v. 2, n. 3, 2022

Scientific Journal of Applied Social and Clinical Science

THE UNCONSTITUTIONALITY OF THE GARBAGE FEE IN BRAZIL

Ana Paula Valdez Barbosa

Abstract: The present work is based on the study of the unconstitutionality of the garbage collection fee, since the tax part of the 1988 federal constitution determines that the tax system obeys limitations when it comes to the power to tax. Competence is the division of the power to tax that is constitutionally attributed to various public entities, where each one has the freedom to institute and collect the taxes that are within their competence. It is also discussed the impacts that the binding precedents number 19 and 29 instituted by the Federal Supreme Court, which would have the possibility of charging fees with the same basis for calculating a tax, also bringing an authorization of the garbage collection fee, it is not necessary to create a constitutional amendment.
Keywords: Tax law. Constitutionality. Unconstitutionality. garbage fee

INTRODUCTION

The tax part of the FEDERAL CONSTITUTION/88 brought the determinations regarding the power to tax attributed to various public entities, where each one has the power to institute and collect their taxes. The CTN defines the difference between a tax, which is a compulsory cash payment, and a fee that is related to the regular exercise of police power or the provision of a public service, which can be charged with the use or mere disposal. The federal constitution states that fees need to be specific and divisible, as well as it could not have its own tax calculation base, however binding precedents 19 and 29 give scope for the creation of new fees, since in an analogous way several of them could have a calculation basis close to that of the tax and be indivisible, being these backed by the judiciary, which would result in the creation of true taxes without the due legal limitations of this type of tax. There is still a limitation of the judiciary on the institution of fees, which is the impediment for excess, since this tax cannot be profitable and the public entity must charge according to what is spent for the execution of that service.

TAXES

Let's see examples of general and indivisible services that cannot be remunerated by a fee, they are: public lighting, cleaning of streets and public places and solid waste collection. It is also worth noting that the STF (Federal Court of Justice) in the binding precedent number 670 states that the public lighting service cannot be remunerated by means of a fee.[1]

However, some services can be remunerated for a fee, such as household garbage collection, supply of piped water, sanitary sewage and others.

Regarding the concept of effective or potential use, they are used for the simple availability at any time and potentially when they are willing to operate at their will, it is not necessary for the user to use the service and even so will be liable.

But for this it is necessary that the law establishes that that public service is of mandatory use, in general they are services that are linked to public health, such as sanitary sewage, household garbage collection, piped water supply and others.

The sole paragraph of article 77 of the CTN states] that the fee cannot be based on the calculation or taxable event identical to those corresponding to taxes, nor can it be calculated based on the capital of the companies.

Therefore, it is very difficult to state within the concrete cases what would be a criterion that would be adequate to establish the basis for calculating the rates.

1 BRAZIL. Precedent 670, of October 13, 2003. Available at http://www.stf.jus.br/portal/jurisprudencia/menuSumarioSumulas.asp?sumula=1517 accessed on 08/20/2021

GARBAGE COLLECTION FEES

Garbage removal, as well as the provision of education and health are mandatory services to be provided by the state although there is no exclusivity, together with the IPTU booklet are found the releases of garbage collection fees. The tax hypothesis of charging the aforementioned tax is to be the owner of urban property, contrary to what the laws that carry out the institution of garbage collection say.

In what we can say about the laws that make the institution of garbage collection, the basis of calculation used most frequently is according to the area of the property or the frontal footage, although several have elements that influence the rate, such as the use or location, as established by Ordinary Law number 7,192, of December 21, 1981 of the city of Belém/PA, which states that the rate is calculated according to the area of the property.

Regarding garbage or garbage removal or public cleaning fees, owners of vacant lots or even garages are subject to this tax, let's see the interpretation expressed by the Federal Supreme Court in the interlocutory appeal in the interlocutory appeal 311.693/SP, by rapporteur Dias Toffoli.[2]

The change in price to be paid must not be linked to consideration, but to the degree of possible waste production. Fees for services that do not provide public services for the citizen, which are instituted as just collection instruments, are unconstitutional. The Federal Supreme Court has already positioned itself about the fees for issuing guides is in the exclusive interest of the administration. Marcus Abraham argues that on this reasoning there would be unconstitutionality in the fee that is charged for cleaning in public places when this collection is not completely different from other cleaning services.

There would be no present sense for the payment of only public cleaning fees, being totally meaningless to make the payment in the case of only public cleaning, these being financed by the institution and the collection through taxes.

INTEREST IN INSTITUTION OF NEW FEES

The union, according to constitutional norms established in articles 154.159 of the FEDERAL CONSTITUTION/88, has the duty to share the tax collection with States and Municipalities, as well as the State has the duty to share the tax collection with the municipalities.

There is also a link for the destination of taxes of all federated entities, with emphasis on health and public education, as stipulated in the articles (article 198, §2 and article 212 both of the FEDERAL CONSTITUTION). The constitution also stipulates, in articles 165 § 8 and 167 § 4, the provision of guarantee for credit operations in anticipation of revenue from state and municipal taxes.

In other words, creating or increasing taxes does not mean that there would be more revenue available to the entity that is collecting it when compared to social contributions (from the union) and fees (from all federated entities).

Fees are taxes for which there is no specific destination stipulation, nor are they prevented from being affected by the judiciary.

Therefore, the non-existence of linkage to the collection of fees by the federated entities are free to be used for any purpose and may vary according to the idea of the rulers.

2 BRAZIL. Federal Court of Justice. Regimental Appeal in Interlocutory Appeal 311.693/SP. Rel. Dias Toffoli. Appellant: Osmar Naves. Appellee: Municipality of Franca. First Class. Electronic Journal of Justice 19. December 2011.

BASIS OF CALCULATION AND SPECIFICITY IN THE BINDING SUMMARY, NUMBER 29

The fees must be paid by those who benefit from it, since the issue of specificity/divisibility is the most relevant feature of this tax. The public lighting fee, as it is an indivisible service, was judged unconstitutional, let's see a clear example, those who live in a residential condominium pay the condominium fee in order to cover general expenses, such as employees, elevator maintenance, etc. , however, if any unit owner wants to use the party room, they must pay an extra fee as only he will be the beneficiary and will spend energy, cleaning and other resources.

Therefore, in the first case, it is fair that everyone pays, as all residents use it, however in the case of using a party hall, only the beneficiary must bear these fees and that this does not exceed the cost of its use.

The fees due to the fact that they do not have the same calculation basis as taxes show that we must not be linked to the economic characteristics of those who make the contribution, but to the service being used. The fees are responsible for the exclusive service provided by the state to a specific taxable person and not their collectivity in general, since the payment of fees does not imply taking advantage of a public service and not a private tariff.

Based on the calculation of fees for the provision of services by the public entity. As analyzed by Paulo Carvalho, we are dealing with a tax (directly linked tax) if the normative antecedent mentions a revealing fact of state activity.[3]

By the binomial hypothesis/calculation base, it is observed that the calculation base is the area of the property and the hypothesis is not the actual or potential use of public cleaning services provided to taxpayers or made available to them, but rather, being the owner of immobile. The tax hypothesis is not the administrative activity.

As stated by José Renato Camilotti, precedent 29, which allows fees to be used as one of the elements of the tax calculation basis, does not have as precedent a single judgment that talks about garbage fees.[4]

In this hypothesis, there is no mention of the basis of the merely potential use of the garbage fee, this being said Minister Ayres Britto that the size of the property would not be enough to measure the amount of garbage produced, since immense properties can inhabit few people and small spaces can inhabit a vast number of people.[5]

Although the basis for calculating the IPTU is not the square footage, but the market value of the property, the square footage is the basis for calculating the tax in the broadest sense, because the larger the square footage, the greater the contributory capacity, however Ayres Britto says that the square footage is poor criterion for measuring consumption.

Precedent 29 legitimizes the garbage fee, even if the property's footage is a poor criterion to measure the use of the garbage collection service, legitimizing the use of the property's footage, since it authorizes the fees to have a very similar calculation basis of the taxes detailed in the Federal Constitution of 1988. (Since the footage as the basis for calculating the garbage rate is a component of the market value of the property which is the

3 CARVALHO, Paulo de Barros. Curso de direito tributário. 23. ed. Saraiva, 2011, p. 407.

4 CAMILOTTI, José Renato. Judicial precedents in tax matters in the STF: pragmatics of the application of binding precedents and the verification criteria for application and distinction (distinguishing). 2016. 441 f. Thesis (Doctorate in Law) - Postgraduate Studies Program in Law, Pontifical Catholic University of São Paulo, São Paulo, 2016, p. 246.

5 BRAZIL. Federal Court of Justice. General Repercussion on the Question of Order in the Extraordinary Appeal 576.321 QO-RG/SP. Rapporteur Minister Ricardo Lewandowski. Claimant: Municipality of Campinas. Defendant: Helenice Bergamo de Freitas Leitão and others. Full Court. Electronic Journal of Justice February 13, 2009.

basis for delimiting the amount to be paid as IPTU).

And it is in this possibility that the summary 19 has an indirect relationship with the summary 29 because according to the reading of the summary it is possible to interpret that any city hall can create a service fee based on the area of the property where the possibility of the service legitimizes its collection, the amount collected being unaffected by the limitations that are imposed by the constitution on taxes.

HYPOTHESIS AND BASIS OF CALCULATION

In order to define the legal nature of the tax, it is necessary to study the calculation basis. The quantitative criterion of a tax is scaled according to the taxpayer's personal criteria, being delimited according to his/her ability to pay, however the rates must bring in the quantitative criterion, the real cost of state action with the real subject, as defined by Fabiana Del Padre tome.[6]

The arbitrariness in the measurement of the collection will calculate the values on top of the value of personal assets, where some pay more than others due to their greater or lesser contributory capacity, disregarding the role of the state for the calculation.There is an unconstitutionality in the use of the fee that is based on the value of assets, income, production volume or number of employees, any elements that do not concern the cost of state activity, especially in the exercise of police power.[7]

The fees must not exceed the real value of the action carried out by the state, nor the proportionality, provided for in article 5, item LIV, of the Federal Constitution/88, since the deprivation of goods depends on due legal process.

The fees are not taxes to make a profit for the state, but they are intended to refund to the government what was spent on its citizens. Therefore, the principle of retribution obliges the state to limit itself to charging only the value of its performance.

INABILITY TO CHARGE FEES BY CONTRIBUTIVE CAPACITY

The quantitative criterion of fees must be linked to the cost that is incurred by the state in carrying out that particular procedure. The License for Location, Operation and Installation (TLIF) fee established in Law No. not the effective cost of the activity developed by the government.

Hugo de Brito Machado states that the institution and collection of a fee does not have as an essential presupposition an individual benefit for the taxpayer, but the referability of the state activity, which must be related to the taxable person and not to the collectivity in general.

In the Interlocutory Appeal of Extraordinary Appeal No. 640,597 of Paraná, there was a citation of jurisprudence in the sense that it is constitutional to use the quantity of the product to be inspected in the definition of the basis for calculating the rate, it states that the greater the quantity of the product to be inspected, the greater the cost of work in verifying compliance with the rules applied.[8]

FINAL CONSIDERATIONS

As demonstrated, garbage collection activities do not refer to specific and divisible services, since it is impossible to measure

6 TOMÉ, Fabiana Del Padre. Notes on the requirements for imposing fees in the Brazilian tax system. Journal of Tax Law, v. 120, p. 59-71, São Paulo: Malheiros, 2013, p. 65

7 BRAZIL. Federal Supreme Court, 2012) and (BRAZIL. Federal Supreme Court, 2013a.

8 BRASIL. Federal Court of Justice. Regimental Appeal in Extraordinary Appeal 640,597. Rapporteur Minister Ricardo Lewandowski, Second Panel, Diario Eletronico de Justiça August 15th. 2014.

precisely how much solid waste a taxpayer produces per month. The basis for calculating the fees must be related to state activity. Binding Precedents 19 and 29, although indirectly, bring the possibility of adopting criteria used in the tax calculation bases; and the acceptance that measurement for individualization only has contours of potential.

The lack of specificity and divisibility of fees, as well as the possibility of using one of the IPTU elements in the base, allow not only garbage collection fees, but also others, without effective consideration and with the measurement of the owner's ability to pay. – in short, the creation of new taxes.

The legal literature forbids the collection of "profitable" fees, in which the Federated Entities, the correct way of charging a garbage collection fee must consider the approximate value of the costs of public cleaning and the real possibility of garbage collection and its correlation with the collection, taking into account the frequency of collection and the waiver of payment for citizens who do not even have the possibility (potential use) of taking advantage of garbage collection.

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