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MUNICIPAL ENVIRONMENTAL TAXATION: (IN)ADMISSIBILITY IN THE BRAZILIAN LEGAL SYSTEM

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ABSTRACT

This article aims to reconcile the constitutional principles that underlie environmental taxation, observing the technical and legal difficulties for the implementation of these fiscal instruments, within the scope of municipal tax jurisdiction and in view of the current constitutional order. At this point, the question is: is there a possibility, given the Brazilian legal system, of creating truly environmental municipal taxes? The analysis to answer this question will be carried out through bibliographical and normative research, using the logical-deductive method. Initially, we analyze the extra-fiscal aspect of exactions and their ability to promote a balanced environment; then, we seek to find out if it would be possible to reconcile environmental and tax principles, to finally analyze municipal taxes in kind, from an environmental perspective. Finally, it appears the environmental tax will prove to be an important effective instrument, at the collection level, to fund the municipal activity to protect the environment, in addition to having the important extrafiscal function of promoting the change of polluting conduct, which it is intended to discourage, through the collection of charges, making it possible to implement a truly environmental municipal tax.

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Keywords: extrafiscality and municipal jurisdiction; principle of contributory capacity; the polluter pays principle; environmental taxation; municipal taxes.

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ABSTRACT

This article aims to analyze the constitutional principles that underlie environmental taxation, observing the technical and legal difficulties for the implementation of these fiscal instruments, within the scope of the municipality tax competence, in view of the current constitutional order. At this point, the question is: is there a possibility, given the Brazilian legal system, of creating truly environmental municipal taxes? The analysis to answer this question will be carried out through bibliographical and normative research, through the logical-deductive method. Initially, the extra-fiscal aspect of the charges and their promotional aptitude for a balanced environment is analyzed, then it is sought to know if it would be possible to reconcile environmental and tax principles, to finally analyze municipal taxes in kind, from the environmental perspective. Finally, it appears that the environmental tax will prove to be an important effective instrument, at the collection level, to fund the municipality activity to protect the environment, in addition to having the important extrafiscal function of promoting the change of polluting conduct, which it is intended to discourage, through the collection of charges, making it possible to implement a truly environmental municipal tax.

Keywords: *contributory capacity principle; environmental taxation; extrafiscality and competence; municipal districts; polluter pays principle.*

INTRODUCTION

The right to life presupposes the existence of an ecologically balanced environment. Because of this, legal science has been seeking to implement mechanisms that can guarantee the balance between economic development and environmental preservation in a sustainable manner.

In the field of Tax Law, a re-reading of institutes that enjoyed a clear fiscal character (collection), based on the search for derived revenue to fund the State and on the principle of economic capacity, has been gaining ground in authoritative doctrine, nationally and internationally, for the extrafiscality bias, which, in the context of environmental taxation, are under the aegis of the polluter pays principle.

This article seeks to break the paradigm[3] between environmental taxation and the State's mere purpose of collecting, given that tax has been shown to be a great tool to discourage typical polluting conducts and encourage remedial conducts in the environment.

Environmental taxes have been gaining prominence, as they aim to promote environmental preservation since they consist of efficient instruments to enable the internalization of the infamous negative externalities, so that those who carry out polluting activities bear the cost of their conduct in their respective responsibilities.

In this study, the taxes in the Municipalities' constitutional tax jurisdiction will be analyzed. From each type of tax of municipal competence, a reinterpretation of the tax will be proposed from the perspective of environmental taxation, notably in its extra-fiscal aspect, so to verify the existence, or not, of a "truly"[4] municipal environmental taxation.

In this sense, the central question of the research is: would it be possible to institute (municipal) environmental taxes whose materiality stems from the very fact that the aim is to curb without, therefore, constituting a sanction for an unlawful act? In other words, essentially extrafiscal exactions, which, unlike other taxes, aim to encourage conduct in favor of the environment, instead of collecting for the municipal public coffers.

Thus, taxes, fees and contributions of municipal competence will be analyzed, as well as the possibility of revealing themselves as important mechanisms for environmental preservation.

3 Regarding the rupture of a paradigm, Kuhn argues that normal science should not be totally determined by pre-established rules (paradigms), but that it could also be directed beyond the rules foreseen in the paradigm.

4 Environmental tax itself (in the strict sense) is one whose material aspect (materiality) results directly from a "polluting" fact.

1 EXTRAFISCALITY: PROMOTIONAL FUNCTION OF THE RIGHT TO AN ECOLOGICALLY BALANCED ENVIRONMENT

Tax Law has the main function of regulating taxation, insofar as taxation is the phenomenon geared towards the derivation of public revenue that the State, with constitutional guidelines, seeks to finance.

From an economic point of view, by granting tax benefits or increasing the tax burden the State can encourage or discourage certain taxpayers' behavior, a facet of taxation which is commonly called an extrafiscal function.

As Kirchhof (2016) teaches, the (modern) State can intervene in the behavior of subjects, on a large scale, based on their financial power, through its normative power, whether through the pressure exerted by money through taxation or concession aid, subsidies, public development policies and other incentives.

Therefore, through the granting of fiscal and taxation benefits, the State, aiming to achieve a different objective from the mere financing of the public machine, seeks to intervene through the extrafiscal function both in the economy and in other areas of public interest.

In this sense, Alfredo Becker teaches as follows:

> The main purpose of many taxes (which will continue to emerge in ever greater volume and variety due to the progressive transfiguration of classic or traditional finalist taxes) will not be as an instrument for collecting resources to fund public expenditures, but an instrument of state intervention in the social environment and in the private economy. In the construction of each tax, extrafiscal finalism will no longer be ignored, nor will the fiscal one be forgotten. Both will coexist in a conscious and desired way; there will only be a greater or lesser prevalence of this or that finalism (BECKER, 2002, p. 587-588).

With the assumptions of extrafiscal taxation aligned, even though it is defined as the preponderant function of a given exaction, taxation is inherent to tributes. However, unlike the tax spectrum, which seeks to increase revenue, the desired consequence with the use of extrafiscality is the change of conduct to the detriment of the vindicated revenue itself, in which, ideally, the derivation would be equal to zero.

Although, according to Pimenta (2020), part of the German doctrine considers the tax that has zero revenue would have a strangling effect (*Erdrosselungswirkung*), and therefore would be an unconstitutional norm in

the face of abuse of form, as there would be a prohibition dressed in tribute.

Ricardo Torres thus advocates:

> […] extrafiscality, diluted in taxation, performs a wide range of economic policy tasks, incumbent upon it, among others: a) improving the people's standard of living, without creating obstacles to the free play of the economy; b) the maintenance of full employment; c) the restraint of activities harmful to hygiene or safety, as well as the disincentive to the consumption of certain goods, such as gasoline, and as happened in the American law on margarine; c) encouraging the consumption of certain goods, such as fuel alcohol after the oil crisis; e) combating inflation and economic stabilization; f) the protection of cultural heritage (TORRES, 2008, p. 257-258).

In addition, a balance point between the phenomenon of taxation and the conduct that is intended to discourage in extrafiscality must be reached without it becoming a punitive act, i.e., the quantitative aspect of the exaction must be consistent with the cost of the externality which is intended to be internalized in the operating costs of the polluting taxpayer.

In this regard, one should highlight that the extrafiscal function is not to be confused with the punitive/sanctioning function, as taxes cannot constitute a sanction for an unlawful act. Thus, the principles of proportionality and reasonableness must draw the quantitative link between the materiality of the taxable event that is intended to discourage and the corresponding tax burden. For taxation should focus on lawful acts and should not make the exercise of freedoms unfeasible, under penalty of being characterized as a punishment for the taxpayer's behavior that it seeks to discourage.

> […] extra-fiscal taxation (and environmental taxation in particular) is not intended to punish wrongdoing. It seeks to guide the economic agent to plan their lawful business in accordance with a public policy legitimized by the Constitution (DOMINGUES, 2007, p. 50).

In view of this, environmental taxation is based on the reinterpretation of the principles that guide the National Tax System, from an extrafiscal perspective, and on in-kind taxes, considered an appropriate instrument for promoting environmental preservation.

On extrafiscal environmental taxation, Cleucio Nunes asserts:

> Not only economic activity as a point of identity of causes to Tax Law and Environmental Law, but also the effects of this activity in the legal order and within society, will allow the opening of a perspective of state action that uses tax as an instrument of preservation of the environment (NUNES, 2005, p. 10).

This understanding is corroborated by Pedro Molina's lesson:

> The 'polluter pays' principle encourages the creation of environmental taxes. I am aware that such taxes do not constitute a requirement of the aforementioned principle, but – in the judgment of the European Commission – "environmental taxes and encumbrances form part of the range of instruments applicable to the environment and may result in an adequate way of practicing the "polluter pays" principle by including environmental costs in the price of goods and services (MOLINA, 2000, p. 42-43).

One should analyze how taxation, on an extrafiscal basis, can be used as an instrument capable of preventing environmental degradation, but before that, one must enter into the apparent conflict between the guiding principles of Tax Law and Environmental Law, so to better understand the legal contours that should govern environmental taxation.

2 ENVIRONMENTAL TAXATION: POLLUTER PAYS PRINCIPLE *VERSUS* CONTRIBUTION CAPACITY

The polluter pays principle can be seen as the basic guideline of Environmental Law, as it seeks to impose the burden on the polluter, related to the costs of preventing and repairing the degraded environment.

From an economic point of view, this principle reveals itself as an additional cost in the production and consumption chain, which must be borne by those who pollute and also by the beneficiaries of production.

According to Cristiane Derani's lessons:

> During the production process, in addition to the product to be sold, "negative externalities" are produced. They are called externalities because, although they result from production, they are received by the community, as opposed to profit, which is perceived by the private producer (DERANI, 1997, p. 158).

Therefore, in addition to the repairing and preventive function, the second, as will be seen, is the main function. There is also the redistributive facet of the negative externality that the principle aims for the polluting agent to internalize.

> This principle is based on the redistributive vocation of Environmental Law and is inspired by the economic theory that the external social costs that accompany the production process (e.g., the cost resulting from environmental damage) need to be internalized, that is, that economic agents must take them into account when elaborating the production costs and, consequently, assume them. In this case, the aim is to impute to the polluter the social cost of the pollution generated by him,

> creating a mechanism of responsibility for ecological damage, encompassing the effects of pollution not only on goods and people, but on all of nature. In economic terms, it is the internalization of external costs (MILARÉ, 2013, p. 267-268).

From the pricing of natural resources, the costs of preserving and repairing the environment, formerly ignored in production costs, the State must act so that externalities are not socialized and profits internalized by the explorers of the environment.

> Pigou analyzes and concludes, in the case of market failure in relation to the perception of externalities, that the State must also introduce a tax system, in case of external diseconomy (negative social effects) and subsidy or incentive, in case of external economy (positive social effects) (AYDOS, 2010 *apud* DERANI, 1997, p. 66).

It is important to highlight that the principle is not intended to encourage the polluter to pay to pollute, the misinterpretation of this important principle would lead to the inversion of its purpose for payer-polluter.

In this sense, Marcelo Rodrigues teaches:

> […] the polluter/user-pays axiom cannot be interpreted literally, as it does not translate the idea of "paying to pollute", or "paying for use", especially also because its scope is absurdly broader than the merely repressive notion it possesses. Often taken as "paid to be able to pollute", the polluter pays principle goes very far from this sense, not only because the environmental cost does not have a corresponding pecuniary valuation, but also because no one could be given the possibility to buy the right to pollute, benefiting from the environmental good at the expense of the community that owns it (RODRIGUES, 2012, p. 190).

The touchstone of the polluter pays principle, with regard to Environmental Taxation, is its preventive function, given that, with tax charges, the objective of environmental extrafiscal enforcement is to induce polluters to seek to reduce their activities degrading the environment, enabling "clean" alternatives, to reduce the *quantum debeatur* on the taxation of these facts. Because of this, the polluter-pays principle, a corollary of the prevention principle, must be seen as two sides of the same coin.

On the other hand, arising from the principle of isonomy, there is in Tax Law the principle of contributory capacity, also called the principle of economic capacity, provided for in art. 145, first paragraph, of the Federal Constitution.

Due to this principle, the quantitative aspect of taxes must be graduated according to the taxpayer's economic capacity. Furthermore, due to the expression "whenever possible", the constituent established, using the adverb "always", a prominent imperative that should guide the legislator in the regulation of taxes.

It turns out that there is an apparent conflict between environmental extrafiscality, which is intended to be promoted through the polluter-pays principle, and the principle of contributory capacity since, to discourage polluting behavior, there will not always be consonance between the taxpayer's economic capacity and the amount of the tax, but the tax base must have a direct relationship with the polluting capacity of the taxpayer. Corroborating the lesson, Ricardo Torres, when dealing with the subject, asserted:

> The expression "whenever possible" allows the contribution capacity and its subprinciples to be adjusted to the various types of taxes, but it does not admit that they are not applied whenever possible. […] On the other hand, the constitutional reservation aims to make the contributory capacity compatible with extrafiscality. Whenever possible, the legislator will observe the principle of economic capacity; but, in certain cases, at its prudent discretion, it may use the tax to achieve extrafiscal objectives related … with the protection of the environment (TORRES, 2013, p. 83).

Therefore, when thinking about environmental taxation itself, i.e., that based on extrafiscality, the logical assumption is the compatibility of the aforementioned constitutional principles, to make the principle of contributory capacity, which should guide taxation, more flexible for taxes of predominantly extrafiscal character.

In another turn, the doctrine teaches that, when dealing with environmental taxes, one can, in a broad sense, include those ordinary taxes designed for the financing of the public machine, that somehow use the destination of resources or promote, to some degree, environmental preservation values without, therefore, the need to change the incidence hypothesis.

On the other hand, with regard to the environmental taxes themselves in a strict sense, i.e., those whose materiality results from the fact that it is intended to discourage; since they are directly related to the degradation of the environment, their quantitative aspect is based on the polluter pays principle, through rates and a calculation basis that allow for inducing behaviors with a clear promotional character for the environment.

> What is essential is to verify that, based on the constitutional principle in force, the political will can, without the need for radical changes in the tax constitutional system, build a tax structure based on more selective rates, capable of adapting to the demands of sustainable development and the improvement of the quality of life for Brazilians (TUPIASSU, 2006, p. 148).

Once the premises of environmental taxation have been established, by means of extrafiscality and the compatibility between tax and

environmental principles, one can see that taxes are an important instrument of environmental protection, in addition to the mere collection function. In view of the extrafiscal purpose, capable of inducing economic agents to conduct behaviors that protect the environment, and, equally, discouraging harmful actions and practices.

3 TAX AND ENVIRONMENTAL COMPETENCES OF THE MUNICIPALITY

As seen in the previous item, environmental taxation is characterized by its extrafiscal nature, based on the principles of environmental policy, aimed at inducing environmentally correct behavior from the stipulation of taxes whose incidence matrix rule maintains an equivalence relation with costs of repairing the environment, in view of the conduct that is sought to discourage.

Thus, environmental taxation reveals itself in the face of the disruption of the classic model of merely levy tax, to give charges an ecological bias of social purpose, as a result of extrafiscality, through the application of the polluter-pays principle, which aims to prevent based on the economic induction of environmental re-education.

This rereading of the phenomenon of taxation results from the consideration of environmental values, backed by the legal system itself, which go beyond the mere collection purpose of the tax rule, considered in isolation, but is subject to the Constitution and the General Principles of Law. It would be, according to Karl Larenz's lessons, a development (overcoming) of the Law that goes beyond the law (extralegem), but in the current legal order, therefore, *intra juris* (LARENZ, 1997).

Considering that the scope of this work lies in the study of the (in) admissibility of "truly" municipal environmental taxes, one should, before entering the central problem of the research, look into the competences of municipalities granted by the Federal Constitution.

Before delving into the nuances, properly speaking, of the tax jurisdiction attributed to Municipalities, one must place the aforementioned entity in the Federated State, given its material and formal legitimacy to regulate and act on matters of local interest and also supplement the state and federal legislation, where omitted.

> The "local interest" does not need to concern or necessarily comprise the entire territory of the Municipality, but a locality, or several localities, of which a Municipality is composed. The expression used by the Federal Constitution of 1988 was a happy one. Therefore, what is convenient for a block, a neighborhood, a subdistrict or a district can be the object of municipal legislation (MACHADO, 2009, p. 389).

Regarding the material competence for the preservation and defense of the environment, it is a competence common to federated entities, as provided for in art. 225 of the Federal Constitution. In view of the obligation imposed by the Federal Constitution, the Municipality must avail itself of instruments that can guarantee and promote the defense of the environment.

> […] the municipality has the power-duty to preserve the environment and fight pollution, and may use Environmental Taxation as an important and efficient instrument to condition the conduct of individuals, directing them to benefit the environment of cities, promoting the social welfare as provided for in art. 225 of CF/88, that is, the healthy quality of life in the urban environment, with the IPTU being a potential tax for this purpose (FOLMANN, 2002, p. 508).

Hely Meirelles also teaches that *"*the municipality's imposing power comes from its financial autonomy, established in the Constitution of the Republic, which ensures the institution and collection of taxes within its competence and the application of local income (art. 30, III)" (MEIRELLES, 2014, p. 150).

Therefore, it is incumbent on the municipal entity to use its tax competence not only to increase the collection to cover public expenses, but also to use taxes as an efficient means of promoting the preservation of the environment.

In this context, in the view of José Nabais:

> … taxation is not, in itself, an objective (that is, an original or primary objective) of the state, but rather the means that enables it to fulfill its objectives (original or primary), currently embodied in the tasks of rule of law and social state, that is, in tasks of the social rule of law. A means that, on the one hand, presupposes a certain type of state from the point of view of its financial support - a fiscal state - and, on the other hand, translates itself, mindful of its current social character, into the requirement of a considerable part of the income or assets, as such or as spent or consumed in the acquisition of goods or services, of its citizens. Because the state cannot give (carry out social benefits), without first receiving (collecting taxes), it is easy to understand that the less it trusts in the self-responsibility of citizens regarding the supervision of their needs (self-satisfaction), the more it neglects the principle of subsidiarity, extreme in a paternalistic social state concerned, if not obsessed, at the

> limit, with the achievement of happiness down to the detail (which will include free time) of individuals and, consequently, more burdening in their ability to provide tax (NABAIS, 2009, p. 185-186).

Having traced the nuances of the tax and environmental competence granted by the Magna Carta to the municipalities, the so-called municipal environmental taxes will be analyzed.

3.1 Municipal environmental taxation

According to Hely Meirelles, in the classic and fiscal sense of taxation, "municipal incomes consist solely of financial resources obtained from the imposing power of the Municipality (taxes) or from the use of its goods and services paid by users (prices)" (MEIRELLES, 2014, p. 152).

Depending on the provisions of art. 145 of the Federal Constitution, the tributes the Municipality must institute are taxes, fees and contributions for improvement, and may also, pursuant to art. 149-A, of the same Letter, "… institute a contribution, in the form of the respective laws, for the cost of the public lighting service, subject to the provisions of art. 150, I and III".

As will be seen, all types of tributes, taxes, fees, improvement contributions, etc. are able to promote environmental protection. Thus, in a broad sense, the environmental nature of taxes can be characterized both by the destination of the revenues collected, and by the extrafiscal purpose performed by the tax exaction.

Thus, according to the doctrine of José Nabais, improper environmental taxes*,* in a broad and "false" sense*,* will be taken as tax exactions that essentially pursue a tax collection purpose, even though it considers aspects of environmental promotion for the purposes of stipulation of the quantitative aspect of the tax or the destination of the resource*.*

> In addition, regarding the first of the aforementioned aspects - i.e., with regard to the purposes of environmental taxes -, one may say that nowadays the idea of dichotomically dividing these taxes into two species is relatively consensual, so that they are either environmental taxes in strict, technical or proper sense, which pursue an encouraging extrafiscal purpose (*reine Lenkungssteuern*), or are environmental taxes in a broad, technical or inappropriate sense, which aim at a remedial purpose *(reine Umwelfinanzierungabgaben*).
>
> It is true that only the first, because they directly or immediately materialize the ecological policy, are considered true environmental taxes, not passing the second, whose objective is, like tax taxes in general, to capture or collect revenue, albeit

> these are consigned to the realization of the ecological policy, of false environmental taxes. Indeed, what characterizes the environmental nature of the taxes is the ecological extrafiscal objective or purpose assumed by the legislator when creating and disciplining them and not the ecological destination of the revenues provided by them, as this destination is located downstream of the corresponding tax relations, inserting itself in the policy of making expenses and not in the policy of obtaining tax revenue (NABAIS, 2003, p. 32).

In this context, environmental taxes, in a broad sense, do not have their materiality necessarily linked to a fact or conduct harmful to the environment, which is intended to discourage. They are in fact traditional taxes, in the classic sense (collection), with an environmental protection guise, whether through tax benefits, encouraging certain politically correct conducts to the environment, or increasing the quantitative aspect of reprehensible conducts, or even, relating to the allocation of revenues from the collection of said resources.

> […] in an "inappropriate" sense, because the objective is to capture the means to be used in carrying out the ecological policy, they will, in principle, be as environmental as any other tax that allows the collection of financial resources for the pursuit of the end in question. Its contribution to the ecological balance of fiscal taxes in general is only distinguished when, without failing to present as its first purpose the capture of revenue, and not the encouragement of the adoption of more sustainable behaviors, they have as their object situations or activities that cause damage to the environment, internalizing externalities. This kind of taxes thus relegates to the background what should be the main way of treating the ecological problem: prevention (SOARES, 2002, p. 13-14).

On the *contrary*, *e*nvironmental taxes, in a strict and "true" sense*,* will be taken as their own environmental taxes, which are guided by extrafiscality, aimed at inducing or discouraging conducts that cause damage to the environment, such as taxes whose materiality arise from polluting facts (NABAIS, 2003).

The tax as an instrument of environmental intervention, whether arising directly from the extrafiscal purpose (environmental tax in the strict sense), or arising from the indirect effects of taxes in a broad sense, with ways to preserve the environment (destination of the collection), both enjoy of an important promotional function of desirable behaviors to the promotion of ecological balance.

In view of the aforementioned considerations, it is now analyzed, considering the municipal tax jurisdiction, the taxes in kind, both through the perspective of environmental taxation in a broad sense and in a strict sense.

3.1.1 Taxes

With regard to the municipal competence for the imposition of taxes, there are three different exactions: (a) Urban territorial property tax (IPTU); (b) Tax on services of any nature (ISSQN); and (c) Tax on the transfer of real estate by "*inter vivos*" act (ITIV).

The existence of municipal environmental tax competence for the institution of taxes in the proper sense can be ruled out, as none of the aforementioned taxes enjoy the material ability to incur on facts that are harmful to the environment.

In spite of that, in the Brazilian legal system, only the Federal Union could, with residual competence, institute, by means of a Complementary Law, a truly environmental tax, in the strict sense.

However, it is undeniable that the aforementioned municipal environmental taxes, in a broad sense, can exercise, in addition to taxation, an important mission in the sphere of environmental protection.

In this sense, it is important to bring up both the progressive IPTU over time[5], which promotes the social function of property, which enjoys an important extrafiscal function, given that it discourages the maintenance of unproductive property, and the so-called "green property tax", which aims to from the preservation or maintenance of green areas, grant tax benefits to the taxpayer.

Although it is not possible to conceptualize a tax benefit as a tax, this type of rule has an extrafiscal function, as it seeks to encourage behavior through the granting of economic advantages, that is, despite these taxes being based on the taxation and the allocation of resources to the benefit of the municipal treasury, without binding revenue, they have, albeit to a lesser degree, the ability to encourage behaviors that are beneficial to the environment.

Regarding the selectivity of the ISSQN, the Municipality can use its implementation to promote environmentally acceptable conduct, both through the exemption of services and the increase in the rate for activities potentially degrading the environment. But, as seen above, the granting of incentives through tax legislation does not have the power to make it a true environmental tax. However, it can play an important role in inducing behavior, as long as it is reconciled with the polluter pays principle.

With regard to the ITIV, also, only under the aegis of the regulation

5 Art. 182, § 4, II of the Constitution of the Federative Republic of Brazil of 1988.

of tax benefits, one can think of encouraging behaviors that in some way may be ecological, such as exemption for the transfer of properties for the purpose of environmental preservation, or for subject who carries out an activity aimed at the recovery of the environment.

> The payment of the environmental tax, by itself, does not legally repair the disturbance of the ecological balance, a bell which, legally, also, and thus, consolidates it. In order for them not to occur, […] it would be necessary for the environmental tax, based on the principle that contaminates pays, and a tax allocated to finance, with it, the cost of a public activity to purify the corrective of the contaminating effect (TABOADA, 2005, p. 80).

Therefore, only in a broad sense, one can speak of the municipal competence for the creation of environmental taxes, based on the regulation of benefits or encumbrances, on the imposition of the aforementioned taxes.

3.1.2 Contributions

With regard to municipal contributions, namely, contributions to improvement and contributions to the cost of public lighting services, they follow the same paradigms outlined above for municipal environmental taxes, since only in a broad sense is it possible to think of them as mechanisms aimed at the environment.

Regina Costa, when dealing with the contributions to improvement from an environmental point of view, draws the following conclusion:

> We believe that the contribution of improvement, moreover, can be made to environmental protection. Necessary premise for its requirement, the performance of public works that may cause private real estate appreciation (CR, art. 145, III). Thus, if the public works turn to environmental preservation, such as the construction of a park, for example, a contribution of "green" improvement may be required. The absorption of this surplus value by the Public Power is linked to the cost of the work, so that, in the case of the urban environment, the contribution to improvement can prove to be a fruitful expedient for urbanistic purposes (COSTA, 2003, p. 306).

Given the bilaterality inherent in the contribution to improvement, as it results from the execution of a public work that generates an appreciation of the private property, the State aims to refinance itself on the costs incurred, only imagining that the work is aimed at preserving the environment environment, or recovery of an environmentally important ecosystem, is what could be thought of in the extrafiscal environmental function of such a tributary species.

Despite the contribution of improvement being suitable, in a broad sense, the purpose of environmental protection, as seen, in addition to being little used, it enjoys the above and above mentioned limitations with regard to extrafiscality.

Another tax type, created from Constitutional Amendment number 39, of December 19, 2002, whose wording added art. 149-A to CRFB/88 establishing the Contribution for the Cost of Public Lighting Services (COSIP). This is a linked tax, whose objective is to fund the supply of energy, as well as the maintenance, operation, installation and improvement of municipal public lighting equipment.

Regarding the environmental aspect of COSIP, even though it is focused on taxation, in order to face the cost of the use of electricity used by the Municipalities, it may have as a basis for calculation values attributed to the property's electricity consumption ranges. , which in itself, increases costs for the use of electricity, promoting the environmental principle of the user-payer.

Another relevant environmental aspect of COSIP is revealed to the extent that Municipalities must seek to reduce the costs arising from the consumption of electricity, so that the funds collected can meet the costs of the public lighting service, which in the final analysis favors the conservation of the environment.

In both tax types dealt with here, it is possible to establish laws that grant tax benefits, observing the level of action of taxpayers in favor of the environment.

3.1.3 Fees

It should be noted that the fee is a kind of bilateral tax, of a counter-payment nature, that is, it results from the performance of a state activity. In addition, the aforementioned tax type has its collection linked to the relative cost of exercising police power, or the service, resulting from the actual or potential use of specific and divisible public services, provided to the taxpayer or made available to them[6].

The material aspect of the taxable event is due to "a state action directly referred to the taxpayer", which "may consist either of a public service or of a police act" (CARRAZZA, 1991, p. 243).

In view of the bilateral and synalagmatic structure, some authors

6 As expressed in art. 145, II, of the 1988 Constitution of the Federative Republic of Brazil.

understand that the rates are fixed, and because of that, they would not be the most suitable tax type for environmental taxation.

> Environmental taxes are criticized in the sense that they have little incentive capacity, as they are calculated based on very low values compared to environmental damage, which distances them from the PPP. On the other hand, the tax is also considered responsible for the sale of authorizations to pollute, since there is the possibility of charging fees for the authorization to explore natural resources and for the release of potentially polluting activities (MONTERO, 2014, p. 248- 249).

However, as seen above, extrafiscality is not incompatible with the principle of contributory capacity. Thus, it is possible that, in the accuracy analyzed here, it is the basis for progressive calculation due to pollution and polluting activity, as well as that, in the subjective aspect, it falls on the polluting contributor. Regarding this perspective, José Nabais suggests:

> […] with regard specifically to environmental taxes, we must start by saying that, *prima facie*, bilateral taxes or fees are more conducive to the internalization of external costs, as prescribed by the polluter pays principle, than unilateral taxes or taxes. Because such internalization is inherently an idea of cause that only the figure of fees is able to express through its ability to directly and rigorously impose a burden on the responsibility for the production of external costs that can be individualized (NABAIS, 2003, p. 33).

There is the possibility of different conclusions about the same phenomenon, as different abstractions are extracted from the established paradigms, that is, depending on the way in which the foundation of the paradigm is used to explain a fact, completely different resolutions can be reached problems, but both are consistent with the presupposed theory (KUHN, 1998).

However, the guideline espoused by the Portuguese author seems more appropriate, as the fees, precisely because of bilaterality, can more effectively promote the internalization of negative externalities, based on the polluter pays principle.

Despite the methodological difficulty of calculation, through this tax species it is possible to directly assess, in a specific and divisible way, the responsibility for the production of external costs and the costs of the State to protect the environment, in order to discourage conduct typically polluting. In this sense, the lesson of José Nabais continues:

> However, although theoretically bilateral taxes or fees are the most appropriate taxes to apply the basic principle of environmental law, the polluter pays principle, in practice there are important obstacles that prevent, and effectively prevent, this. The

> divisibility of the benefit provided by the State and other public entities, which would allow us to determine the magnitude of the payment to be made by the polluter who benefits from it, taking into account precisely the proportion in which this benefit is earned by him, is not always verified when we are in the field of protection or protection of the environment (NABAIS, 2003, p. 33).

Precisely because of bilaterality, the costs for such services to be performed will be calculated and due, according to the responsibility of the polluting agent, in order to discourage such degrading behaviors of ecosystems, since the costs arising from the repair must be much greater than those of the prevention or the performance of other conduct, which is not in the factual support of the exaction.

From the spectrum of action of the Municipalities in the environmental field, through public policies aimed at the repair and prevention of protected environmental assets, the costs of repairing the environmental damage caused or that can be included in the calculation basis of environmental taxes. if it aims to prevent.

From the environmental fees of municipal competence, calculated based on the cost of repair and prevention in an extrafiscal manner, based on the intention of inducing the change of potentially polluting conduct, based on the intervention in the taxpayer's property, through taxation, here is that the tax is a form of restriction of private property, it is possible to discourage polluting behavior, especially the lower the collection of this tax.

As an example of a truly environmental municipal tax, which progressively provides for the collection, according to the degree and polluting capacity of the taxpayer, the licensing fee established by the Municipality of Florianópolis, through Complementary Law no. . 545 of 2015.

The referred law provides in the *caput* of art. 1, as a triggering event, the cost of the licensing service provided by the municipality "according to the polluter/degrading potential and the size of the enterprise", having as the taxpayer the directly or indirectly responsible for the activity of environmental interest (art . 2)[7].

Notwithstanding the extra-fiscal potential of the fees, this is little explored by the Municipalities, and it is more common to institute fees of a fiscal nature on the costs of the collection, removal and disposal of solid waste (garbage fee), and the fees arising from the environmental licensing, based on the exercise of police power.

7 Pimenta opines for the constitutionality of the aforementioned municipal law (PIMENTA, 2020).

FINAL CONSIDERATIONS

In the study of environmental taxation, it was found that the principle of contributory capacity has its prominence shifted, giving way to the environmental principle of the polluter pays.

Environmental taxation emerged from the perspective of the polluter pays principle, exercising a differentiated function, known as extrafiscal, to the detriment of the typically tax-collecting aspect.

From this correlation between the tax and the environment, it was seen in the second item that the federated entity must use the mechanisms inherent to its tax competence, to legislate to promote the preservation and recovery of nature, making use of important tools of Tax Law, on an extrafiscal basis, aiming to promote the internalization of negative externalities.

The State, through environmental exactions, can discourage the practice of behaviors that degrade the environment. In this sense, we studied, at the level of municipal tax competence, the legal feasibility of the institution of environmental taxes, evaluating the effectiveness of each tax species in the preservation of the environment, in a municipal scope.

We observed the materiality of the true environmental exactions stems from the very fact it aims to curb, without thereby constituting a sanction for an unlawful act, as the degradation of the environment can be lawful, and for that reason taxed.

In item four, it was evident that the duty to bear the costs of negative externalities in the production process, whose foundation is the principle of solidarity and an ecologically balanced environment for current and future generations, will be the municipal environmental taxation, presented as an important guaranteeing and promotional instrument for the preservation of the environment.

In this study, we considered that municipal taxes and contributions, only in the broad sense and based on the granting of tax benefits and the allocation of revenue, are able to promote the environment, in view of the (constitutional) municipal tax incompetence for the institution of environmental taxes or contributions in the strict sense.

In addition to the extrafiscal function, the function of collecting contributions and municipal taxes was highlighted, in a broader sense, regard-

ing the possibility of promoting the protection of the environment, either through the collection and allocation of revenues or through the granting of tax incentives aimed at inducing environmentally appropriate behavior.

To answer the question on the possibility of instituting a truly environmental taxation, we concluded that, to achieve environmental extrafiscality (*stricto sensu*), only municipal taxes are the appropriate for this purpose, as from the correlation of bilaterality and the costs of prevention and repair of nature, the Municipality can include in the calculation base of the exaction the amounts that would be spent on services for the recovery of environmental degradation, although this quantification is not an easy task.

For the institution of truly environmental municipal taxes, the materiality of the tax, which can be created by municipal law, must encourage, in extrafiscality (PPP), the taxpayer to seek alternative means to reduce the production of negative externalities, as prevention costs are much lower than repair and tax costs, ideally, to promote the non-performance of the taxable event, and consequently not generate tax revenue.

In view of this, polluters, in order to maximize their profits, must adapt the environmental policy of non-contamination or reduction of damages as far as possible, so to pay less tax, which in itself encourages the development of clean technologies, as well as the adoption of practices or behaviors that do not degrade the environment, by taxpayers that aim to increase their operating income.

Environmental taxation based on extrafiscality is a novelty in Brazilian law. Deeper studies are needed about the municipal constitutional competence, the limits to its use, and the need for legislative improvement. This article does not intend to exhaust the topic, but only to launch the guidelines for municipal environmental taxation, so to promote the implementation of the ideas here raised.

REFERENCES

AYDOS, E. L. P. *Tributação ambiental no Brasil:* fundamentos e perspectivas. Dissertação (Mestrado em Direito) – Universidade Federal de Santa Catarina, Florianópolis, 2010.

BECKER, A. A. *Teoria geral do Direito Tributário*. 3. ed. São Paulo: Lejus, 2002.

BRASIL. [Constituição (1988)]. *Constituição da República Federativa do Brasil de 1988.* Brasília, DF: Presidência da República, 1988. Disponível em: http//www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Acesso em: 22 maio 2020.

CARRAZZA, R. A. *Curso de Direito Constitucional Tributário*. 2. ed. São Paulo: Malheiros, 1991.

COSTA, R. H. Tributação Ambiental. *In:* FREITAS, V. P. (org.) *Direito Ambiental em evolução.* Curitiba: Juruá, 2003. p. 303-314.

DERANI, C. *Direito Ambiental Econômico.* São Paulo: Max Limonad, 1997.

DOMINGUES, J. M. *Direito Tributário e Meio Ambiente***.** 3. ed. Rio de Janeiro: Forense, 2007.

FLORIANÓPOLIS. Câmara Municipal de Florianópolis. *Lei Complementar Municipal n. 545 de 2015***.** Dispõe sobre a Taxa de Licenciamento Ambiental, a Taxa de Prestação de Seriços Ambientais e a Taxa de Controle e Fiscalização Ambiental Municipal. Florianópolis: Câmara Municipal de Florianópolis, 2015. Disponível em: https://leismunicipais.com.br/a/sc/f/florianopolis/lei-complementar/2015/55/545/lei-complementar-n-545-2015-revoga-os-arts-2-4-5-6-8-9-e-os-anexos-i-e-ii-da-lei-complementar-n-206-de-2005-os-arts-5-6-10-e-os-anexos-ii-e-iv-da-lei-complementar-n--376-de-2010-e-dispoe-sobre-a-taxa-de-licenciamento-ambiental-a-taxa--de-prestacao-de-servicos-ambientais-e-a-taxa-de-controle-e-fiscalizacao--ambiental-municipal. Accessed on: Nov. 2, 2020.

FOLMANN, M. IPTU e tributação ambiental: uma visão sob o enfoque constitucional e tributário. *In:* PEIXOTO, M. M. *IPTU*: aspectos jurídicos relevantes. São Paulo: Quartier Latin, 2002. p. 503-521.

KIRCHHOF, P. *Tributação no Estado Constitucional*. São Paulo: Quartier Latin, 2016.

KUHN, T. *A estrutura das revoluções científicas*. 5. ed. São Paulo: Perspectiva, 1998.

LARENZ, K. *Metodologia da Ciência do Direito.* 3. ed. Lisboa: Fundação Calouste Gulbekian, 1997.

MACHADO, P. A. L.. *Direito Ambiental Brasileiro*. São Paulo: Malheiros, 2009.

MEIRELLES, H. L. *Direito Municipal Brasileiro*. 17. ed. São Paulo: Malheiros, 2014.

MILARÉ, E. *Direito do ambiente.* 8. ed. São Paulo: Revista dos Tribunais, 2013.

MOLINA, P. M. H. *Derecho Tributario Ambiental*. Madrid: Marcial Pons, 2000.

MONTERO, C. E. P. *Tributação ambiental:* reflexões sobre a introdução da variável ambiental no sistema tributário. São Paulo: Saraiva, 2014.

NABAIS, J. C. Direito fiscal e tutela do ambiente em Portugal. *Revista do Centro de Estudos de Direito do Ordenamento, do Urbanismo e do Ambiente*. Lisboa, ano VI, n. 12, p. 23-42, 2003. Available at: https://digitalis-dsp.uc.pt/bitstream/10316.2/8603/3/2.pdf?ln=pt-pt. Accessed on: Oct. 25, 2020.

NABAIS, J. C. *O dever fundamental de pagar impostos*: contributo para a compreensão do estado fiscal contemporâneo. Coimbra: Almedina, 2009.

NUNES, C. S. *Direito Tributário e meio ambiente.* São Paulo: Dialética, 2005.

PIMENTA, P. R. L. *Direito Ambiental Tributário*. Rio de Janeiro: Forense, 2020.

RODRIGUES, M. A. *Elementos de direito ambiental*. São Paulo: Revista dos Tribunais, 2012.

SOARES, C. D. *O imposto ambiental: direito fiscal do ambiente*. Coimbra: Almedina, 2002.

TABOADA, C. P. El principio 'quien contamina paga'y el principio de capacidad económica. In: TÔRRES, H. T. (Org.). *Direito Tributário Ambiental*. São Paulo: Malheiros, 2005. p. 79-95.

TORRES, R. L. A política industrial da era Vargas e a Constituição de 1988. *In:* SANTI, E. M. D. (Coord.). *Curso de direito tributário e finanças públicas:* do fato à norma, da realidade ao conceito jurídico. São Paulo: Saraiva, 2008.

TORRES, R. L. *Curso de Direito Financeiro e Tributário.* 19. ed. São Paulo: Renovar, 2013.

TUPIASSU, L. V. C. *Tributação ambiental:* a utilização de instrumentos econômicos e fiscais na implementação do direito ao meio ambiente saudável. Rio de Janeiro: Renovar, 2006.

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