an action by the State, just for that reason, in relation to it there is no talk of contributory capacity. Now, the performance of the State is important to measure the benefit, never to exclude the consideration of the capacity to pay the benefit, an attribute of the passive subject and not of the legal fact.¹⁹

Roque Antônio Carraza, however, establishes that “nothing prevents the rates and the contribution for improvement are graduated according to the economic capacity of the taxpayers”²⁰ justifying that it is due to the principle of equality.

Moving forward in terms of the scope of application, José Marcos Domingues de Oliveira deals with the topic taking into account the constitutionally provided equality, not limited to exemptions, but considering the different economic conditions of taxpayers that justify the differentiated collection of tax charges, including fees²¹.

In a recent decision by the Plenary of the Supreme Federal Court, the following were judged: unconstitutional laws of the States of Rio de Janeiro and Pará regarding inspection fees on water use.

Regarding ADI 5489 which established the control, monitoring and inspection fee environmental activities of generation, transmission or distribution of electrical energy of origin hydraulic, thermal and thermonuclear, the STF understood that despite the legitimate charge, the magnitudes fixed to determine the value were disproportionate, violating the principle of contributory capacity in the cost/benefit dimension²²:

Summary: CONSTITUTIONAL AND TAX LAW. DIRECT ACTION OF UNCONSTITUTIONALITY. COMMON COMPETENCE OF ENVIRONMENTAL INSPECTION. POLICE FEES. DISPROPORTIONALITY OF THE TAX BASE

19 COÊLHO, Sacha Calmon Navarro. **Brazilian Tax Law Course**. Rio de Janeiro: Forense, 2010, p. 86.

²⁰ CARRAZZA, Roque Antônio. **Course in Constitutional Tax Law**. São Paulo: Malheiros, 2012, p. 96.

²¹ OLIVEIRA, José Marcos Domingues de. **Tax Law: Principle of Contributory Capacity: Content and Effectiveness of the Principle**. 2nd ed. Rio de Janeiro: Renovar, 1998, p. 92-97.

²² STJ. **Laws from PA and RJ that created an inspection fee on energy generation are unconstitutional**. <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=461456&tip=UN>. Available in: Accessed on: July 1, 2022.

CALCULATION. 1. The central issue in this direct action is (i) whether a state law can establish a tax in the form of a fee based on the police power exercised over the generation, transmission, and/or distribution of energy within the respective State's territory; and, if the answer is yes, (ii) whether the tax established by Law No. 7,184/2015 of the State of Rio de Janeiro in any way exceeded this taxing authority. 2. The common political-administrative authority for environmental protection legitimizes the creation of a tax in the form of a fee to remunerate the States' oversight activities. 3. The inclusion of generated electricity as an element in quantifying the tax obligation is legitimate. It is reasonable to conclude that the greater the electricity generated by the energy resource exploiter, the greater the potential social and environmental impact of the enterprise, and therefore, the greater the degree of control and oversight by the Government. 4. However, the magnitude values set by state law (1 megawatt-hour) together with the criterion of generated electrical energy cause the tax to disproportionately exceed the cost of state inspection activities, violating the principle of tax capacity, in the cost/benefit dimension, which must be applied to the rates. 5.

Direct unconstitutionality action ruled admissible. Establishment of the following thesis: The institution of an environmental police fee that blatantly and disproportionately exceeds the costs of state inspection activities violates the principle of taxable capacity, in the cost/benefit dimension. (ADI 5489, Rapporteur: ROBERTO BARROSO, Full Court, decided on February 24, 2021, ELECTRONIC PROCESS DJe-047 DISCLOSED March 11, 2021, PUBLISHED March 12³, 2021)

In the same sense, in previous STF jurisprudence, it was also decided by possibility of establishing a fee for monitoring securities markets variable depending on the company's net worth, as a way of ensuring the application of the principle of tax capacity:

HEADNOTE: - CONSTITUTIONAL. TAX. SECURITIES MARKET INSPECTION FEE - CVM FEE. Law No. 7,940 of 20.12.89. GENERATING EVENT. CONSTITUTIONALITY. I. - The CVM inspection fee is generated by the exercise of the police power attributed to the Securities and Exchange Commission - CVM. Law No. 7,940/89, art. 2. Its variation, depending on the company's net equity, does not mean that its calculation basis is said to be equity, especially since, in this case, there is a fixed tax. Its constitutionality. II. - RE not known. (RE 177835, Rapporteur: CARLOS VELLOSO, Full Court, tried on 04/22/1999, DJ 05/25/2001 PP-00020 EMENT VOL-02032-04 PP-00762)

23 BRAZIL. Supreme Federal Court. **Adi No. 5489**. Brasília. Available at: https://jurisprudencia.stf.jus.br/pages/search?base=acordaos&pesquisa_inteiro_teor=false&sinonimo=true&plural=true&radicais=false&buscaExata=true&page=1&pageSize=10&queryString=%20Tribunal,%20by%20unanimous,%20judged%20acceptable%20the%20request%20formulated%20in%20a%20C3%A7%C3%A3o%20direct%20para%20declare%20a%20unconstitutionality%20da%20Law%20n%C2%BA%207.184%2F2015%20do%20Estado%20do%20Rio%20de%20Janeiro&sort=_score&sortBy=desc. Accessed on: July 1, 2022.

24 BRAZIL. Supreme Federal Court. **Extraordinary Appeal No. 177835**. Official Gazette. Brasília. Available at https://jurisprudencia.stf.jus.br/pages/search?base=acordaos&pesquisa_inteiro_teor=false&sinonimo=true&plural=true&radicais=false&buscaExata=true&page=1&pageSize=10&queryString=CONSTITUCIONAL.%20TRIBUT%C3%81RIO.%20TAXA%20DE%20INSPECTION%C3%87%C3%83O%20DOS%20MARKETS%20DE%20T%C3%8DTULES%20E%20VALUES%20MOBILI%C3%81RIOS%20-%20TAXA%20DA%20CVM.%20Lei%20n%C2%BA%207,940,%20de%2020.12.89.%20FATO%20GE RADOR.%20CONSTITUTIONALITY.%20&sort=_score&sortBy=desc. Accessed on: July 1, 2022.

It is noted, therefore, that despite the divergence in doctrine regarding the application of the principle of taxpaying capacity, the courts have applied the thesis, since nothing prevents the said principle is observed with regard to fees.

FINAL CONSIDERATIONS

In view of the above, it follows that the Federal Constitution is the basic foundation of all Brazilian legal system, serving as a guide and radiating its effects on all standards. In tax law, its observance was observed when talking about tax justice, applying the principle of equality.

In this sense, the discussion arises on the application of the principle of contributory capacity, which derives from the principle of equality, to all types of taxes, especially rates, even if they are taxes in return for a type of service that is costly to the State.

After analyzing the doctrine on the subject, it is understood that it is possible to apply the principle of tax-paying capacity, not only through exemption, but through analysis of the financial capacity of taxpayers, demonstrating the application through the STF jurisprudence.

In view of the above, the principle of contributory capacity must always be respected as possible to the rates, either through exemptions or by graduating the rate according to the taxpayer's ability to contribute.

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