

DISCRETIONARIETY, INDETERMINATED LEGAL CONCEPT AND ACCOUNTABILITY IN THE CONTEXT OF TAX INCENTIVES

DISCRICIONARIEDADE, CONCEITO JURÍDICO
INDETERMINADO E ACCOUNTABILITY NO
CONTEXTO DOS INCENTIVOS FISCAIS¹

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ABSTRACT

The historical construction of the Brazilian State points to a marked degree of regional inequality between the federal units. As a result, several member states have adopted the ICMS tax incentives as a mechanism for socio-economic development and development. In this context, a major problem emerges: the control and limitation of tax incentives. In this context, the present study sought to analyze the incidence of discretion, the indeterminate legal concept and accountability in the ICMS incentives granted by the State of Goiás. For that, the hypothetical-descriptive method was used, using the literature review and the critical exposure of the topics covered. Thus, the central aspects related to the duality between type and concept, discretion, undetermined legal concept and accountability were understood, founded on the theoretical references of Humberto Ávila, Maria Sylvia Di Pietro, Floriano de Azevedo Marques Neto and Luis Felipe Sampaio. Furthermore, the analysis of the Fomentar, Produir and Pró Goiás programs was also central to this research, as well as the observation of the current administrative concepts mentioned above in the context of such tax incentive programs. Thus, it was found that the discretion of the incentives in question must be limited by the realization of judicious and effective accountability.

KEY WORDS: Accountability. Discretion. Undetermined legal concept. Tax incentives.

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RESUMO

A construção histórica do Estado brasileiro aponta para acentuado grau de desigualdade regional entre as unidades federativas. Em decorrência disso, diversos Estados membros passaram a adotar os incentivos fiscais de ICMS como mecanismo para fomento e desenvolvimento socioeconômico. Nesse contexto, emerge um problema de grande monta: o controle e a limitação dos incentivos tributários. Nesse contexto, o presente estudo buscou analisar a incidência da discricionariedade, do conceito jurídico indeterminado e do accountability nos incentivos de ICMS concedidos pelo Estado de Goiás. Para tanto, se utilizou o método hipotético-descritivo, recorrendo-se à revisão da literatura e a exposição crítica dos temas abordados. Dessa forma, compreendeu-se os aspectos centrais relativos à dualidade entre tipo e conceito, discricionariedade, conceito jurídico indeterminado e accountability, fundados nos referências teóricos de Humberto Ávila, Maria Sylvia Di Pietro, Floriano de Azevedo Marques Neto e Luis Felipe Sampaio. Ademais, a análise dos programas Fomentar, Produzir e Pró Goiás também foi objeto central desta pesquisa, bem como a observação dos atuais conceitos administrativistas acima citados no contexto de tais programas de incentivo tributário. Dessa maneira, restou constatada que a discricionariedade dos incentivos em comento devem ser limitadas pela realização de criterioso e efetivo accountability.

PALAVRAS-CHAVES: *Accountability. Conceito jurídico indeterminado. Discricionariedade. Incentivos fiscais.*

INITIAL CONSIDERATIONS

The construction of the Brazilian state took place, historically, in an unequal way and without the elaboration and consistent execution of some project that considered the national territory as a whole, thus favoring the emergence of considerable regional disparities, so that, alongside the existence of economically active centers, there are regions with a lower socio-economic development index.

Given this reality, as well as the persistent absence of effective and lasting national public policies aimed at the development of regions with lower socioeconomic rates, Member States, having observed the obstacles they have to the development of their territory to a greater degree, began, throughout the 20th century, to adopt the institution of VAT incentive programs for attracting greater private sector investments.

Given the importance of such tax incentive programmes over the last few decades, especially for states in the North-Central regions of the country, research into this phenomenon has become of prime importance, particularly as a result of the considerable power that such incentives confer on political representatives, given that their tax relief is high.

Aware of the relevance that such forms of economic development present to a large part of the Brazilian states, this research will focus on the analysis of current concepts involving Administrative Law, in particular those of discretion, indeterminate legal concept and Accountability, so that it is possible to understand the existence of possible typological failures by the programs object of this study.

The analysis of tax incentives under the bias of such concepts provided by the *jus administrativist* discipline stems from the central problem that this study will address: the misappropriation of ICMS tax incentives. Due to the weight that such benefits have, the rulers

are imbued with considerable political power in their hands to dispose, and it is necessary, therefore, effective control over their concession and execution.

This control, it should be emphasized, becomes a priority precisely because the outbreak of anomalies in the treatment of tax incentives is detrimental to the Member State that instituted it, not only because of the effects on the public finances of each federal unit, as well as the inefficiency and ineffectiveness that can result from them, contributing to the worsening of the precarious socioeconomic conditions of the instituting state.

Thus, making an epistemological cut in the State of Goiás, this article will focus on the analysis of the main fiscal-financial incentives instituted by this unit of the Federation, in this case, the programs Foment, Produce and Pro Goiás.

Thus, it is verified that the State of Goiás, through its programs of development, will be object of this research, delimiting the analysis now elaborated to the territorial limits of this political entity. Moreover, it is pointed out that the time lapse under study dates back to 1984 until the present day, considering that the first of these programs instituted, namely, the Foment, was promulgated by state law that dates from the same year of the 1980s.

In this sense, in view of the problem mentioned here, which is, the possible typological misappropriation of tax incentive programs from the perspective of central elements of the current Administrative Law, the general objective of this research is to understand how it should and how the incidence of discretion, the use of indeterminate legal concepts and Accountability occurs in the legal acts instituting such incentives for economic development, in view of the central importance such tributary possessions currently have for the economy of the Member States establishing them.

To this end, we will seek, as a specific objective first, the understanding of the three fundamental concepts brought to the fore of this research: discretion, undetermined legal concept and Accountability. Moreover, the understanding of the tax incentives institute, based on a conceptual and typological analysis, becomes of utmost relevance.

Then, in order for the concrete study of the programs that are the object of this research to materialize, this research presents as second specific objective the description and understanding of the laws instituting the programs Foment, Produce and Pro Goiás.

It also manifests itself as a specific objective of this research, an understanding of how the impact of the three *jus administrativist* elements raised from the perspective of the aforementioned laws governing these tax incentive programs granted by the State of Goiás should be addressed.

Accordingly, the methodology used to achieve the desired result, namely the analysis of discretion, of the undetermined legal concept and of Accountability in tax incentive programmes, will be the bibliographic review for the meaning of the concepts raised, as well as the exhibition of the current state of the art involving such a theme. In addition, the hypothetical-deductive method will be used, constructing conjectures with high probability of occurrence, for the subsequent analysis of the relevance of the hypothesis launched.

In this sense, the hypothesis to be tested is precisely that tax incentive laws grant a high degree of discretion to rulers through the large-scale prediction of indeterminate legal con-

cepts, Control and Accountability are of paramount importance in order to avoid the misappropriation of these mechanisms.

Finally, it should be noted that the structure of this article is based on six chapters, the first being related to the exposure of the three elements *jus administrativistas* object of this study, while the second will be analyzed tax incentives from the dual perspective of type and concept. From the third to the fifth chapter, we will talk about each of the incentive programs established by the State of Goiás: Foment, Produce and Pro Goiás, respectively. Then, in chapter six, in the concrete form of the hypothetical-deductive method, there will be the incidence of the larger premise, namely, the discretion, the undetermined legal concept and Accountability, on the smaller, that is, the tax incentive programs under consideration. Finally, in the conclusion, the results obtained from this research will be exposed.

It now enters into the understanding of administrative and tributary concepts necessary for the analysis it proposes to carry out.

1. DISCRETION, UNDETERMINED LEGAL CONCEPT AND ACCOUNTABILITY AT THE CURRENT STAGE OF ADMINISTRATIVE LAW

It is appropriate to emphasize, first, that this research is based fundamentally on the conception of type and concept raised by the specialized tax doctrine (ÁVILA, 2018, p. 11) but of great value and applicability to the terms *jus administrativistas* that consist at the heart of this study.

Thus, the meaning given to the term type should be treated as “the description of usual characteristics that usually occur, and should be analyzed together” (ÁVILA, 2018, p. 12) so that such an expression is limited to describing typical properties that are constantly observed, but such properties are not necessary and sufficient for type verification.

In this perspective, when a certain category is understood as typological, it implies to say that it is possible to expose certain generic characteristics to it. However, in the absence of any of these characteristics, the identification of the category in question will not be compromised by itself, and may be observed in the presence of other elements that will serve as a substrate for its individualization.

In general, the typological category will have a higher degree of abstraction and generality, and its occurrence can be verified from the presence of properties that commonly, but not necessarily, occur.

On the contrary, the term concept brings the idea of properties necessary and sufficient for its verification, in the sense that without certain property the concept does not manifest itself, the same as with such properties the concept is confirmed (ÁVILA, 2018, p. 11). The consequence of this is that, unlike type design, the concept will consist of rigid, limited and exhaustive structures.

Thus, the conceptual category will be present only when all the elements that consist in its requirements are present, which confers a higher degree of concreteness to this category, distinguishing, at this point, the typological category.

In the tax field the idea of concept can be easily verified, given the fact that its essence is to be composed of norms that aim to limit the state power to tax. Thus, the generating fact itself in the Tax Law, for example, is a conceptual category, because, if a certain necessary and sufficient element is not present for its occurrence, this fact will not materialize and the tax obligation will not be born.

In this study, however, despite the tax nature intrinsic to tax incentives, these will be analyzed from the perspective of structures that are primarily part of the administrative law, because both branches are affiliated to Public Law and thus having a similar legal regime in some respects.

Among these aspects that allow communication between Tax and Administrative Law emerges the concept we have of the terms discretionary, undetermined legal concept and Accountability, which gain considerable relevance in relation to tax incentives, because, through them, the legal control of the institution and execution of these benefits can be realized.

In this context, it is essential to understand that the three terms administrative law comment are typological category, so that the structuring elements of such expressions are fluid, unlimited and exemplifying.

This distinction is fundamental to understand the control of tax incentives in a more appropriate way, especially given the fact that a rigid structure for the configuration of Accountability or the indeterminate legal concept is not observed, so that the discretion of the governor in this respect must be carefully controlled and supervised, otherwise damaging the misappropriation of tax incentives, which leads to considerably perverse consequences for public finances, the state economy and, consequently, to social conditions.

Specifically entering into the analysis of each typological category under study, it should be emphasized, regarding the discretion, that this will manifest itself in the hypotheses in which the power of the Administration can adopt the casuistic solution based on criteria of opportunity, convenience, justice and equity, given the absence of conceptual definition by the legislator (DI PIETRO, 2016, p. 254).

It should be noted, however, that such a perspective of discretion does not presuppose that power is unlimited; on the contrary, the freedom of action of the public administrator will find limitation traced by law.

In any case, the control of the discretion of the competent agent, even if the administrative merit and political judgment deserve to be respected, is of considerable importance, given the juridical power that is conferred to such agent.

The understanding of this power goes back to the expansion of legality (DI PIETRO, 2012, p. 3), which, by governing the whole structure of the rule of law, limits the power of state representatives, emerging the discretion as a vast space of action of the public agent in the broad sense, which now has a considerable share of legal power for the exercise of its competence.

In this context emerges the typological understanding of an undetermined legal concept. This arises in the legal debate based on the theory of determining motives, which limited administrative discretion to the extent that it enabled the judiciary to examine the legality of the motives raised by the administrator (DI PIETRO, 2012, p. 10).

The consequence of this was the assessment of the facts, followed subsequently by the legal qualification of the facts presented in the motivation by the public administrator. With this, it became possible to examine the indeterminate legal concepts, terms with broad and open meanings, eminently typological, being understood, in short, as the granting of discretion to the Public Administration (DI PIETRO, 2012, p. 10). In any case, to the extent that the Judicial Branch was granted the examination of the indeterminate legal concepts used by the public administrator, there was a natural reduction of administrative discretion, and the latter began to live with greater limitations and control.

On the other side of the perspective of the performance of the public administrator, at a time when the manifestation of discretion and the realization and fulfillment of indeterminate legal concepts is present, the idea of Accountability, focused, above all, on the idea of accountability, accountability (MARQUES NETO, 2010, p. 2).

It should be emphasized that discretionary power is a fundamental prerogative for the social democratic rule of law that is built. This is because only through the freedom of action of the public administrator will it be possible to think, develop, build and implement efficient and effective public policies for the guarantee of rights ensured by the legal system.

In this way, the Public Administration's fully linked action does not meet the needs and demands of a highly complex society like the present one. The discretionary power of the public manager emerges precisely at that moment, before the possibility of choosing, according to criteria of convenience and opportunity, the legal mechanisms to be elaborated and materialized by the Public Administration.

It happens that, as already demonstrated, the performance of the Public Administration, when imbued with discretion, cannot occur in an unlimited way. The conception of undetermined legal concepts emerges precisely because of this commotion, aiming to confer prerogatives of control by the Judiciary in the task of assessing acts of the public administrator endowed with discretion.

In the same way, although discretionary certain choice, it must meet the control requirements established by law, being corollary of this requirement what is conceptualized as Accountability, that is, the accountability and accountability of the public manager for the acts prepared.

In the present case, such elements assume contours of higher importance, in view of the openness assumed by tax incentives, from their legal and factual assumptions, through the mechanisms provided by the legal order for its elaboration and ending whether within the scope of the control to be carried out after its granting.

In view of all the above, it should be emphasized the relevance of the types presented here, due to the fact that, although the performance of the public administrator in relation to the granting of tax incentives is discretionary, it cannot be considered arbitrary. Limits and criteria should be established on the basis of the fulfilment of the indeterminate legal con-

cepts surrounding the matter, as well as the stipulation of a careful and clear Accountability by the granting administrative authority.

2. TAX-FINANCIAL INCENTIVES - REGULATORY UNDERSTANDING AND TYPOLOGIES

Having understood the administrative typological terms fundamental to this research, it is now entering the field mainly tax and financial, from the study of fiscal incentives, both in its conceptual perspective, and through the understanding of its typologies.

Traditionally, the tax is taken from its fiscal purpose, aimed at the collection and supply of public revenue to the State, so that it can execute and add to the obligations contracted. In this perspective, one has the understanding of the State Tax Distributor, being the entity that taxes those who have more, as far as possible, to pass on to those who need more, either through the services or public goods, or through the monetary itself (MACHADO; MOREIRA, 2019, p. 157).

Through the tax concept, the tax assumes a priority role in the financing of fundamental rights (CORREIA NETO, 2019, p. 185). This is because the public funds collected by the collection of taxes demanded from the taxpayer will, later, be reverted to the financing of the most diverse obligations assumed by the State, highlighting, in this perspective, the implementation of fundamental rights, be those related to the defence, to the participation or to the actual provision by the state entity.

However, the tax does not assume exclusively fiscal purpose. According to a peaceful understanding of the tax doctrine, taxes may also have an extrafiscal connotation, in the sense of stimulating or discouraging certain economic activity (MACHADO, 2015, p. 36). Thus, it is precisely in this tax sense that the phenomenon of tax incentives emerges.

In this way, tax incentives manifest themselves as an instrument provided for in the Federal Constitution to combat the country's internal inequality, enabling regional development in a broad and egalitarian way. In this perspective, development should be seen not only as an element of quantitative order, but as an equitable one, thus differentiating itself from mere economic growth (BERCOVICI, 2003, p. 103).

Thus, tax incentives will manifest themselves from the perspective of taxation from the inductive function, motivating the economic agent as a leveraging factor of the economic development of a certain region of the country (BEVILACQUA, 2013, p. 162).

It should be emphasized that, contrary to the types presented in the above topic (discretion, undetermined legal concept and Accountability), tax incentives have a conceptual characteristic, being a term of closed connotation, composed of elements necessary and sufficient for its manifestation.

This meaning of tax incentives is in line with the logic-semantic constructivist method (PIVA, 2018, p. 36). Through it, the juridical phenomenon is analyzed from the language (constructivism), indicating syntactic analysis of the language from the logical perspective, as

well as the relationship of the signs with the objects being constructed (semantic perspective).

Based on this method, tax incentives are understood as legal rules that change the configuration of the tax incidence matrix rule, either by means of change in the antecedent (material, spatial and temporal criteria) or in the consequent (personal and quantitative) so that a normativity of induction and attraction of investment will be established, thus taking into account the extra-fiscal purpose of the tax.

Once the conceptual aspects of tax incentives are understood, it is now necessary to mention the typologies that such a legal phenomenon assumes. Such classification is of great relevance, especially in relation to the Foment, Produce and Pro Goiás programs, which may also take the perspective of financial incentive and not merely fiscal.

The relevance of the proper understanding of this classification increases as the Federal Constitution was not based on a strict technical criterion for the definition and delimitation of tax incentives. Thus, the terms tax benefits and incentives (Articles 43, §2, 151, I, 155, §2, XII, g, 156, §3, III, 195, §3, 227, §3, VI, CF and Articles 40, 41 and 88, II, ADCT) are found in the constitutional text, indicating, in short, the same phenomenon, although these concepts differ.

Therefore, for tax benefits should be understood legal rules that interfere with the rule of tax incidence, decreasing or eliminating the amount of money due, without, however, seeking to induce the conduct of the taxpayer. Thus, it is the case of benefits granted as an IRPF exemption (art. 6º, Federal Law n. 7.713/1988), which have no intention of inducing the conduct of the taxpayer.

On the contrary, tax incentives are also manifested by the interference in the tax incidence matrix rule, decreasing or eliminating the amount of money due, however, for the extra-fiscal purpose, to induce the behavior of the private agent. On the other hand, the financial incentives differ from the fiscal ones, since they are not within the scope of Tax Law, in that they grant privileges after the abolition of the tax obligation, and therefore such relationships are imbued with extra-tax character (PIVA, 2018, p. 195).

Thus, understanding the meanings given to fiscal incentives in a broad sense, is now being incorporated into the analysis of each of the programs that are the subject of this study.

3. THE PROGRAMME TO PROMOTE

Understanding the theoretical aspects that underlie this research, it is now necessary to specifically enter into the study of the financial-fiscal incentive programs of ICMS established by the State of Goiás over the last decades, beginning with Fomenting, promulgated by State Law No. 9,489 of 19 July 1984.

Thus, through the aforementioned legislative act of Goiás, the Fomenting, Participation and Promotion Fund for the Industrialization of the State of Goiás was established, created with the aim of increasing the industrial sector of the State, either through the implementation, through the expansion of existing activities (GOIÁS, 1984, Article 1).

Thus, it can already be observed that the scope of such fiscal-financial incentive consists precisely in the development of the industrial sector of the economy of Goiás, based on the assumption that such a productive area would need stimuli from the state entity in order to be more and/or better developed.

For the composition of this fund, the law listed as sources the State Treasury, budget credits allocated by the Government, resources made available by public or private institutions, income from its operations (financial charges, repayment of capital and other charges), proceeds from the disposal of shares, debentures and other securities or assets acquired or incorporated into the Fund and rents arising from securities.

It is important to stress this point in order to highlight, first and foremost, the nature and origin of the funds that make up the Fund in question, so that, in the case of public finances, monitoring must be rigorous, due to the fact that the State needs to be in financial health in order to be able to enforce the rights to which it was obliged (HOLMES; SUSTEIN, 1999, p. 23).

Finally, this law also established (GOIÁS, 1984, article 8) the creation of the Deliberative Council, composed of secretaries of state, representatives of federations and unions, as well as the Executive Board, under the responsibility of the State Development Bank of Goiás, which would exercise the administration of Fomento.

This administrative structure should be emphasized from now on, because, as will be seen below, it consists of one of the central aspects of the research. This is because the law confers powers to the Fomenting Deliberative Council, especially for the suspension and revocation of the granted benefits (GOIÁS, 1990, article 6).

However, the creation of such a fund has not yet served to leverage the industrial sector of the State of Goiás. Thus, six years later, the State Law n. 11,180, of April 19, 1990, was enacted, establishing modifications to the Foment program and thus creating the financial incentive-tax that would seek the induction of economic agents for the development of this sector of the economy of Goiás.

The difference, therefore, was that the law enacted in 1984 only created the Foment fund, but it was only in 1990 that the fiscal-financial incentive was created.

In this context, four stimuli were established for industrial enterprises from Goiás (GOIÁS, 1990, Article 2): (i) sale of land in the industrial districts of the State, (ii) construction of civil construction works in urban areas owned by the State of Goiás considered of high relevance for regional development, (iii) payment of the ICMS rate of 7% (seven percent) in the operations they carry out with other industrial establishments also beneficiaries of the program with own manufacturing products and covered by the project approved at the Foment Deliberative Council and, finally, (iv) loans of up to 70% (seventy percent), via budget resources, the ICMS that the company has to collect from the state exchequer, except the tax arising from the exit of merchandise as a bonus, donation, gift or similar operation, this being the core of the program.

This legal provision thus establishes a financial legal relationship, since the beneficiary will keep the full collection of the ICMS due; however, this will be done by means of financing before the competent agent maintained by the State. In the words of Lucas Bevilacqua (BEVILACQUA, 2013, p. 64), this practice can be summarized as follows: "the taxpayer discharges

the tax obligation with the loan taken before the financing agent, forming a second legal relationship of a non-taxable nature".

As a result of this system, the incentive of Fomento has a fiscal-financial nature, and not merely tax, since it extrapolates the legal-tax relationship between State and taxable person.

Finally, it should be noted that, as well as the other programs under analysis, Foment can be taxed as an incentive at zero cost (BEVILACQUA, 2013, p. 177). This implies the granting of a certain stimulus for previously nonexistent ventures, so that the current tax collection will not suffer any direct impact arising from this incentive, which current exclusively on the new ICMS generated.

4. THE PROGRAMME PRODUCE

Aiming to expand the effects of the Foment program, the State of Goiás, aiming to increase its developmental policy in the industrial sector, created the program Produce, through the State Law n. 13.591, of January 18, 2000, as the new instrument for implementing the industrial policy of the State of Goiás.

In order for a particular private agent to benefit from the incentive under consideration, the law establishes as a framework criterion the presentation of a project of economic and financial viability that meets the requirements related to the beneficiaries and the priorities determined by the law (GOIÁS, 2000, Article 4).

The evaluation of such project will be the responsibility of the Executive Committee of Produce, with competence for the approval of such requirements. Again, it is important to highlight this aspect, having knowledge of the administrative structure that such programs present for decision-making

. In this context, it should be noted that Produce provides for the creation of two administrative competence centers in its structure: the Executive Committee and the Deliberative Council. The difference between the two, in addition⁴ to the powers provided by the law, consists of the composition of each: while the former has four representatives of the State (three being Secretaries of State and the Director-President of Fomento S.A.) and three from civil society, the Deliberative Council presents twelve representatives of the State and eleven of civil society.

4 State Law n. 13.591/2000: Art. 11 - The Deliberative Council will have the following tasks: I - approve the annual programming, budget and report; II - establish the guidelines, priorities and strategies of action; III - submit annually to the Chief Executive, detailed reports on the implementation and the results achieved by PROD; IV - suggest to the Executive Branch modifications in the legal discipline of PROD; V - authorize the use of FUNPROD resources, promoted by the Superintendency of Fomenting/Producing of the Secretariat of Industry and Trade, aiming at attending programs of interest for the development of the State; VI - other general tasks. Art. 12. The Deliberative Council will have an Executive Committee consisting of the Secretaries of State for Economic, Scientific and Technological Development and Agriculture, Livestock and Irrigation, Farm, Management and Planning and the Director-President of the Financial Agent of the PRODUCE Program, representing the State of Goiás, and also by the Presidents of the Federation of Industries of the State of Goiás and the Association for Industrial Development of the State of Goiás - ADIAL, as well as by 02 (two) members elected by the representatives of the participating civil society entities, with the following tasks: I - preparation of the annual programming proposals and the budget; II - preparation and presentation to the Deliberative Council of the Annual Report of the PRODUZIR activities; III - approval of operational standards and procedures; IV - approval of the project and grant of benefits; V - monitoring of the implementation of the PRODUZIR and the assisted projects, in liaison with the Financial Agent and the other governmental bodies involved; VI - other tasks defined in the Regulation.

As will be best outlined and deepened below, it can be seen that the opening of the Produce programme to civil society is a valid and important mechanism of democratic legitimacy, with a view to enabling the participation of representatives of civil society in the decision-making of the programme.

Once the incentive has been granted, the beneficiary may benefit from the following benefits, as approved by the competent Council of Produce (GOIÁS, 2000, article 20): (i) financing up to 73% (seventy-three percent) of the ICMS due to the State Treasury arising from its own industrial operations; (ii) investment subsidy of up to 100% (one hundred percent), if it is intended for the expansion or modernization of the industrial park; and (iii) payment of the ICMS for the rate of 7% (seven percent) operations with their own manufacturing products carried out with other industrial establishments benefiting from the Fomenting or Producing programs. Once again, the program's priority attraction is the financing of the ICMS due to the State of Goiás, as was the case with the Fomenting, but this time, up to 73% (seventy-three percent).

It turns out that on such financial-fiscal incentive the beneficiary must make the following payments (GOIÁS, 2000, article 20): (i) advance of at least 10% (ten percent) of the value of the monthly ICMS portion encouraged; (ii) interest incidence of up to 0.2% (two-tenths percent) per month, non-capitalizable, whose payment will be made monthly; and (iii) 15% of the ICMS collection encouraged by the Protege Fund⁵ (GOIÁS, 2003, article 9).

In this point it should be noted that the Protege Fund consists of funds for the provision of social services, especially in the areas of nutrition, housing, health, education, basic sanitation, social assistance, family income reinforcement (GOIÁS, 2003, Article 1). In short, it is a mechanism created by the State of Goiás to create a fund aimed exclusively at the provision of assistance activities, so that the entire regulation of budget execution can be reduced.

Still, important to note that, despite, at first glance, the tax waiver involved is in the 70% (seventy percent), the effective incentive will remain established in much lower amount, before all the rules of counterpart that the legislation establishes to enjoy the benefit in comment.

Another aspect of great relevance of the Produce Law is the establishment of objective criteria to fully enjoy the value of the tax financed (GOIÁS, 2000, article 20-A). Accordingly, the law provides for discount factors that will act on the amount of financing agreed between the Government and the private sector, such factors being linked to the adimplence, the acquisition of certain goods, the maintenance of employment, environmental issues and investment in certain sectors of state action by the beneficiary of Produce.

The rules on such discount factors are a mechanism aimed at ensuring the efficient and responsible enjoyment of the incentive by the beneficiaries, in view of the fact that obtaining the benefit under review will not be sufficient, and should be presented, monthly, the compliance with the discount factors to which it was obliged to meet, under pain of the incentive suffer significant affectation and decrease.

5 State Law No. 14,469/2003: Art. 9th Is the Chief Executive authorized to: II - condition the enjoyment of tax benefit or incentive, granted by state law, to the contribution to the Fund dealt with by this Law corresponding to the percentage of up to 15% (fifteen percent) applied on the amount of the difference between the value of the tax calculated with the application of full taxation and that calculated with the use of a tax advantage or incentive

Finally, it should be indicated, regarding the structure and procedure of Produce the creation and operation of Agência de Fomento de Goiás S.A., as Financial Agent of the program. This is because obtaining the benefit in comment only materializes with the stipulation of the contract with such legal entity, and this will act as the agent financing the incentive.

5. THE PRO GOIÁS PROGRAM

After the twenty-year duration of the Produce program, the State of Goiás established its new tax incentive program, Pró Goiás, through State Law n. 20,787, of June 3, 2020. This program was developed based on three priority criteria, namely, the alignment to the Complementary Law n. 160/2017, the search for a greater reduction in the bureaucracy of fiscal incentives and the fight against legal uncertainty in this sector.

Thus, it should be noted that the priority north of the new tax incentive program of the State of Goiás dates back to the discipline given by Complementary Law n. 160, of 7 August 2017 to exemptions and incentives and tax or financial-tax benefits. Based on this rule, the possibility remains for member states to adhere to tax incentive programs granted by other component states of the same region, during the term that lasts the benefit in the creative federated unit (BRASIL, 2017, Article 3). Therefore, based on the adhesion to Complementary Law n. 93/2001 and to State Law n. 049/2011, both from the State of Mato Grosso, the State of Goiás created the aforementioned Pro Goiás program.

Like its historical predecessors, Pró Goiás seeks the socioeconomic development of the State through the implantation, expansion and revitalization of the industrial establishments of its territory, so that the beneficiaries will be based on these categories. (GOIÁS, 2020, Article 3).

With regard to the incentives granted, the programme provides for the granting of credit, which means that this time it is an eminently fiscal incentive, rather than a financial-fiscal one. The credit granted may be of two categories, always considering the positive value resulting from the confrontation between debts and tax credits: (i) 67% (sixty-seven per cent) for the establishment located in a municipality considered as a priority (to be determined in regulation), choose collection targets or belong to a company whose annual gross revenue does not exceed the Simple National framework limit; or (ii) variable between 64% (sixty-four percent) to 66% (sixty-six percent) according to the elapsing time of enjoyment of the incentive, for the period of up to 12 (twelve) months, from 13 (thirteen) to 24 (twenty-four) months (percentage of 65%) or from the 25th (twenty-fifth) month, respectively (GOIÁS, 2020, article 5). Still, it remains also possible, by authorization of specific decree, the replacement of the credit granted in comment by the enjoyment of presumed credit, provided that the person concerned has benefited from the programme and is granted credit for the purchase of raw materials, secondary material, inputs and packaging materials.

In any case, in order to benefit from this incentive, the beneficiary must present as a counterpart: (i) payment to the Protege Goiás Fund of the percentage of 10% (ten per cent), 8% (eight per cent) or 6% (six per cent), depending on the period of enjoyment of the program, having regard to the value granted by the incentive; (ii) the realisation of the investments

undertaken; and (iii) the granting of the request by the Goiás State Industrial Development Council, having heard the State Secretariats of Industry, Trade and Services and the Economy, and the application must be in accordance with the program Pro Goiás and meet the criteria of convenience and opportunity of the public interest (GOIÁS, 2020, article 11).

For the enjoyment of said incentive, the beneficiary establishment will not be able to enjoy the incentives Promote or Produce, nor to exercise certain productive activities listed by the law under review (GOIÁS, 2020, article 6). However, despite such legal limitations, the prerogative of the Chief Executive remained established, via state decree, founded on relevant economic, social, fiscal or improvement interest of the Goiás production chain, to remove such fences.

It can be seen, from now on, that the law of Pró Goiás presents notorious distinction with respect to its predecessor programs, being the largest concentration of powers in the hands of the Governor of the State the main one of them, as opposed to further decision-making devolution to the Deliberative Council and the Executive Committee foreseen in the Produce.

Thus, the existence of these two consultative and decision-making bodies is replaced by the presence of the Industrial Development Council of the State of Goiás (GOIÁS, 2020, article 15), composed of the Governor and four Secretaries of State. The opening for the participation of civil society only occurs, now, through the Advisory Council, composed of eight civilian representatives, however having its structure linked to the Industrial Development Council, without decision-making power and having its duties established, once again by decree of the Governor.

On the other hand, establishing as obligations to be followed by the beneficiary of the program, the law of Pro Goiás determines that the taxpayer will be the tax substitute back in relation to the primary products purchased, at the same time as it provides for the possibility to carry out the settlement of the ICMS incident in the import of raw material, secondary material and fixed assets by debiting the tax book. Regarding this last permission, the law, another one provides, provides the Governor of the State the prerogative to exclude it, considering market conditions (GOIÁS, 2020, article 6).

In any case, in view of the structure of the new incentive programme of the State of Goiás, it can be seen that the search for the reduction of bureaucracy is achieved through the following changes: the extinction of the decision-making powers of the councils with representatives of civil society, concentration of power in the hands of the Governor, as well as his direct representatives, extinction of Agência de Fomento S.A. as a financial agent and replacement of an incentive of a financial nature for one of a exclusively tax nature.

Despite the scope for seeking greater legal certainty and less bureaucracy, such changes may be detrimental to the implementation of the tax incentive in question, especially in the face of the concentration of decision-making powers and the reduction of administrative bureaucracies itself, which also served the beneficiary as an instrument of defence in the face of possible arbitrariness of the Executive Power. However, these aspects will be duly examined in the following chapter.

6. THE FINANCIAL-TAX INCENTIVE PROGRAMMES OF THE STATE OF GOIÁS FROM THE PERSPECTIVE OF CURRENT ADMINISTRATIVE LAW

Given all the above, standing out and analyzing the basic peculiarities of each program under study, demonstrating the course adopted by the State of Goiás since the 1980s, in an attempt to promote its industrial park, it is understood that the Pro Goiás manifests if, in fact, as an innovative program and that changes the paradigm of action of the state of Goiás, although the common north of all incentives persists.

The changes resulting from Pró Goiás in relation to Foment and Produce can be divided critically into three groups: the nature of the tax incentive granted, the amount of the effective benefit and the structuring of administrative competencies to govern the program.

In this way, it is necessary to emphasize, first, the nature of incentives. Whereas the Foment and Produce programs consisted of tax-financial benefits, since in addition to the tax relationship between beneficiary and State there was also the contractual relationship between the first and the financial agent of the program, Pró Goiás is characterized by being an incentive of exclusively fiscal nature, because it is a credit granted by ICMS, so that the Fomento S.A. Agency does not even exist anymore in this program.

However, the core of this study goes back to the other two changes coming from Pró Goiás. Thus, in relation to the quantitative aspect of the programs under analysis, that is, one must immediately analyze the quantum that the respective state laws provide for incentive for the beneficiaries. This is because the power of a certain tax incentive program manifests itself precisely with fulcrum in the greater or lesser amount of tax burden encouraged, thus becoming a political instrument of greater or lesser reach based on this question.

In this sense, as shown above, the Foment program provides financial incentive of 70% on the new ICMS generated by the beneficiary, and the counterparts will be: collection of 15% (fifteen percent) on the encouraged value for the Protege Fund, interest rate of 0.2% (two tenths per cent) per month on the amount financed and monetary correction of 25% (twenty-five percent) of the remaining amount to be benefited.

Thus, it can be concluded that the final incentive of the Foment dates back to the approximate percentage of 59.38% (fifty-nine integer and thirty-eight hundredths percent) of effective financial incentive, disregarding the annual monetary correction to be applied to the benefit.

Regarding the Produce program, the financial incentive granted will be up to 73% (seventy-three percent) over the ICMS generated by the beneficiary. As counterparts, the law provides for: 15% (fifteen percent) on the amount encouraged for the Protege Fund, incidence of interest of 0.2% (two tenths per cent) per month on the amount financed and the anticipation of 10% (ten percent) on the amount benefited. Considering all these values, the final effective incentive will be approximately 54.64% (fifty-four integers and sixty-four hundredths percent) of the new ICMS that would be due by the beneficiaries to the state coffers.

Finally, regarding the Pró Goiás program, the incentive, of fiscal nature, granted consists of credit granted up to 67% (sixty-seven percent), and, as a counterpart, the law establishes

up to 10% (ten percent) for the Protect Fund in the enjoyment exercised in the first year of incentive, reducing to 6% (six percent) from the third year onwards.

Consequently, it is noted that in the first year, the Pro Goiás will grant effective incentive of 60.3% (sixty whole and three tenths per cent), while from the third year, this benefit will rise to 62.98% (sixty-two whole and ninety-eight hundredths per cent) effective incentive of ICMS.

From the above figures, it is noted that the incentive of Pró Goiás, despite the increasing criticism made about the possible excess in the granting of tax incentives of ICMS, which would result in high tax waiver by the State, even if it is a tax that, as a rule, it would not be generated (GOIÁS, 2019, p. 12), is, in final terms, percentually higher compared to the predecessors Foment and Produce.

Thus, as discussed in this research, the Pró Goiás program, in fact, results in a political instrument of greater power, given the concession of benefits effectively superior to the Foment and Produce programs.

At the same time, it can be seen that the elaboration of the new tax incentive program of Goiás, aiming at reducing bureaucracy in the granting of benefits, extinguished the old Deliberative Councils, which would have the task of evaluating and approving the economic projects presented, being composed of representatives of civil society.

In return, the Industrial Development Council was established, composed exclusively of state secretaries. Thus, the former representativeness of organized civil society remained configured only in the forecast of the Advisory Council, which will have exclusive powers of advice in decision making, which will be the responsibility of the said Development Council.

Thus, the third notable change coming from Pró Goiás dates back to the reduction of competence and, consequently, representation of civil society, concentrating the powers in an eminently political body and with direct connection to the State Government.

In addition, there is also a reduction in the complexity of the treatment of the program. Production had an entire administrative structure, composed of the Administrative Council and Executive Committee, as well as the existence of the Fomento S.A. Agency for the conclusion of financing contracts, in addition to the need to present a feasibility economic project. On the other hand, in the sphere of Pró Goiás, the entire elaborate structure was deconstructed: the Council and the Commission have undergone the amendments set out above, Agência de Fomento S.A. no longer has tasks (for this programme) and the viability project becomes, according to the law, "simplified" in accordance with a pre-established model.

Finally, but no less important, complementing the analysis presented here, there is an increase in the competence of the Head of the State Executive Power on the implementation of the program. Thus, if in the context of Produce only a specific allocation to the State Governor was foreseen, which could extend the benefits granted under Microproduzir to industrial establishments framed in Produce, in the context of the Pro Goiás program such attributions gain greater importance: (i) power to remove the legal restrictions to the enjoyment of the incentive, based on criteria of relevant economic, social or fiscal interest, (ii) permissive to exclude the power conferred by law on beneficiaries to liquidate the ICMS of raw materials and purchased inputs; (iii) determination of the procedure of meetings within the Industrial and Advisory Development Councils; and (iv) permission to change the credit incentive granted to presumed.

The consequence of all these changes is, in fact, a reduction in the bureaucratization of the incentive, as a political objective guiding the new program. On the other hand, such a reduction implies a reduction in the representativeness of civil society in the decisions taken, as well as a reduction in the complexity of the debates held. All this transformation is added to the increase of the attributions and the concentration of competencies to the Head of Executive Power, who now directly manages and influences the program.

Described this new reality of the fiscal policy of the State of Goiás, it is now necessary to recover the understanding developed regarding typologies (ÁVILA, 2018, p. 13) categories defined by discretion, undetermined legal concept and Accountability.

Based on the concentration of greater prerogatives and attributions to the Chief of the Executive Branch, the legislature granted considerable discretion (DI PIETRO, 2012, p. 4) in the Governor's role in the exercise of his regulatory power.

Such discretion is materialized through the use of indeterminate legal concepts (DI PIETRO, 2012, p. 10), such as "relevant economic, social or fiscal interest" (GOIÁS, 2020, article 6) or even by defining the powers to be exercised by the representative bodies of organised civil society.

Added to this is the fact that the Pró Goiás program, despite the numerical appearance of granting less incentive, which, according to the above analysis, remains remote, manifesting itself as a politically more influential instrument than its predecessors, in the face of the increased tax burden encouraged.

Therefore, in addition to the change in the administrative structure of the programs having concentrated more powers in the hands of the State Governor and his Secretaries, The increase in the political power of Pró Goiás due to the higher tax incentive being also contributes to the widening of the discretion of public administrators.

In short, with the scope of reducing bureaucratization, the Pró Goiás ended up becoming a program that gives broad discretionary powers to the Governor and his immediate agents (Secretaries) through the use of indeterminate legal concepts instead of the greater plurality ensured by the participation of representatives of organised civil society in decision-making.

Thus, in order to avoid the misappropriation of the fiscal and/or financial-fiscal incentive policy in the State of Goiás, it is urgent to establish technical criteria and compliance with Accountability (MARQUES NETO, 2010, p. 2) It should require the clear and detailed provision of information on the decisions taken within the Pro Goiás, otherwise there will be a disastrous setback in the control of public policies of fiscal incentive.

In this perspective, the Accountability now defended as a control criterion of fundamental importance for ensuring the efficient management of the Pro Goiás program can be understood from three different perspectives (NASCIMENTO; RIBCZUK, 2015, p. 224) all of them related to the requirement of a transparent public management: accountability by the public agent, accountability for the acts performed and social control.

The first perspective highlighted above goes back to the understanding of Accountability as an act of an individual towards the State (SIU, 2011, p. 122). In this case it consists of accountability that must be carried out in a judicious and systematic manner by the Governor

and/ or Secretaries of State when they carry out any decision-making under the Pro Goiás, each of those decisions must be duly reasoned and in line with the public interest involved.

Regarding the meaning of Accountability from the point of view of accountability, it should be effective and occur when it remains configured the adoption of conduct that violates the state public finances, that disregards the isonomy or legality of taxation in the context of the granting of tax incentives or that extrapolates the discretionary power that each competent agent has, given that discretion cannot be confused with arbitrariness (DI PIETRO, 2016, p. 255).

The third perspective goes back to the idea of the State Act for Society (SIU, 2011, p. 122), revealing the guarantee of access to and publicity of information. In this context, the question that involves responsiveness emerges as a basic principle of contemporary administrative law.

In this field, we understand by responsiveness the instrumental action of democracy in the administrative field, conferring democratic legitimacy and conciliation with the expression of the popular will in the decisions made by public administrators (SAMPAIO, 2015, p. 10).

Notes that the legislative choice made by Pró Goiás, with regard to the excessive reduction of powers for the existing social representation bodies within the scope of Produzir, depriving them of their decision-making capacity and making them merely advisory structures, is conduct that, in theory, significantly reduces the responsiveness present in tax incentive programs in the State of Goiás, given that the democratic legitimacy arising from the participation of various representatives of organised civil society is too shaken.

Therefore, it is also noted that the choice of reducing bureaucracy consisted, in short, in the considerable decrease of both democratic legitimacy and the opening of tax incentive programs to civil society in Goiás. Although valid from the legal point of view, this change should be carried out with cleanliness and rigour, it is not permissible that the greater discretion of the powers of the Chief Executive under Pro Goiás makes the fiscal incentive policy of the state of Goiano a mere instrument serving political interests.

CONCLUSIONS

This study, based on the hypothetical idea that tax incentive laws grant a high degree of discretion to governments through the large-scale prediction of indeterminate legal concepts, what makes of fundamental importance the control and Accountability to avoid the misappropriation of these mechanisms, could conclude that, in fact, it will be precisely through careful systematization of Accountability that the discretion conferred by the tax incentive programs will not compromise the efficiency and effectiveness of such incentives, in particular the Pro Goiás, that significantly raised such a feature through the concentration of power in the summit of the state executive power.

In order to make it possible to achieve such a result, it was necessary, first, to gain an understanding of certain conceptual aspects that consist in the theoretical substratum of this research.

Thus, the distinction between type and concept and the framework of the elements discretionary, undetermined legal concept and Accountability as typological categories consisted of the first understanding obtained in this study. Then, the critical explanation of each of these elements became possible to verify how these relate and can affect the tax harvest.

Having achieved these specific objectives, the analytical and critical description of the programs Foment, Produce and Pro Goiás demonstrated not only the structure and procedure of each of these incentives, as well as the most sensitive nuances regarding administrative structuring and empowerment of such benefits.

Finally, given the implementation of the hypothetical-deductive method, with the incidence of the jus-administrative typological structures occurring in the context of each of the programs under study, the extent of the discretion of Pro Goiás was verified compared to Foment and Produce, so that the control and Accountability of the latest fiscal incentive goiano should be even more judicious and rigorous

In any case, the changes in the administrative structure of Pró Goiás reported in the previous chapters do not in themselves serve to undermine the program's failure, nor to disqualify the political decisions that will be taken. Such analysis cannot be made in an aprioristic way, under penalty of bias the research, given the need for casuistic weightings.

However, the fact is that the change highlighted is of considerable importance, so that, given the choice made by the legislature of Goiás, which owes all deference, strict control should be exercised in the granting of such incentives, from the perspective of current jus administrativist debates, in particular the need for Accountability in the exercise of discretionary powers and in the complementing of indeterminate legal concepts.

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