

(RE)SIGNIFICANCE OF RECIPROCAL TAX IMMUNITY: THE COLLECTION OF IPTU ON PUBLIC GOODS AND THEIR EFFECTS ON TAX COLLECTION IN THE CITY OF IMPERATRIZ-MA

(RE)SIGNIFICAÇÃO DA
IMUNIDADE TRIBUTÁRIA RECÍPROCA:
A COBRANÇA DE IPTU SOBRE BENS PÚBLICOS E SEUS EFEITOS SOBRE
A ARRECADAÇÃO FISCAL NA CIDADE DE IMPERATRIZ-MA

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ABSTRACT

The constant decisions of the Federal Supreme Court are of great importance for the application and interpretation of legislative texts. The purpose of this work is to identify the impacts caused to the municipal treasury of Imperatriz-MA in the face of the change of understanding of the STF in RE 601.720 / RJ, on the inapplicability of reciprocal immunity to public property when ceded to individuals. It is an empirical research, with data collection and preliminary analyzes on the system of collection of the Imperatriz-MA SEFAZGO. The research was carried out with a bibliographical, documentary and field survey, with pre-ordered interviews and having as approach the qualitative and quantitative method. The study on the reciprocal immunity applicable to the IPTU allowed the correct delimitation of the tax incidence field. Likewise, the survey of the concepts and modalities of the transfer of the public goods allowed the perception of the evolution of the supreme court regarding the preservation of the system federative. Although the search for the impacts of RE 601.720 / RJ, in the tax collection of Imperatriz-MA did not achieve the desired results, it was possible to analyze the municipal collection system, identifying its failures, problems and exposure of possible solutions for them.

KEY-WORDS: Mutual immunity. IPTU. Public Goods. Federative System.

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RESUMO

As constantes decisões do Supremo Tribunal Federal são de grande importância para a aplicação e interpretação dos textos legislativos. A finalidade desse trabalho é identificar os impactos causados ao fisco municipal de Imperatriz-MA, frente a mudança de entendimento do STF no RE 601.720/ RJ, sobre a inaplicabilidade da imunidade recíproca à propriedade imóvel pública quando cedida a particulares. Trata-se de uma pesquisa empírica, com levantamento de dados e análises preliminares, sobre o sistema de arrecadação da SEFAZGO de Imperatriz-MA. A pesquisa foi realizada com levantamento bibliográfico, documental e de campo, com entrevistas preordenadas e tendo por abordagem o método qualitativo e quantitativo. O estudo sobre a imunidade recíproca aplicável ao IPTU permitiu a correta delimitação do campo de incidência do tributo, de igual modo, o levantamento dos conceitos e modalidades das formas de concessão dos bens públicos, permitiu a percepção da evolução da suprema corte, quanto a preservação do sistema federativo. Por mais que, a busca dos impactos do RE 601.720/RJ, na arrecadação fiscal de Imperatriz-MA não tenha alcançado os resultados pretendidos, foi possível analisar o sistema de arrecadação municipal, identificando suas falhas, e problemas e a exposição de possíveis soluções para os problemas.

PALAVRAS-CHAVE: Imunidade recíproca. IPTU. Bens Públicos. Sistema Federativo.

1. INTRODUCTION

This work has as thematic field the reciprocal tax immunity: the collection of property tax on public goods and its effects on tax collection in Imperatriz-MA. The academic justification for this study came through the judgment of RE 601.720/ RJ by the Supreme Court (STF) where it was decided by the application of the Urban Property and Territorial Tax (IPTU) on a public good that was assigned to the private company, believing that the mutual immunity did not reach the property, in order for the company to pursue a profit-making activity and therefore to obtain a competitive advantage over other companies.

This research is justified by the need to understand the concept of “fiscal justice” so vehemently defended by the ministers of the Supreme Court in the trial of the appeal, the consequent restructuring of the tax collection system, as well as the possibility of increasing the collection of municipalities and the probability of extending the cost of their expenses.

Thus, according to data from the Organization for Economic Cooperation and Development (OECD), in 2012 property taxation corresponded to 6% of the tax collection in Brazil, while consumption amounted to 44% of the total, reality that still directly affects the poorest class of the country, because those who “earn less pay more, in contrast to those who earn more and pay less” (CURI, 2007).

In view of the relevance of the jurisprudential change of the Supreme Court to the tax collection of the property tax by the Municipalities, this study establishes as a research problem: What are the effects produced by the recent change of the Supreme Court jurisprudence, as regards the inapplicability of reciprocal immunity to public property transferred to private individuals? Thus, the general objective is to identify the main challenges that presented to the municipal government regarding the collection of property tax and the applicability of the new interpretation given by the Supreme Court and, for this purpose, will seek to understand the institute of reciprocal tax immunity applicable to the property tax, raise the forms of cession of public goods related to the property tax on the perspective of RE 601,720 RJ and,

analyze its impacts on the inspection and collection of property tax in the Municipal Tax of Imperatriz-MA.

For the effective development of the specific objectives and the consequent analysis and formulation of the argumentation, a

quantitative and qualitative approach, with bibliographic study, document analysis and field research through preordered interviews. Without the longing of

establish a definitive discourse or value judgments on the questions researched, we seek to analyze the basic concepts treated in this research, contributing with new reflections and projections on the object of study.

2. BASIC CONCEPTS: TAX IMMUNITIES AND THEIR RELATIONSHIP TO PROPERTY TAX

Observing the social and institutional relations, one can notice an intense relationship between the State and the collection of taxes. What at the beginning was a simple reward, paid by the tribes to the strongest warriors, at a given moment happened to have an imposing character (MONTEIRO, 2018).

In a Democratic State of Law sovereignty³ belongs to the people, as well denotes the Federal Constitution (CRFB), in its art. 1st, sole paragraph "All power emanates from the people" (BRAZIL, 2018, p. 22), including the tax power. Operating power of the State, which manifests itself through a legal-tax relationship that delimits its powers and, therefore, its immunities (MARTINS, 2003)

The tax competence is conceptualized as an authorization and constitutional limitation to the exercise of the tax power of the State, that is to say, it is a prerogative that the federative entities are bearers, and that enables them to legislate on the production of tax laws and regulations (CARVALHO, 2012).

However, tax immunity can be conceptualized as the tax jurisdiction in a negative sense, being assured to some people, in certain situations, removing the power of the State on the imposition of certain taxes, including its competence (PERES, 2018). In this way, it conveys itself to a constitutional commandment or the maximum law of a nation, which removes not the incidence of the tax, but the tax jurisdiction itself (RUEDELL, 2013).

The majority doctrine conceptualizes immunity as limitation or exclusion of the jurisdiction to tax. However, Paulo Barros de Carvalho (2012) states that immunity is not a constitutional limitation to tax jurisdiction, but to the power to tax, because what limits jurisdiction comes in the opposite direction to it, seeking to repress or amputate it. Function that does not belong to the immunizing norm, since it collaborates with the design of the field of competence in the constitutional sphere, in which political persons will operate.

3 In the words of the constitutionalist Kildare Gonçalves Carvalho: "It is the sovereignty, therefore, the highest quality, of the state power, and not the state power itself, meaning, on the internal level, supremacy and superiority of the state over other organizations and, on the external level, independence of the state from other states" (CARVALHO, 1999. p. 71).

Thus, the constitutional limitations to tax power, in addition to tax competencies among federal entities, include the principles of legality, precedence, irretroactivity, contributive capacity, isonomy, prohibition to confiscation, and tax immunity itself (SCAFF, 2018).

2.1 PARALLEL BETWEEN IMMUNITY, EXEMPTION AND NON-INCIDENCE

Prior to the continuation of the study of immunities, it is necessary to distinguish it from the exemption and non-inclusion institute.

Tax immunity, according to what was cited, is born from a constitutional rule that establishes the incompetence of tax entities to issue rules establishing generating events (WIESE, 2012, p. 14). In it there is no tax obligation, because the fact that generates the tax described by the hypothesis of incidence does not occur.

The exemption, unlike immunity, is in the infraconstitutional plan, in which the legislator exempts the taxpayer from paying the tax. In this case, there is the occurrence of the generating fact described by the hypothesis of incidence arising from the obligation, however, the tax does not occur, and therefore the tax credit is not constituted.

No incidence is linked to the taxation rule itself, which describes the hypothesis of tax incidence: "This rule describes the actual situation, which when carried out, gives rise to the legal duty to pay the tax. Anything not covered by such a description constitutes a tax-free hypothesis." (WIESE, 2012, p. 24).

In summary, the exemption is legally qualified exception by another Law, the immunity is the constitutional prohibition on taxation and the non-inclusion is fact left out of taxation by the legislator, either expressly or tacitly (WIESE, 2012, p. 25).

2.2 MUTUAL TAX IMMUNITY

The art. 150, VI, the Federal Constitution lists the various types of immunities, such as reciprocal tax immunity, religious immunity, the immunity of political parties, among others.

Reciprocal immunity (art. 150, IV, "a" of CF/88) is the impossibility of collecting taxes by federal entities on each other's incomes, assets and services.

It first emerged with the independence of the American colonies from the British court, in the Federalist project drawn up by Alexander Hamilton, James Madison and John Jay. At its inception, it aimed to instigate the new government's ability to self-finance, because money was and still is considered an essential tool of the political body, it is the one that sustains life, moves and empowers the state in the execution of its essential functions. (HAMILTON, 2003).

Then, in the American context, a "federalism of competition", whose rivalry between the states (strong side) and the central government (frank side), plus the absence of a constitutional rule on certain competences, led to the trial of the *Mcculloch v. Maryland* case, in 1819, considered as the origin of tax immunity, or in its own terms the principle of reciprocal Immunity of federal and state instrumentalitie (BALEEIRO, 2015).

In 1791, the Bank of the United States of America was established to regulate trade and currency throughout the country. A few years later, the bank established a branch in the city of Baltimore, Maryland.

Thus, the State began to demand from this branch the tax on sealing the stamps, an act that was rejected by the then bank teller Mr James McCulloch.

The obstacle was brought to the Supreme Court in 1819, then chaired by the Chief of Justice John Marshall. Such a trial sought to answer two diverse questions, the first being whether Congress had the power to create a bank as well as establish branches; the second question was whether the State of Maryland could tax the bank's branch without violating the Constitution.

According to Marshall, the answer to the first question was in the autonomy given the Union to each federal state in the promulgation of its Constitution. For although the powers of the Union were limited, their rule was supreme among the rest, and their laws, as soon as they were drawn up in observance of the Constitution, became supreme in the country.

In this sense, the American Constitution gave Congress the power to draft any laws that were necessary for the full exercise of its powers, a fact that justified the possibility of creating the Bank of the United States as well as its subsidiary.

The understanding of the Supreme Court recalls the theory of implicit powers, a thesis defended by Alexander Hamilton, according to which, although the Constitution does not explain in its normative devices certain powers, these would be subject implicitly to the legal body and its other articles.

In turn, in the search for the answer to the second question (the possibility of taxation), it was established the thesis of reciprocal immunity, created under the following axioms (LIMA, 2011):

- a) The power to create implies the power to preserve;
- b) The power to destroy, when exercised by a stranger, is hostile and incompatible with the powers to create and preserve;
- c) Whenever such an incongruity exists, that authority which is supreme must prevail.

In the Brazilian legal context, the state Federative form came with the proclamation of the republic in 1889. Once the federation is defined as a form of State, this fact brings as a reflection the incidence of the federative principle for the spatial planning (ARENHART, 2013).

Making this relationship between the taxation and autonomy of each federal entity, Almi-car de Araújo Falcão (1957, p. 3-4) teaches that the provision of reciprocal immunity in the legal system aims "safeguard the incolumity of the federal system, avoiding that the federated units interfere, through taxation, in the area of competence and autonomy one of the others". Therefore, autonomy is the legal principle driving the duty of reciprocity.

The second principle underlying the existence of reciprocal immunity is the principle of isonomy. Now, if in the taxation relationship, in a first analysis, there is a supremacy of who taxes on who is taxed, then one cannot tax the federative entities. For among the political people reigns the most absolute legal equality. "One does not take precedence over the others. At least not in legal terms. It is enough to remove any idea that they can be subject to taxes." (QUEIROZ, 2017, p. 67).

2.3 OF THE URBAN PREDIAL AND TERRITORIAL PROPERTY TAX – IPTU

The tax incidence rule is also known as the tax rule, being a kind of legal rule, possessing the ability to define the tax incidence of the tax. This is initially configured as a set of hypothetical-conditional judgments (CARVALHO, 2012, p. 171), with a hypothesis in the antecedent and a commandment in the consequent.

In the hypothesis, one finds a material criterion (behavior of a person), conditioned in time (temporal criterion) and in space (spatial criterion). As a result, one encounters a personal criterion (active subject and taxable person) and a quantitative criterion (calculation basis and rate). The joining of these two data results in the possibility of fully displaying the logical-structural core of the standard tax incidence standard (CARVALHO, 2012).

As provided by art. 156, I of CF/88, the property tax will affect the urban property and territorial located in the urban area of the municipality. Thus, the material aspect of the rule-matrix incidence of property tax, as well mentioned by Furlan (2010), is the situation of owning the property.

The spatial aspect is considered to be the set that delimit the place of occurrence of the generating fact. The National Tax Code (CTN) in its art. 32, § 1º brings a general definition of delimitation of the urban perimeter of municipalities throughout the country.

For this, any area that contains at least two improvements made explicit by the incisions of the art §1º. 32 do CTN poderá, as municipal law become urban area and liable to the application of property tax.

The temporal aspect of the incidence rule refers to the moment when the tax obligation is born, having as a rule and, followed by the vast majority of municipalities, the day 1º January of each exercise as the moment of launch of the property tax.

The personal aspect refers to the persons represented in this legal-tax relationship, which according to art. 34 of CTN, has as taxpayer the owner of the property, the owner of its useful domain and the owner of any title.

They compose the quantitative aspect of the rule of incidence the basis of calculation, as provided in the art. 33 CTN is the market value of the property, not including the value of the movable property that is permanently or temporarily in it. It is also composed by the tax rate, being a percentage added to the base, enabling an exact value of the tax. The rates need to be set in municipal law, observing the principle of economic capacity and non confiscation (SÁ, 2013).

The CF in its art §4º. 182, also stresses that the composition of the calculation base may have a progressive character of the property tax, authorizing the Municipal Government by specific law, observed by federal law, require the owner of urban land not built, underused or unused, that promotes its adequacy under penalty of progressive collection of property tax.

Many are the doctrinators who consider the progressive character of the property tax as a regulatory instrument of the social function of property. In this sense, Carrazza (2019) relates the progressivity of the property tax to the ability to pay taxpayers. The author argues that the search for equality between these should be guided by the principle of isonomy, leading to the overcoming of social injustices and inequalities (TRINDADE; RIBEIRO, 2018).

3. THE GRANTING OF USE OF PUBLIC GOODS BY PRIVATE PERSONS

There is no uniformity of thought among the doctrinators regarding the definition of the concept of concession. Most Italian authors, in particular Cino Vitta (1962), attribute to the term concession, the meaning of any act of public administration that grants rights or powers to the individual.

On the other hand, authors such as Santi Romano (2008) have a restrictive perspective, dividing it into two types: translative and constitutive, admitting in addition the existence of public service concession, public works and use of public goods, thought also shared by most French authors. And finally, we have the doctrinators who attribute to the term concession only to the kinds of public services.

Brazilian law allows the following modalities of concession:

- a) Concession of public service, in its traditional form, according to Law 8.987 of 1995;
- b) Sponsored concession, provided for in Law 11.079 of 2004, is a kind of public-private partnership;
- c) Concession of public works, also governed by Law 8.987/95 and Law 11.079/04;
- d) Administrative concession established by Law 11.079 as another form of public-private partnership;
- e) Granting of use of public property, whether or not increased exploitation of the property, regularized by sparse legislation. This is the subject of analysis in this research.

Therefore, this chapter will be structured in the conceptualization of the concession of use of public good as well as its modalities and in the jurisprudential analysis of the subject, in front of the possibility of collection of property tax under the perspective of RE 601.720/RJ (STF).

3.1 PUBLIC GOOD USE CONTRACT

The concession of use is an administrative contract in which the Public Administration transfers to the private the use of public good, whose nature "is public law contract, sinalagmático, onerous or free, commutative and celebrated *intuitu personae*." (MELO, 2013).

Celso Antonio Bandeira de Melo (2013), understands that the concession is the product of an agreement of wills between the grantor and the concessionaire, aiming at the formation of a legal link that would be governed by complementary and unilateral rules organized by the grantor, on the means, ways and forms that the legal act would take place, thus stemming from a conventional and non-contractual act.

Similarly, thinks Gaston Jèze (1914), which limits the institute to the contractual aspect, that is, only the concession of a public service, understanding that there is no purpose or an object in the occupation of the public domain, therefore there would be no contract, but a unilateral act of public good management.

Brazilian law shares the contractual thesis, very well represented by the concept of Professor Hely Lopes de Meirelles:

The concession may be remunerated or free of charge, for a fixed or indefinite period, but it must always be preceded by legal authorization and, normally, by bidding for the contract. Its award is neither discretionary nor precarious, because it obeys regulatory rules and has the relative stability of administrative contracts, generating individual and subjective rights for the concessionaire, in terms of the adjustment. Such contract confers on the holder of the concession of use a personal right of special use over the public good, private and non-transferable without prior consent of the Administration, as it is carried out for personal purposes, although admitting to profit purposes. This is what happens with the granting of paid use of a municipal hotel, market areas or places for bars and restaurants in public buildings or public places. (2016, p. 296)

In this context, the concession of use can be divided into two modalities, the first being administrative concession of use, which only transmits to the concessionaire a personal right non-transferable to third parties. The second as the granting of real right of use, which distributes to third parties by legitimate succession and testamentary or by live inter act, the use of good as a right in rem.

The granting of royal law is regulated in Decree-Law No 271 of 28 February 1967, which in art. 7th provides that the Administration transfers to the private the use of public land remunerated or free of charge, as a real and solvable right, answering the concessionaire for all charges that overflow on the property, be they civil, administrative or tax nature (SANTOS, 2016).

In the meantime, there are some other diversities of modalities of concession of use of public goods, as the concession of exploitation, where the administration confers to the concessionaire the power of management dominial, being able to exploit the good, taking as example the concession of exploitation of ore, oil and plant extractivism.

We also have the temporary concession of public utility, such as water and energy, or perpetual or private utility, such as burial, or the exploitation of algae fields.

Therefore, it is extremely important to identify the legal nature of the existing contract between the Public Administration and the third party, as it is from it that the possibility of the property tax incidence will be verified, being this right real or personal.

3.2 A JURISPRUDENTIAL ANALYSIS OF RE 601.720 / RJ (STF)

The plenary of the Supreme Court on 19 April 2017 judged the extraordinary appeal under the number 601.720/ RJ arising from an annulment of tax debt action, now promoted by the Municipality of Rio de Janeiro to charge property tax on Union property, administered by INFRAERO.

The election was guided in the analysis of the possibility of IPTU collection on a property that although it belonged to the union, It was granted to the private operator of economic activity, Barrafor Veículos Ltda, including this as defendant in the case in question.

In his vote Min. Edson Fachin, rapporteur of the appeal, recalled the legal nature of INFRAERO, being legal entity of private law, constituted in the form of public company under authorization of Law 5.862/72, having as function the administration, operation and operation of airport infrastructure.

The Brazilian Code of Aeronautics (CBA) in its art. 38 affirmed that airports are assimilated to federal public goods, allowing business establishments to be established there. Previously the Supreme Court, in the general repercussion, had extended the tax immunity to INFRAERO, in the capacity of public service provider, in the following terms:

APPEAL. Extraordinary. Reciprocal tax immunity. Extension. Public companies providing public services. Generally recognized repercussion. Precedents. Reaffirmation of jurisprudence. Impromptu appeal. Is compatible with the Constitution the extension of reciprocal tax immunity to the Brazilian Company of Airport Infrastructure - INFRAERO, as a public company providing public service (STF, BRASIL, 2011)⁴

The rapporteur dismissed the appeal by stating that the concession agreement between the parties is binding in nature. However, even if the concessionaire has direct ownership of the property, it is a precarious relationship, still remaining, the property in the patrimonial sphere of the Federal Union. The concessionaire, by virtue of municipal law, cannot be listed as a taxable person of the tax obligation, because the property is qualified as a federal public good and, although intended for economic exploitation, is immune to taxes as provided by art. 150, VI, "a" of CF/88.

However, Min. Alexandre de Moraes, in arguing the origin of immunity rules, recalled some cases tried by the American court, such as that of *Helvering v. Power and Allen v. Regents of University of Georgia*, where it was determined that "reciprocal immunities should be applied only in relation to the exercise of governmental competencies, having no impact on commercial issues" (BRASIL, 2017)

The aforementioned minister reaffirmed the interpretation given by the Court to the legal meaning of reciprocal immunity, being a true guarantee of preservation of the federal system, adding that the legitimization of immunity actually takes place through the linkage to the public purposes of the State.

Alluding to the vote of Min. Joaquim Barbosa in the Rapporteur of RE 434.251, and the interpretation given by him to art. 150, VI, a, it is possible to make the application of reciprocal immunity conditional upon the observation of three questions:

- 1) The immunity shall cover the properties, goods and services of the federal entities that use it to fulfil their institutional objectives;
- 2) the good, which is used economically and which is intended solely for the purpose of increasing the assets of the State or of individuals, must be taxed;
- 3) Exemption from payment of the tax may not be to the detriment of the principle of free competition or the exercise of lawful activity.

Therefore, if the concession contract transfers the use of the property to another, and this is used to achieve purposes other than those of public interest, the property will cause

4 This is ARE-RG 638.315, Min. Cezar Peluso, DJe 31.08.2011.

the loss of its social attribute as a public good, ie its disaffection, satisfying the objectives and purposes of private interest, with consequences extended to the economic⁵ competitive segment.

It is important to highlight the thought expressed by Min. Luís Roberto Barroso despite the concession contracts. According to him, these contracts, for the most part, are long-term, with an initial term of 15 to 20 years. Giving the concessionaire almost all the inherent powers of the owner, being able to modify the property as he wants, configuring this possession that before was precarious in exclusive, which would result in the possibility of incidence of property tax on the property, as provided by art. 32 from CTN.

[...] So I understand, first of all, why the taxation of the property belonging to the Union but exploited economically by does not imply any risk to the balance between the entities federated; second, because the defendant demonstrates objective contribution, for dedicating itself to the exploration activity economic activity on a private basis. [...] reciprocal immunity does not benefit individuals, third parties who have real rights in the assets of public entities. [...] Recognizing the applicability of reciprocal immunity to the taxation of property leased to individuals, for the exploitation of economic activity of a private nature, would ultimately result in privileging private economic exploitation, and not the federative pact (BRASIL, STF , 2007).⁶

Finally, the plenary approved the appeal, concluding that the property tax can be released on public property, when in possession of private company exploited economic activity for profit, ruling out reciprocal immunity in light of the art §3º do. 150 of CF/88, prioritizing respect for the federative pact through the search for fiscal justice consistent with social reality (PAULSEN; MELO, 2015).

4. EMPIRICAL APPROACH TO THE CONSEQUENCES OF THE JURISPRUDENCE ON RECIPROCAL IMMUNITY IN THE MUNICIPAL SPHERE: THE CASE OF THE MUNICIPALITY IMPERATRIZ-MA

This chapter has two specific objectives: 1) to present the tax collection system in the City of Imperatriz-MA, in order to recognize the problems, failures and difficulties in the municipal tax structure; 2) verify the possible effects on tax collection in the face of the jurisprudential change generated by RE 601. 729/RJ (STF).

5 Argument expressed verbally by Min. Alexandre de Moraes in the plenary of the judgment of the RE 594,015 and 601,720 on 04/06/17;

6 This is the vote seen by Min. Joaquim Barbosa in RE. 451.152, Rel. Gilmar Mendes, DJE 27.4.2007, Segunda Turma.p.8-17.

4.1 METHODOLOGICAL RESEARCH PROCEDURES

Regarding the methodology of data collection and analysis, this study adopted bibliographic, documentary and empirical research, with a qualitative and quantitative approach associated with preordered exploratory interviews.

The bibliographic and documentary survey was essential for the theoretical construction of this research, providing means that helped in the understanding of the basic institutes that form the theory, now expressed in RE 601/729. Understanding as bibliographic search:

The survey of all bibliography already published in the form of books, magazines, loose publications and written press. Its purpose is to put the researcher in direct contact with everything that was written on a given subject [...] (MARCONI; LAKATOS, 2011, p. 43-44).

The empirical research, that is, field analysis, was carried out together with the Department of Planning, Finance and Budget Management (SEFAZGO) of the city of Imperatriz-MA, and two tax auditors and an official of the administrative sector were interviewed. The interview was based on a preordered questionnaire whose surveys sought to associate the knowledge cadenciados by bibliographic survey and the reality experienced by the municipal tax in the collection of property tax.

Finally, the information was collected following the ethical rules of the research. The interviewees had their identities preserved and signed the informed consent form. We highlight the innovative character of the empirical research carried out by the structural understanding of the municipal collection system, as well as by the confrontation of the data collected in a theoretical survey with those collected in the field.

4.2 TAX COLLECTION SYSTEM IN THE MUNICIPALITY OF IMPERATRIZ-MA

As provided by the Federal Constitution in its art. 156, it is the competence of the Municipalities the institution of taxes on property and urban territorial property (IPTU), on the transmission "Inter vivo" of real estate and rights on real estate (ITBI) and on services of any nature (ISS). In addition to the taxes already mentioned, the municipal tax revenue is also withheld at source (IRRF), as well as the specific improvement taxes and contributions.

The Municipal Tax of Imperatriz-MA through the Department of Planning, Finance and Budget Management (SEFAZGO) is structured in three sectors, as well stated the interviewee A, tax auditor of the municipality. The first sector is Revenue, responsible for the collection of taxes, followed by the accounting sector, whose main function is to record the collection of previous years and, finally, the budget sector, responsible for the collection forecast for future fiscal years.

The tax laws in force in the municipality are the Municipal Tax Code (CTM) Complementary Law 001/03; the National Tax Code (CTN); the Posture Code Law n° 850/97; the Federal Constitution (CRFB) and the Zoning Law ⁷. In the meantime, there is still legislation in the

⁷ Verbal information granted by the interviewee B. 08/11/18. Interview conducted by the authors. Empress: 2018.

municipal tax sphere, such as LC No 04/2007 on the granting of tax benefits and exemptions, Law 923/2000 defining the urban area of Imperatriz and LC n° 001/2003 establishing the tax recovery programme - PROFIS.O Código Tributário Municipal possui a seguinte redação:

Art. 6° The municipal tax system consists of:

I- Taxes:

[...]II- fees:

a) by virtue of the exercise of police power:

1- monitoring of location, installation and operation;

2- for health surveillance;

3- monitoring of notices;

[...] III- contributions:

a) improvement resulting from public works;

b) the cost of the lighting service;

As provided by CTM in its art. 14 the property tax "will be due annually and calculated by applying to the market value of the respective properties, the rates established in this Law". Regarding the normative fatigue, interviewee C states that the tax launch in Imperatriz takes place in March of the respective financial year, through the SAT and STAR systems with the issuance of a physical charge distributed to taxpayers in their homes, the whole procedure being approved by the mayor.

In the municipal system, according to the latest 2019 update, is broken down as buildings subject to tax incidence: houses, shacks, apartments, houses, warehouses, temples, industries, land, among others.

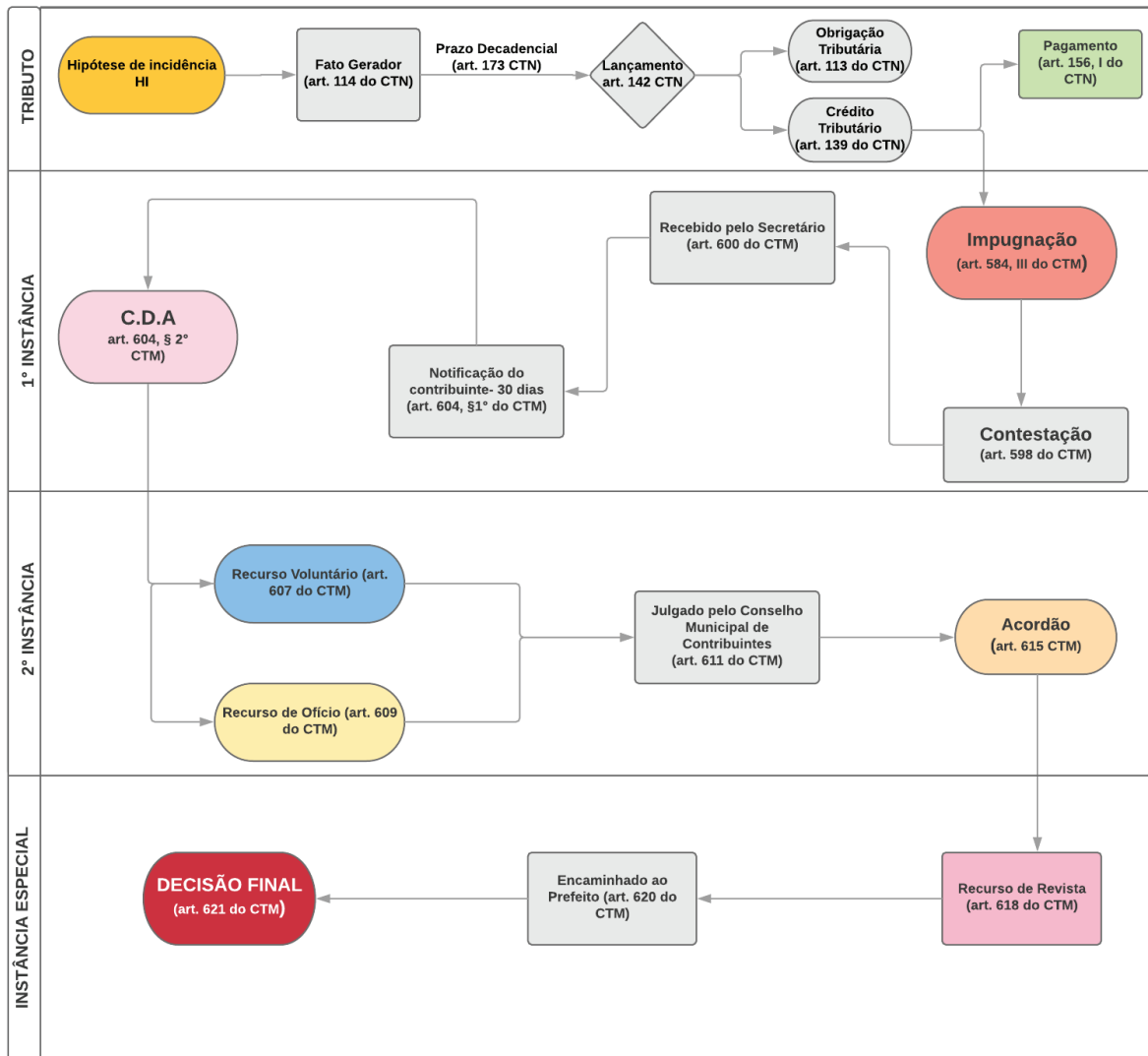
According to interviewee A, in the entire existence of the municipal tax office, SEFAZGO has never conducted administrative trials of appeals or petitions, even if the CTM had granted him such a procedure. Remaining, to the taxpayer or third party, only the appeal in judicial way. However, this situation has changed, from the organization and choice of personnel, in order to allow the trial of tax litigation processes.

It is noteworthy that, although the CTM has determined in its art. 600, ⁸that the appeal in the first instance would be received by a Prosecutor, currently it is analyzed by the Secretary of SEFAZGO. Another important aspect raised by interviewee A is the composition of the Municipal Council in second instance, whose renewal takes place every two, being composed of two representatives of civil society or entities of classes, two auditors, a prosecutor and the municipal secretary himself.

From the perspective of interviewee A, the presence of the Municipal Finance Secretary in the composition of the Council in the 2nd instance can cause controversies of interests, as it is he who in the 1st instance admits or not the appeal filed by taxpayers or interested third parties.

8 It provides the respective article: Prepared the challenge, the process will be sent to the Municipal Attorney's Office to give the decision (IMPERATRIZ, 2003).

According to the information collected by the researchers, crossing the data collected in the interviews and the provisions of the Municipal Tax Code, a flowchart about the fiscal administrative process in Imperatriz-MA can be prepared, structured as follows:



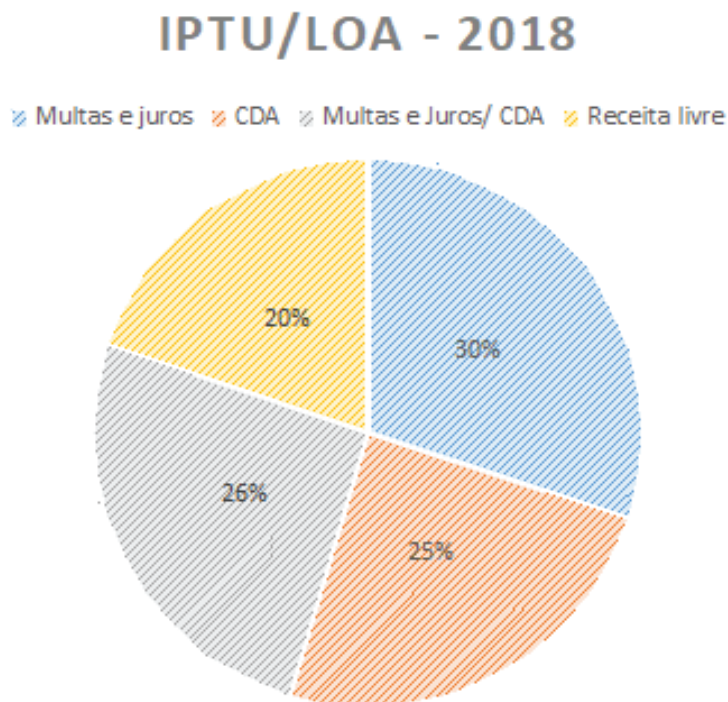
Source: Own elaboration (2018).

4.2 OF THE IMPACTS OF RE 601.720 / RJ ON MUNICIPAL COLLECTION

There are many legal questions about the correct application of property tax and the possibility of optimizing tax collection in municipalities facing the problems that spread throughout its structure, such as management problems, political influences and unjustified bureaucracy. These ailments are present both at the state and federal level.

This fact can be associated with the data brought by the author De Cesare (2005), according to which the collection of property tax in Brazil is very poorly used and exploited as a source of revenue by municipalities. In turn, this tax represents 2 to 3% of the GDP of the United States, New Zealand, the United Kingdom and Australia, while in Brazil this percentage reaches only 0.5% of the national GDP.

In the analysis of the data collected, it was found that the municipal tax authorities also experienced such problems, since the interviewees were incisive in stating that the collection of property tax did not reach all the properties of the municipality, nor those in its system, being registered around 125,533 (one hundred twenty-five thousand five hundred thirty-three) immovable.



Source: Own elaboration (2018).
Primary source: Annual Budget Law of Imperatriz - MA, 2018.

The graphic above shows the projection of collection of property tax for the financial year 2018-2019, deducted the incidence factors on the total amount of collection present in the LOA, emphasizing the fact, according to interviewee C that the municipal register only reach 60% of such projection, situation increased by the lack, in the past, of administrative processes and the resulting failure to enroll taxpayers in active debt, is finally associated with an outdated and insufficient register.

Unfortunately, it was not possible to obtain enough data to table the layout of the property tax in the 2019 and 2020 exercises.

Of the public buildings covered by the reciprocal immunity rule, only 80% are managed by the municipal tax authorities. This situation was justified by the interviewee C, as a result of the occupation by the federative entity of its own assets.

Regarding the existence of public properties ceded to private individuals in the city of Imperatriz, interviewee A believes that there is no property in this situation, because "the vast majority of the properties that the municipal entity occupies are rented, and its property two properties are they, the building where the City Hall works and where the Secretary of Health is. Being the other public goods of the State and of the Union or to these equated, they are in full use by these not having relatively free goods."

Both respondents stated that they follow the jurisprudential changes in relation to tax matters, however they denoted not knowing the RE 601.720/ RJ which allows the collection of property tax on public property transferred to private individuals when exploiting economic activity for profit.

As verified in the field research, the lack of a register with specification of the properties owned by the city, rented and/or leased prevents a real monitoring of the impacts of the jurisprudential change. The information presented is based on personal intuitionism, not evidence of administrative and fiscal transparency.

5. RESULTS AND DISCUSSIONS

This chapter aims to analyze the results obtained by the interviews of the auditors and the employee of the Department of Planning, Finance and Budget Management (SEFAZGO), associated to the hypotheses raised in the research project, with the intention of issuing notes that lead to the factual understanding of the object of this work.

What could be observed is that the Property Tax and urban territorial property tax-IPTU is despised by the public administration, compared to other taxes of municipal competence, fact confirmed by Interviewee A. This assigns to the ISS the most relevant tribute post currently in the municipality, due to the fact that the auditors have recently acquired a "Digital Certificate" that give them access to the Federal Revenue system, facilitating the monitoring of the collection of the ISS by the Simple National and the subsequent registration of taxpayers in debt.

The researcher José Roberto R. Afonso (2014) stated that in 2007 the national tax collection of property tax did not reach R \$ 50 (fifty reais) per inhabitant, a value that changes throughout the national territory, in view, that in some municipalities the tax collected did not exceed R \$ 5 (five reais) per person.

This reality is justified by the cultural, economic and social diversity present throughout the national territory. This heterogeneity is reflected in the local socioeconomic aspect, since a small municipality could not be expected to have a large IPTU tax collection, as well as a large municipality to obtain an insignificant tax collection against its tax capacity.

The first hypothesis pointed out in the project was that the change of understanding of the Supreme Court had valued the federative pact and the economic order consolidating thus fiscal justice, as well as enabling the increase of tax collection of municipalities.

The above assumption was confirmed, as the creation of reciprocal immunity was designed with the intention of protecting the federative pact. To vulnerate it by subtracting a municipality's exhaustion is to violate the principle of free competition and economic order⁹.

Subsequently, there is the possibility that the municipality of Imperatriz-MA is not prepared to collect the property tax on public goods that were in the possession of private com-

⁹ Argument expressed verbally by Min. Luís Roberto Barroso in the plenary of the judgment of RE 594.015 and 601.720 on 06/04/17

panies due to the precariousness of its tax system. This proposition was also confirmed, as shown in the reports that were described in the previous chapter.

According to the interviewees, the last registration that took place in Imperatriz was in 2004, descriptions of which are in notes the pencil, outdated and inconsistent. Situation enhanced by lack of specialized personnel. In addition, the municipality only has 3 (three) tax auditors, inadequate number to local demand.

Finally, it was stated that the full inspection of the property tax would only be possible, first of all, if the municipality carries out a detailed study of its system, in order to identify its failures and difficulties, wishing to optimize it

This is the third hypothesis that was confirmed before the field analysis, being notorious the need that the municipal tax has to understand the importance of the property tax and its correct collection. In the data collection, was highlighted by all the interviewed municipal projects to improve the tax collection system, such as the renewal of the local physical structure, the formulation of a new CTM, the purchase of a new system that will enable the joint analysis of all municipal taxes and the re-registration of the property through a geoprocessing system. Existing measures only in the plan of becoming. In turn, reality is still a time-consuming, bureaucratic and hermetic collection system.

FINAL CONSIDERATIONS

The study on RE 601,720/RJ showed the change of understanding of the Supreme Court on the concept of reciprocal immunity, aiming at the realization of fiscal justice and the protection of the federative pact, as well as the maintenance of free competition and economic order. The renewal jurisprudence caused the need to restructure the tax collection system of the municipalities, which if effective, would allow the increase of the collection and the probability of extending the cost of their expenses.

The understanding of the institute of reciprocal immunity, applied to the tax on urban property and territorial property - IPTU, proved to be of great importance for the delimitation of the tax incidence field, making possible the correct demarcation of its material aspect, spatial, temporal and personal.

Likewise, the mapping of the concepts and modalities of the forms of transfer of public assets, in particular the concession contract and the jurisprudential analysis of RE 601.720/RJ, allowed the perception of the arguments raised by the ministers in the trial and the consequent evolution of the supreme court regarding the preservation of the federal system.

Thus, the search for the impacts on the tax collection of Imperatriz-MA after the trial of RE 601.720/RJ, not having achieved the initially desired results, it was possible to analyze the collection system of the municipality and, identify the failures and problems in its entire structure, which would enable its optimization and possible restructuring.

It was demonstrated that the three hypotheses raised in the research project, explained in detail in the previous chapter, were confirmed. This leads to reflect on the impacts caused in the municipal public administration due to an inefficient tax system. Observing that the

State is not self-sufficient and acquires income by taxing individuals, one imagines that it should at all costs value its monetary collection, but it is not what happens.

It turns out that in the city of Imperatriz-MA there is an inefficient tax system, notably in its ability to perform its primary function that is the collection. In the municipal tax system analyzed there is a large shortage of labor, investment in technologies, resources and mainly lack of interest of the authorities responsible for fiscal planning.

An efficient tax collection system is necessary for tax planning that can guarantee and fulfill the constitutional objectives (art. 3, CRFB). Fundamental rights, even though they are not tied to budget reserves, need resources to implement them. It is a reality that cannot be evaded. It is the material order of rights itself. Therefore, the improvement of a collection system, when accompanied by fiscal transparency and respect for the Constitution, serves not only the State, but ultimately the taxpayers themselves.

Finally, this work did not exhaust the possibilities of research and studies on the subject, because this is vast and unlimited, fostered with its results a north to future researchers of this theme, as the need to analyze the decisions of the Supreme Court in tax matters and the impact of it on the executive, legislative and judicial spheres.

REFERENCES

ARENHART, Fernando Santos. *Reciprocal immunity and federalism: from the North American construction to the current position of the Supreme Court*. Brazilian journal of public policies, Brasília, v. 3, n. 2, July- Dec, 2013.

BALEEIRO, Aliomar. *Brazilian Tax Law*. 11th Ed. Updated by Misabel Abreu Machado Derzi. Rio de Janeiro: Editora Forense, 2015.

BRAZIL, Superior Federal Court. Judgment. Extraordinary Appeal nº 253.472/RJ. Plenary. PROPERTY TAX-TRANSFER- LEGAL PERSON OF PRIVATE LAW. The Urban Property and Territorial Tax is considered a public good assigned to legal persons under private law, which is the debtor. Municipality of Rio de Janeiro x Barrafor Veículos Ltda. Rapporteur Min. Edson Fachin. STF, Brasília, 19 Apr. 2017.

BRASIL, Superior Tribunal Federal. Judgment. *Extraordinary Appeal* nº 451.152-5/RJ. Segunda Turma. IPTU. Real estate property of the Union intended for commercial exploitation. Concession contract of use. Precarious and unfolded possession. The defendant cannot be included in the taxable area of the tax obligation. Precedent. Action rejected. Município do Rio de Janeiro X Rio Sport Center Academia LTDA. Rapporteur Min. Gilmar Mendes. STF, Brasília, 22 de Agosto de 2006.

BRAZIL. *Federal Constitution of 1988*. Promulgated on October 5, 1988. Available at: http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.html. Accessed: 20 Oct. 2018.

BRAZIL. Federal Supreme Court. Tax Immunity, Nº 861- 10 to April 21, 2017. Available at: <http://www.stf.jus.br/arquivo/informativo/documento/informativo861.htm>. Accessed: 04 Oct. 2018.

CANTO, Gilberto de Ulhoa. Some considerations about the tax immunity of public entities. Available at: <http://bibliotecadigital.fgv.br/ojs/index.php/rda/article/viewArticle/18117>. Accessed on: 22 Sep. 2018.

CARRAZZA, Roque Antonio. *Course on Tax Constitutional Law*. São Paulo: Editora Malheiros, 2019.

CARVALHO, Kildare Gonçalves. *Didactic Constitutional Law*. 6. Ed. rev. and current. Belo Horizonte: Delrey, 1999

CARVALHO, Paulo de Barros. *Tax law course*. São Paulo: Saraiva, 2012.

CARVALHO, Ivo César Barreto de. *Tax Immunity in the View of the Supreme Court*. Available at: http://dspace.idp.edu.br:8080/xmlui/bitstream/Handle/123456789/699/Right%20Publico%20n332010_Ivo%20Cesar%20Barreto%20de%20Carvalho.pdf? Accessed on: Sep 22. 2018.

COSTA, Dilvanir José da. *The system of possession in civil law*. Legislative information magazine, Brasília, a.35, n 139, Jul-Sep, 1998.

CURI, Bruno Mauricio Macedo. *Constitutional limitations to the power to tax: analysis of its soundness before the public reason*. Dissertation (master's degree). Universidade Federal Fluminense. Niterói-RJ, 2007.

FALCÃO, Amílcar de Araújo. *Autonomy of local governments in tax matters*. Rio de Janeiro, Journal of Administrative Law, Vol. 38, 1954.

FURLAN, Valéria. IPTU. São Paulo: Editora Malheiros, 2010.

GANEM, Bruna Ribeiro. *Incidence of property tax on public real estate occupied by private companies: a critical analysis of the constitutional materiality of the tax and its relations with reciprocal tax immunity (Theme 437 of the General Repercussion of the Supreme Court)*. Master's Dissertation (Tax Law). Universidade Católica de Brasília, Brasília- DF, 2015.

HAMILTON, Alexander. *The Federalist*. Belo Horizonte: Ed. Leader, 2003.

EMPRESS. *Complementary Law 0001/2004*. Establishes the tax recovery program in the municipality (PROFIS) and gives other provisions. Empress: City Council, 2004.

EMPRESS. *Complementary Law 001/2003*. It provides on the municipal tax system and the general rules of tax law applicable to the Municipality. Empress: City Council, 2003.

EMPRESS. *Complementary Law nº 04/2007*. It provides for the granting of tax benefits and exemptions within the municipality of Imperatriz and provides other arrangements. Empress: City Council, 2007.

EMPRESS. *Law nº 859/97*. Gives new wording the Municipal Law nº 221/78, establishing the Code of Posture of the Municipality of Empress. Empress: City Council, 1997.

EMPRESS. *Law nº 923/2000*. It provides on the definition of the urban area of Empress and gives other provisions. Empress: City Council, 2000.

EMPRESS. *Ordinary Law nº 1.708/2017*. It provides on the multi-annual plan of the Municipality of Imperatriz-MA for the 2018-2021 quadrennial, and makes other arrangements. Empress: City Council, 2017.

EMPRESS. *Ordinary Law nº 1.709/2017*. It provides on the budget guidelines for the 2018 financial year, and gives other provisions. Empress: City Council, 2017.

IMPERATRIZ. *Ordinary Law nº 1.710/2017*. Estimates the revenue and fixes the expenditure of the Municipality for the financial year 2018. Empress: City Council, 2017.

JÉZE, Gaston. *Les Principes generaux du droit administratif*. Paris: Ed. M. Giard e Briere, 1914.

LIMA, Rogério de Araújo. The federalist articles: the contribution of James Madison, Alexander Hamilton and John Jay to the emergence of federalism in Brazil. *Revista de informação legislativa*. Brasília, v. 48, n. 192, p. 125-136, Oct/Dec. 2011.

LUKIC, Melina de Souza Rocha. Taxation in Brazil analyzed from the cognitive approach of public policies. *Journal of ethics and political philosophy*. Juiz de Fora, v. 1, n. 15, p. 8-36, May. 2012.

MARCONI, Marina de Andrade; LAKATOS, Eva Maria. *Methodology of scientific work: basic procedures, bibliographic research, project and report, publications and scientific papers*. 7 ed. São Paulo: Atlas, 2011.

MARTINS, Marcelo Guerra. Constitutional limitations to the power to tax. *Cadernos de Direito*. Piracicaba, v. 2, n. 4, p. 249-278, 2003.

MEIRELLES, Hely Lopes. *Brazilian administrative law*. 39. ed. São Paulo: Malheiros, 2016.

MELO, Celso Antonio Bandeira de. *Administrative Law Course*. 30th ed. São Paulo: Malheiros, 2013,

MONTEIRO, José Carlos Braga. *The relationship of the history of humanity and tributes*. Available at: <http://www.portaltributario.com.br/artigos/relaca-da-historia-humanidade-e-tributos.htm>. Accessed: 26 Oct. 2018.

PAULSEN, Leandro; MELO, José Eduardo Soares de. *Impostos Federal, Estaduais e Municipais*. 9. ed. Porto Alegre: Livraria do Advogado, 2015.

PERES, João Bosco. *Negative tax competence*. Immunities. Available at: <http://www.egov.ufsc.br/portal/sites/default/files/anexos/21272-21273-1-PB.pdf>. Accessed on: 22 Sep. 2018.

QUEIRÓS, Etides Yuri Pereira. *Reciprocal immunity: analyze the scope and limitations of the immunization norm*. 2017. Master's Dissertation (Public Law) Universidade Federal da Bahia, Salvador-BA, 2017.

ROMANO, Santi. *The Legal Order*. Translated by Arno Dal Ri Júnior. Florianópolis: Fundação Boiteux, 2008.

RUEDELL, Claudir Luis. *Tax immunity and rents unrelated to the essential purposes of the exonerated entities*. 2013. Dissertation (graduation). Universidade Federal de Santa Maria, Santa Maria/RS, 2013.

SÁ, José Delfino. et. al. An optimization model for socially more fair taxes. *Revista de Administração Pública*, Rio de Janeiro, Jan/Feb, 2013.

SANTOS, Gustavo Magalhães. *The incidence of property tax on public real estate used by private individuals under a concession contract*. 2016. Monograph (Specialization)-Instituto Brasiliense de Direito Público, Brasília- DF, 2016.

SCAFF, Fernando Facury. *Citizenship and Tax Immunity*. Available at: <https://egov.ufsc.br/portal/sites/default/files/anexos/21047-21048-1-PB.pdf>. Accessed: November 10, 2018.

TRINDADE, Larissa; RIBEIRO, Thiago Bão. *Tax equality: a brief philosophical conception of equality and the jurisprudence of the Supreme Court*. Available at: <http://www.publicadireito.com.br/artigos/?Cod=9c502490400407d6>. Accessed: 20 Nov. 2018.

VITTA, Cino. *Diritto Amministrativo*. Torino: Editrice Torinese, 1962.

WIESE, Hernane Elesbão. *Limitations to the power to tax the tax immunities of art. 150, inc. VI and paragraphs of the federal constitution*. 2012. Dissertation (graduation). Universidade Federal de Santa Catarina. Florianópolis/RJ, 2012.

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