THE BASIS OF CALCULATION OF FEES: CONSIDERATIONS AROUND BINDING SUMMARY NO. 29 AND THE "COST OF STATE ACTIVITY"

A BASE DE CÁLCULO DAS TAXAS: CONSIDERAÇÕES EM TORNO DA SÚMULA VINCULANTE Nº 29 E O "CUSTO DA ATIVIDADE ESTATAL"

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ABSTRACT

The article examines, in the light of the Binding Precedent No. 29 of the Supreme Federal Court, the supposed need for the fee (rate) calculation base to reflect the cost of state activity, stating the thesis that this link does not exist, especially in view of the Supreme Court's guidance Federal Court signed in a similar binding summary.

Keywords: Fee (rate). Quantitative aspect. Binding Precedente 19/STF.

RESUMO

O artigo examina, à luz da Súmula Vinculante nº 29 do Supremo Tribunal Federal, a suposta necessidade de que a base de cálculo da taxa reflita o custo da atividade estatal, afirmando a tese de que não existe esta vinculação, principalmente ante a orientação do Supremo Tribunal Federal firmada na referida Súmula Vinculante.

Palavras-chave: *Taxa. Aspecto quantitativo. Súmula vinculante 19/STF.*

1. INTRODUCTION

The study of fees, in Brazilian law, still seems contaminated by what Alfredo Augusto Becker called "the biggest mistake" in tax law, that is, "the contamination between legal principles and concepts and pre-legal principles and concepts (economic, financial, political, social, etc.)" (BECKER, 1972, p. 35). It is enough to see that it is still recurrent to link the rates to the

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cost of *specific expenditure* of the State, attributing to the taxes the cost of *general expenses* of the State. Thus, for example, Anis Kfouri Júnior, points out that the collection of taxes has "the objective of financing the *overhead* of the State", and the fee, "unlike taxes", has "its collection destined to cover the cost" of the service which is her generating event (KFOURI JÚNIOR, 2012, p. 93 and 95, *"passim"*).

It is certain, however, that the legal nature of the tax should not be linked to the destination given to the revenue collected from it. The National Tax Code (CTN - Law nº 5.172, of October 25, 1966), as notorious, provides that the "specific legal nature of the tax is determined by the fact that generates the respective obligation, being irrelevant to qualify it [...] the legal destination of the proceeds of its collection" (art. 4, item II), although there is E, although there is a fierce theoretical dispute over the prevalence of this statement concerning special contributions (SPAGNOL; FERRAZ; and GODOI, 2014, p. 197). Besides, the Constitution of the Republic, of October 5, 1988 (CR / 1988), as a general rule, prohibits the "[...] linking of tax revenue to an organ, fund or expense [...]" (167, item IV). However, despite this, at all times, such linkage of the tax revenue to the expense related to its taxable event appears in legal arguments developed, both in forensic cases and in theoretical studies.

In case-law terms, the Federal Supreme Court (STF) does not present clear and defined decision parameters, oscillating on a case-by-case basis, without being able to perceive the existence of a common pattern or orientation in the decisions handed down. And this occurs even after the edition of the Binding Precedent nº 29 of the Supreme Federal Court, an instrument that, theoretically, should portray the dominant understanding in that court (art. 103-A of CR / 1988; Law nº 11.417, of December 19, 2006).

The purpose of this article, therefore, is to discuss the basis for calculating fees, based on the guidance established in the Binding Precedent nº 29 / STF, confronting this guidance with the idea that the basis for calculating fees should reflect the "cost of the state activity", a parameter that, at least, would serve as a maximum limit to guide the volume of funds raised with the rate requirement. What is sustained here is the legal dissociation between the legal validity of the fee and the volume of funds raised, which does not need to be equivalent to the cost of state activity.

It should be emphasized that, in political and economic terms, it is even recommended that the institution of fees should have as a parameter the cost of state activity that constitutes a taxable event. It is also recommended, from a political angle, the creation of collection limits, preventing the imposed rate from becoming a very "expensive" tax, not least because parsimony in tax collection can function as a legitimate factor for taxation. But these are pre-legislative considerations, which do not affect the legal validity of the rate eventually imposed.

This article maintains that CR / 1988 only determined *what cannot be* the basis for calculating fees, but did not impose or define what should be the basis for calculating fees (BRASIL, 1988). For this reason, the margin of action of the ordinary legislator, in defining the quantitative aspect of the rate, is very broad, even broader than the margin of action to the calculation basis taxes. This is because, if the complementary law sets the tax framework, defining the taxable event, the taxable persons, and the calculation base (art. 146, subparagraph III, paragraph a, of CR / 1988), concerning the tax rates, don't there is even this definition in a complementary law, except for repetition, in art. 77, single paragraph, of the CTN, of the prohibition contained in art. 145, § 2º, of CR / 1988, plus the prohibition to calculate the rate "[...] according to the capital

of the companies" (final part of the sole paragraph of the referred art.77; but, also here, the parameter is negative, as the rate *cannot be* calculated based on the capital of the companies).

Methodologically, the article is divided into two parts. In the first, the legal configuration of the fee is discussed, in the light of the Brazilian legal system. In the second part, the STF's case law guidance is examined, especially with a view to Binding Precedent No. 29 / STF. In the end, it is expected, as a conclusion, to state that the basis for calculating fees should not necessarily be the cost of state activity, although it can be done at the option of the legislator since such cost is not a legal parameter mandatory for stipulating the fee amount.

2. FEES: GENERATING FACT AND CALCULATION BASE

Fees, art. 145, §2, of CR / 1988, "cannot have their tax calculation base". CR / 1988 unequivocally adopted the option of defining "what cannot be the basis for calculating the rate", avoiding, then, defining "what should be the basis for calculating the rate" (BRAZIL, 1988).

CR / 1988 could have opted for a positive definition, that is, it could, in the same paragraph 2 of art. 145 have stated, for example, that *the basis for calculating fees should be the cost of state activity*. In this context, there would be a clear and unique parameter to quantify the rates (BRAZIL, 1988).

Nevertheless, this was not the path chosen by CR/ 1988. Thus, from the constitutional text, there is a (negative) determination that the rate does not have "its tax calculation base".

The complementary law of general rules of tax law, CTN, likewise, provides, in the sole paragraph of art. 77, that "[...] the rate cannot have the same calculation basis or taxable event as those corresponding to tax, nor be calculated according to the capital of the companies" (BRAZIL, 1966). Therefore, the rate calculation base cannot be "identical" to the tax calculation base, nor can it be calculated according to the capital of the companies. Here too, it should be repeated, the legislator opted for the *negative criterion*, instead of disposing of, more simply, that the "basis for calculating the rate is the cost of state activity that is the generating factor for it".

Notwithstanding the literalness of the constitutional text, as well as that of the CTN, what Paulo de Barros Carvalho defined as the "superlative valuation" of the calculation base is still present, which would be the result of the great influence exerted by Alfredo Augusto Becker in Brazilian doctrine (CARVALHO, 2019, p. 357)[2]. And Paulo de Barros Carvalho himself, while emphasizing the exaggeration in the "valuation" of the calculation base, argues that in the "General Theory of Tax Law", the calculation basis fulfills three functions: i) "measuring function"; ii) "objective function"; and, especially for this article, iii) "comparative function" (CARVALHO, 2019, p. 357 and 362, *"passim"*). The basis for calculating the rate fulfills this third and last "comparative function" when it is, obviously, compared with "[...] the material criterion of the hypothesis", being able, then, to confirm, to affirm or to affirm "[. ..] what appears in the text of the law, in an obscure way" (CARVALHO, 2019, p. 2019).

2 Alfredo Augusto Becker, a mythical name in Brazilian tax law, maintains that the "core" of the "hypothesis of incidence of the legal taxation rule" is "[...] the calculation basis and gives the tax the legal genre. The adjective elements are all the other elements that make up the composition of the incidence hypothesis (BECKER, 1972, p. 343).

From these assumptions, the conclusion reached by several tax assessors is reached, according to which the rate, if it adopts its tax calculation base, will become a true tax, because the calculation base, in this hypothesis, will not confirm the taxable event (the "material criterion of the hypothesis", alluded to by Paulo de Barro Carvalho). For this very reason, Paulo de Barros Carvalho himself maintains that the basis for calculating the fee must necessarily portray "[...] the measure of the intensity of the State's participation. Should the legislator mention the existence of a tax, but choose a measuring basis that is, in fact, foreign to any activity of the Public Power, then the tax type will be another, naturally a tax" (CARVALHO, 2019, p. 71)[3].

In the same vein, Alfredo Augusto Becker, to distinguish the tax rate, states that "[...] the legal rule that has chosen the *state service or state thing* as the basis for calculating the tax, will have created a tax" (BECKER, 1972, p. 346). Later, Becker points out that, in the case of "[...] dealing with fees, only the value of the state *service* or state *thing* can be taken as the *basis of calculation* [...]" (BECKER, 1972, p. 348). The taxpayer recognizes that "[...] it is impracticable to take the *real* value of the service [...]", and it is, therefore, permissible for the legislator to "indirectly" fix the value, always following, however, the "measure of state service (or thing)" (BECKER, 1972, p. 348/349, *"passim"*).

Still in this same line, as an example, see the lesson of Misabel Abreu Machado Derzi, in his notes for updating the work of Aliomar Baleeiro (BALEEIRO, 2013). Emphatically, Misabel Derzi, invoking lessons from Paulo de Barros Carvalho, Alfredo Augusto Becker, Alberto Xavier, among others, accentuates the syntagmatic character of the rates, for which reason, among others, points out the following consequence:

> [...] the syntagmatic character should also be reflected in the tax calculation base, which should measure the cost of the State's performance, in proportion to each obligation. Nor should it vary according to the taxpayer's own thing, a strange fact. Fees that elect a calculation basis different from the cost of the state action relative to the taxpayer (value of the property, vehicle, value of the cause, the value of the work, etc.) are imposed in disguise, as a rule, instituted against the rules of the Constitution (BALEEIRO, 2013, p. 845).

Sacha Calmon Navarro Coêlho, equally emphatic, points out that between calculation base and taxable event "[...] there is a relationship of almost carnal inheritance (*inherent et ossa)*, a relationship of pertinence, of harmony", so that the rate, "[...] any fee, cannot have a tax calculation base as a species" (COÊLHO, 2020, p. 56/57, "*passim*")[4].

Luís Eduardo Schoueri also asks "[...] what is the basis for calculating the fee?" (SCHOUERI, 2017, p. 195). And, after recognizing that, "due to the constitutional mandate, there is already the first answer, even if in the negative" (SCHOUERI, 2017, p. 195), he adds the following explanation:

> [...] if the justification of the fee is not to force the entire community to bear an expense that can be attributed to an individual taxpayer, it is clear that there is an indication of the possible calculation basis: it will be enough to measure, although with a certain degree of approximation, the value of the activity that the referred taxpayer demanded from the State (SCHOUERI, 2017, p. 195).

3 Interestingly, Paulo de Barros Carvalho, in a footnote after the aforementioned excerpt, records the guidance established in the Binding Precedent No. 29 of the Supreme Federal Court, according to which the adoption in the tax calculation base of "any of the tax calculation base, as is the example of the 'tested property', does not constitute an offense to the provisions of art. 145, § 2, of the Constitution "(CARVALHO, 2019, p. 71, note nº 10).

4 Sacha Calmon also refers to the Binding Precedent No. 29, stating his disagreement: "[...] the great danger is to weaken the difference between tax (fact of the taxpayer) and tax (fact of the State) consistent with state actions [.. .] "(CÔELHO, 2020, p. 57/58).

It is not the case, here, to carry out a comprehensive review of the literature, but the invocation of real pillars of Brazilian tax law, Misabel Derzi, Sacha Calmon, Paulo de Barros Carvalho, Alfredo Augusto Becker, and Luís Eduardo Schoueri, lends itself to the demonstration that, in our doctrine, the assimilation between the "generating facts" of the tax and its "basis of calculation" is recurrent. In other words, if the CR / 1988 defines the "taxable facts" of the tax (exercise of police power or provision of public service, potential or effective, specific and divisible, according to art. 145, subparagraph II), then it is stated that the calculation bases chosen by the legislator must reflect the "cost" of these "generating facts", the cost of "state activity" (BRAZIL, 1988).

This logical-legal consequence affirmed by several authors, however, is not supported by the literality of the constitutional text, thus requiring an exegetical construction that seeks, as emphasized by Luís Eduardo Schoueri, the "justification" for the creation of the tax. But it is not just the literal limit of art. 145, § 2º, of CR / 1988 (which contains a precept of a negative nature, as already stated) that must be considered, and a systematic understanding of the legal system must be sought, and especially in the purpose of this article, the guidelines established by the Supreme Federal Court, in Precedent No. 29 / STF, as set out in the subsequent topic.

3. BASE OF CALCULATION OF THE FEE IN THE LIGHT OF THE BINDING SUMMARY Nº 29 / FTS

As seen, the tax cannot have its tax calculations base, which means, for several authors, that the tax calculation base must be established based on the cost of state activity, being foreign to it, as Misabel Derzi points out, in an update note to the work of Aliomar Baleeiro, anything "something of a taxpayer" (BALEEIRO, 2013, p. 845).

It should be noted that the constitutional text, at first sight, establishes broader protection for taxpayers than the protection established by art. 77, single paragraph of the CTN, because the latter provides that the bases for calculating fees cannot be *identical* to the bases for calculating taxes. Now, the *identical is the same*, it is *very similar*, being, therefore, a much stricter protection rule, because it would act only if there was an *identity* between the basis for calculating the rate and that of the tax. However, to prohibit, as the CR / 1988 prohibits, the adoption for the *tax base tax rate*, is to prohibit the adoption of the tax base for the rate that *could also be* the tax calculation base, even if it was not *identical,* which is why the constitutional rule seems to have a much broader scope, at first glance, than the CTN rule (BRAZIL, 1966).

Hugo de Brito Machado, in this line of argument, compares the wording of CR / 1988 with the wording adopted in Constitutional Amendment No. 1, 1969 (EC No. 1/1969), whose art. 18, § 2, provided that the fee could not "[...] be used as the basis for calculating what has been used for the incidence of taxes". According to Hugo de Brito Machado, in the current CR / 1988, "[...] it is not necessary that a *certain quantity was used for the incidence of taxes*. Even if it was used for the calculation of any tax. It is enough that it is proper, that is to say, adequate for the calculation of taxes" (MACHADO, 2017, p. 442, "passim").

Notwithstanding the possibility of recognizing itself in the rule of art. 145, § 2º, of CR / 1988, a broader limitation for the definition of the tax calculation base, the STF jurisprudence, over time, did not endorse such interpretative orientation (BRAZIL, 1988). Far from this, the jurisprudence that came to be built does admit that the tax calculation base considers *facts of the taxpayer*, as long as there is no "integral identity" with the tax calculation base.

3.1 STF FEES AND JURISPRUDENCE: SUMMARIES Nº 595, 665 AND BINDING SUMMARY Nº 19

As an example of the path taken by the STF jurisprudence, Precedent No. 665, of the Supreme Federal Court, approved on September 24, 2003, according to which "the Inspection Fee for the Securities Markets established by Law 7,940 / 89". The basis for calculating this fee, whose constitutionality was affirmed by the STF, is determined based on the net worth of the inspected companies, adopting specific rates, that is to say, varied values fixed in "BTN - National Treasury Bonds", which are linked the ranges of equity values (according to Table A of Law No. 7,940, of December 20, 1989)[5].

It should be added that after the edition of Precedent No. 665, the Supreme Court, when judging on 30.30.2006, ADI No. 453 / DF, Full, Minister Rapporteur Gilmar Mendes, whose object was also the same Law No. 7.940, of 1989, the Federal Supreme Court reaffirmed the constitutionality of the tax. And, specifically based on calculation, Minister Gilmar Mendes said that "[...] the fluctuation of the amounts charged derives from the amplitude of the taxpayer's net worth, which identifies a need for greater inspection". And, according to Minister Gilmar Mendes, the "[...] variation of the amounts posted not only reflects the contributory capacity of the interested party but also reflects the amount of public service provided,' uti singuli "".

In a criticism of Precedent No. 665, of the Federal Supreme Court, Sacha Calmon Navarro Coêlho reiterated that the adoption of "net equity" as the basis for calculating the rate would not measure "[...] the State's performance in favor of the taxpayer. On the contrary, this exception is charged solely based on a particular fact, the net equity it has [...]" (COÊLHO, 2020, p. 59). The STF, however, reaffirmed that shareholders' equity would be a safe parameter to estimate the degree of state intervention, assuming that the greater the company's net equity, the greater the inspection activity. It is, however, a mere "approximation" (SCHOUERI, 2017, p. 195) or indirect criterion (BECKER, 1972, p. 348), because there is no necessary correlation between the company's net equity and the inspection work of the activity.

Long before Precedent No. 665, still in force of EC No. 1/1969, the STF also edited Precedent No. 595, of December 15. 1976: "The municipal road conservation fee for which the calculation basis is identical to the rural land tax is unconstitutional". Here, too, the identity between the tax calculation base and the tax base was prohibited, but the use of factual elements related to the taxpayer[6] was not prohibited in the tax calculation base6+.

5 Thus, for example, for "publicly-held companies" with a net worth of up to 10,000,000 BTN, the fee is 1,500 BTN; for shareholders' equity whose value ranges from 10,000,000 to 50,000,000, the fee is 3,000 BTN; and net assets above 50,000,001 BTN, the fee is 4,000 BTN (Table A of Law No. 7,940, 1989).

6 It should be noted, however, that subsequently the issue of Precedent No. 595 / STF, in other decisions, the STF stated that to configure the rate to be unconstitutional, "identity in one of the launch criteria with ITR would suffice. The tax excludes the fee "(Extraordinary Appeal No. 96.848-SP, Full, Rel. Min. Néri da Silveira, DJe, 29.Jun.1984). However, as indicated in the text, the STF came to abandon this orientation that the identity of one of the criteria adopted for the tax calculation base would render

There is, then, a certain line of continuity between Summaries nº 595 and nº 665 and the most recent Binding Summary nº 29 / STF, approved on 03 Feb. 2010, with the following wording: "It is constitutional to adopt, in the calculation of the fee amount, one or more elements of the tax calculation base, as long as there is no full identity between one base and another". Thus, the understanding was consolidated that the tax calculation base cannot keep "full identity" with "calculation base specific to a certain tax", however, preventing anything from the adoption of elements that concern the taxpayer.

In this context, in the light of the Binding Precedent No. 29 / STF, the statement that the tax calculation bases must necessarily *measure the cost of state activity* cannot be supported, since they can adopt "one or more elements of the base of own tax calculation ", and only" full identity "is not allowed between the tax calculations base and that of the tax.

In the opposite sense, Werther Botelho Spagnol, in a work written jointly with Luciano Ferraz and Marciano Seabra de Godoi, criticizes the Binding Precedent No. 29 / STF, stating that it caused the "emptying" of the content of art. 145, § 2º, of CR / 1988 (SPAGNOL; FERRAZ; GODOI, 2014, p. 211). The criticism, of course, stems from the link that Werther Botelho Spagnol, like so many others, claims to exist between the basis for calculating the fee and the cost of the state service, pointing out, then, that this "[...] calculation base must correspond, as closely as possible, at the cost of police power and/or the public service provided, and it is unavoidable to adopt elements specific to taxes, whose measurement is based on the ability to pay "(SPAGNOL; FERRAZ; GODOI, 2014, p. 211). Such an argument has already been faced in this article, when it is stated that this intended link was not made by the constitutional text, which is why the interpretation based on the Binding Precedent nº 29 / STF, about the expression "own calculation basis ", does not apply. it shows absurdity, proving to be reasonable, either from the historical perspective or from the literal perspective.

The observation that we have, in this scenario, is that the thesis that the tax-generating fact is a state activity was overcome by the STF case law, its calculation base would necessarily calculate the *cost* of this state activity. After all, if that were the case, how can we admit that the tax calculation base considered "one or more elements of the tax calculation base"?

Even if the assumption was made that elements of the tax calculation base would serve to estimate the cost of the state action, it is a mere assumption or "approximation", with no necessarily direct and objectively measurable relationship between these *elements and the cost of state activity*. Returning to the example of the Inspection Fee for the Securities Markets, just imagine a company that has a very high net worth, operating, however, with few and large investors. Such a company would carry out far fewer operations than, for example, a smaller company that operated with dozens or hundreds of small investors, so that, in this basic example, shareholders' equity, the criterion adopted to *quantify* the referred rate, would not be effectively measuring the amount of state activity.

It is worth adding here, closing this topic, that it is not being affirmed that *the tax calculation base cannot reflect the cost of state activity*. What is stated is that, legally, *there is no obligation for the basis for calculating fees to be the cost of state activity*. This reflection will be the option of the legislator, which is not prohibited by the constitutional text but is also not man-

the tax calculation base unconstitutional, settling on the argument based on the "integral identity" between the rate and tax calculation bases, so that it qualifies as unconstitutional.

datory by the same constitutional text. The argument developed by Luís Eduardo Schoueri, based on the justification of the rates, is shown to be meta-legal, because it dispenses with the legal rules to be based on arguments contaminated by that "mistake" mentioned by Alfredo Augusto Becker, due to the "contamination" of the tax law by " pre-legal principles and concepts (economic, financial, political, social, etc.)" (BECKER, 1972, p. 35).

In short, legally, CR / 1988 only prohibits the rate from having its tax calculation base, which, in the interpretation signed by the STF, in the Binding Precedent No. 29 / STF, means to say only that the tax calculation base rate cannot be identical to the tax calculation base. Hence the need to examine two other circumstances that also corroborate the guidance established in Binding Precedent No. 29 / STF, thus removing the consideration of the cost of state acts as an essential factor for stipulating the basis for calculating fees: the option for the establishment certain value for rates and their use in the field of extra-taxation.

3.2 RATE WITH A CERTAIN AMOUNT (WITHOUT CALCULATIONS BASE) AND "CHINESE SKILLS"

Not infrequently, rates are stipulated by the legislature in a certain amount, thus dispensing with the calculation basis and rates (either specific rates or "*ad valorem*" rates).

Two examples can be given: (i) the fee of R$ 1,000.00 (one thousand reais) for the dispatch of possession and of the weapons (art. 11 and Attached Table, subparagraph V, both of Law No. 10,826, of December 22, 2003); and (ii) the fee of R$ 257.25 (two hundred and fifty-seven reais and twenty-five centavos) for issuing a passport (Article 3, subparagraph I, item a, of Complementary Law No. 89, of February 18 of 1997, combined with Article 49 of Decree No. 3.345, of November 30, 1938, and Table Attached to Ordinance No. 927, of July 9, 2015, of the Minister of Justice)[7]. Several other examples could be cited, at the federal, state, and municipal levels, but these two examples are enough to demonstrate that there are rates established in certain amounts, which will hardly represent the cost of state activity.

Theoretically, it could even be assumed that, when fixed by the legislator, such rates established in a fixed amount would represent the cost of state activity. It is, of course, a mere assumption, which would require thorough research in the processing of the respective bills, with the need to examine any financial statements that the stipulated amount would represent the cost of state activity. Anyway, even if there was this correlation between the value effectively established and the cost of the state activity, it is not reasonable to suppose that, almost seventeen years after the fixing of the rate for the dispatch of the weapon (Law nº 10.826, of 2003), the cost of state activity has not changed. Just as it is also not credible to assume that the cost of the activity related to the issuance of the passport has remained unchanged for five years, since it was last readjusted in 2015, by Decree No. 927, of the Minister of Justice.

7 The calculation of the fee for issuing a passport would merit its research. Decree No. 3,345, of November 30, 1938, issued by the Vargas Dictatorship, established the "Passport Regulation", fixing the amount of the respective fee (art. 49). Complementary Law No. 89, of 1997, providing for FUNAPOL - Fund for Equipment and Operationalization of the core activities of the National Federal Police - the following: "Art. 3rd - FUNAPOL's revenue comprises: I - fees and fines charged for migration services, provided by the Federal Police Department, as follows: a) fees for the issuance of travel documents, instituted by art. 49 of Decree No. 3,345, of November 30, 1938, and updated under current legislation ". The last "update", as noted, was made by Decree No. 927, 2015, of the Minister of Justice, without explaining which monetary restatement criterion was used, if any.

The issue is dealt with by Sacha Calmon Navarro Coêlho, who notes that there is "[...] an embarrassing question regarding the current techniques for setting the value of fees" (COÊLHO, 2020, p. 58). Recalling that "in most cases, the amount payable for the fees is fixed randomly, at *a forfait*, Sacha Calmon recognizes that "this does not match well with the functions reserved for the calculation basis of them, even by constitutional imperative. Doesn't the Constitution say that the tax cannot have a calculation basis identical to that of the tax? The calculation base here must measure the state's performance" (COÊLHO, 2020, p. 58, "passim").

It should be reiterated that Sacha Calmon Navarro Coêlho removes from a negative command (the rate cannot have its tax calculation basis) a positive order (the rate must measure the state's performance), but, instead of concluding, then, by unconstitutionality of the criterion *"a forfait"* (fixed value) adopted "in most cases", appeals to the presumption, again hardly credible, that the fixed value corresponds to the cost of the state activity: "In these cases, it is assumed that the base of calculation measures the costs of state activity by the over-provision of the required public service, the *forfait* "(COÊLHO, 2020, p. 58).

The reason for such a presumption is unknown, which more closely resembles a belief or a desire. But there is no legal guarantee (or accounting, or economic, or of any kind) that the fixed amount established represents, even if approximately, the cost of state activity.

On the other hand, there are obvious practical difficulties in fixing, concretely, the cost of given state activity, even due to the constant interaction between different public bodies involved in given police activity or the provision of public services. Besides, there are still variations concerning the real demand for state activity, which also affects the eventual definition of the exact value or close to the rate, because, obviously, the frequency with which the state activity is exercised influences the cost of this same activity, to each taxable person: if a given activity costs x Reais per month, if it is provided for a thousand taxable persons, this cost would be *x / 1,000*, which is much lower, in principle than the cost of a service provided to only ten taxable persons per month *(x / 10)*.

In this regard, there was an interesting discussion in the judgment, by the STF, of RE 416.601-DF, Full, Minister Rapporteur Carlos Velloso, judged on 10.10.2005 (DJ, 30. September 2005), in which the constitutionality of the Environmental Control and Inspection Fee - TFCA, instituted by Law nº 6.938, of August 31, 1981, with the modification made by Law nº 10.165, of January 28, 2000 (articles 17-B, 17-C, 17-D, 17-G). Among the controversies faced by the STF, it is worth examining the statement that TFCA would be unconstitutional because its calculation base would be the "economic size" of each taxpayer (measured by the "annual gross revenue", combined with the "pollution potential", as 17-D, § 1; and Annex XI). Minister Carlos Velloso, in dismissing the alleged unconstitutionality of the TFCA, used a lesson from Sacha Calmon Navarro Coêlho, in an opinion attached to those records, making the following transcript in the judgment issued by the STF:

> Regarding the alleged abusiveness of the TFCA value, it should be noted that its amount goes from R$ 50.00 (fifty reais), for the micro-company with a high degree of environmental pollution or use of mineral resources, up to the ceiling of R$ 2,250, 00 (two thousand, two hundred and fifty reais) per establishment of a large company also framed in the maximum degree of pollution or use.

> They do not seem to me to be excessive values, especially when it comes to the cost of inspecting an oil platform on the high seas, which depends on displacement by helicopter, the use of the most modern safety equipment, a large number of men and hours spent.
>
> One cannot ignore, however, the virtual impossibility of direct mathematical measurement of the cost of each State action (the collection of garbage from a given household, over the course of a month; the issue of a passport, etc.). The calculation would require Chinese skills such as researching the time spent making each passport, and its correlation with the minute wages of the officials in charge and the monthly rent value of the Federal Police building where the document was issued, among other intangible variables, to collect the cost of issuing each passport, for the requirement of the corresponding rate (which would vary for each taxpayer, according to whether their document had required more or less work or had been issued in their own or rented building). The same is true for garbage collection: imagine the ridiculousness of having garbage dumps, such goldsmiths, weigh the debris produced day by day by each household with a precision scale, so that the rate could correspond to the total amount of garbage produced each month by the taxpayer (I highlighted).

As it is not possible to ascertain the "Chinese Skills", Sacha Calmon Navarro Coêlho, in the opinion quoted in RE 416.601-DF, Full, Minister Rapporteur Carlos Velloso, is content to demand "[...] reasonable equivalence between the real cost of services and the amount to which the taxpayer can be compelled to pay [...]", without specifying, however, what this" reasonable equivalence "would be, nor how to determine its configuration. In the case of TFCA, as seen, Sacha Calmon understood that the stipulated values are not excessive, but did not offer objective legal criteria to define this reasonableness between the fee and the cost of the state service, which, repeat, is virtually impossible to measure mathematically, according to Sacha himself.

In this sense, the link between the fee amount and the "reasonable equivalence" reflects, once again, the "biggest mistake" pointed out by Becker, for importing concepts from other areas into law, without making it possible to adequately transpose those concepts. for legal language. What would be "reasonable equivalence" (Sacha Calmon) or "a certain degree of approximation" (Schoueri), or even the "closest possible form" (Spagnol)? They are, of course, extra-legal data, which could (and even should) be taken into account by the legislator, especially as a factor that legitimizes taxation, but it is not data that can be used by legal operators unless legal discussions can be based in mere assumptions (for this one, there is "reasonable equivalence", for that one, however, the "closest possible form" was no longer adopted ...).

From this perspective, then, the use of rates with fixed values also points to the mistake of intending, legally, to require a correlation between the tax calculation base and the cost of state activity. This correlation does not exist, which is why, in many cases, rates with certain values are adopted, which do not represent the cost of state activity.

3.3 EXTRA-TAXATION AND FEE: CONSIDERATIONS ABOUT CONTRIBUTIVE CAPACITY AND RATE

Another circumstance to be considered in this article, which also influences the understanding of the tax calculation base, is the use of extra- taxation concerning this tax species.

Extra- taxation, is the use of the tax to induce or restrain certain behaviors or acts, making the tax become, in Sacha's words, "an instrument of economic, social, cultural policies, etc." (COÊLHO, 2020, p. 162). The discussion on extra- taxation is not going to be deepened, which is why, here, I reiterate only what I stated in another article: "[...] there is no incompatibility between the extra fiscal use of taxation and the principle of equality. Yes, it is understood that equality, about extra- taxation, is based on other criteria of discrimination, other than just the economic capacity of the taxpayer "(MUZZI FILHO, p. 243). In the same vein, Sacha Calmon Navarro Coêlho, when discussing the constitutional principle of isonomy and that of contributory capacity, makes two considerations: "In certain situations, the legislator is authorized to treat equals unequally, without offending the principle; such are the cases derived from *extra-taxation* and *police power* "(COÊLHO, 2020, p. 162, highlighted in the original).

Therefore, taxes, including the tax, can be used by the legislator as an instrument to discourage certain conduct or to stimulate other conduct desired by the legislator. Two other examples, here, can illustrate the argument being developed.

There are certain activities that, financially, are expensive, that is, they cost a lot, and their remuneration through the fee, if the fee had to remunerate the entire cost, would make the payment of the tax impracticable. The most eloquent example is perhaps the *judicial fee*, required for the provision of the judicial service. The 2019 Accounting Report, of the Government of the State of Minas Gerais, points out that the collection of the *judicial fee*, in that year, was in the order of R$ 218 million (two hundred and eighteen million reais), for a total expense of the Judiciary Power of the order R$ 6.6 billion (six billion and six hundred million reais). Even if the resources resulting from the *judicial inspection fee*, required about public records services, which were in the order of R$ 756 million (seven hundred and fifty-six million reais), were added, we would have a total amount of R$ 974 million (nine hundred and seventy-four million reais), or 14.75% of the total expenditure of the Judiciary[8].

See, then, that, if it were a constitutional imperative that the *judicial fee,* obligatorily, had to correspond to the cost of state activity, the need for a substantial increase in the tax would prove to be inescapable. But, since the judicial service is a true constitutional guarantee, the legislator, more than he can, must stipulate modest values, so as not to make the value of the tax prohibitive, thus ensuring effective access to the jurisdiction, under the terms of art. 5, subparagraph XXXV, of CR / 1988 (BRAZIL, 1988).

Another example can be seen in the aforementioned fees for the *issuance of a weapon and a fee* for the *issuance of passports*. The first was stipulated at R$ 1,000.00 (one thousand reais), with annual renewal, while the issue of a passport costs R$ 257.25, with a 10-year renewal[9]. The discrepancy between the values (and the validity periods of the documents)

8 Information from the Minas Gerais State Accounting Report, fiscal year 2019, is available at: http://www.fazenda.mg.gov.br/governo/contadoria_geral/demontracoes_contabeis/relatorios_contabeis/relatoriocontabil2019.pdf

9 According to art. 38, subparagraph I, of the Travel Documents Regulation, approved by Decree No. 5,978, of December 4, 2006, with subsequent amendments.

makes it possible to affirm, without much effort, that the *fee for the expedition of the possession of the weapon* had its value exacerbated because government policy does not favor the use of weapons by the population, using the tax as a strategy to discourage this use of weapons. On the other hand, since there is no intention to discourage Brazilians from traveling abroad, the value of the *fee for issuing passports* is substantially lower, notably when comparing the validity period of the documents in question. Both rates are used for extra-fiscal purposes, and there is certainly no financial equivalence between the cost of the respective state activities and the (certain) amounts required by the tax law.

If, however, it is mandatory as a legal requirement that the rates are necessarily stipulated, according to the cost of state activity, the possibility of having extra-fiscal employment of the tax species is lost, because it could never vary due to policies public policies adopted by the State.

It should be noted, in passing, that the issue could be further developed from the perspective of the principle of contributory capacity. Although CR / 1988, referring to the contributory capacity, provides that the "taxes [...] will be graduated according to the economic capacity of the taxpayer" (art. 145, § 1) (BRAZIL, 1988), the STF has already decided that this principle of contributory capacity can also be applied about fees. The theme goes beyond the objective of this article, noting Werther Botelho Spagnol that the "question is plausible", having not been "still satisfactorily appreciated by the STF" (SPAGNOL; FERRAZ; GODOI, 2014, p. 211).

Werther Botelho Spagnol explains that CR / 1988, when linking the contributory capacity to taxes, part of the finding that the taxable event relates to the taxable person, making it necessary, then, to consider the contributory capacity of this taxable person. The same phenomenon would not be configured concerning rates, because the facts that generate these are state activities, which do not reflect the taxpayers' ability to pay (SPAGNOL; FERRAZ; GODOI, 2014, p. 263). However, Spagnol recognizes that the "residual and extraordinary" use of contributory capacity, "as in the case of granting an exemption, in favor of the poorest, of fees linked to the exercise of fundamental rights (exemption from court fees for example)" (SPAGNOL; FERRAZ; GODOI, 2014, p. 263)[10].

Despite his reservations, Werther Spagnol cannot fail to record, with criticism, that "on several occasions the STF's jurisprudence has manifested itself in the sense of agreeing that the legislator uses economic capacity as a criterion for grading rates", citing some decisions judicial (SPAGNOL; FERRAZ; GODOI, 2014, p. 263/264).

Before the literality of art. 145, § 1, of CR / 1988, the use of contributory or economic capacity seems to be inappropriate. However, it can be replied that CR / 1988 determines that the contributory capacity *should be* used in taxes, but does not prohibit its use, at the discretion of the legislator, in other tax species (BRAZIL, 1988). Thus, if taxes are *to be* graduated according to the contributory capacity, there is no explicit prohibition on the use of contributory capacity concerning fees (or other taxes), it is reasonable to maintain that they, the fees, *may be* graduated according to the contributory capacity.

And one could also invoke Roberto Ferraz's more detailed lesson that "the contributory capacity applies to all taxes, but in each tax in a unique way, specific to that tax" (FERRAZ,

10 I emphasize that, in my opinion, the example used by Werther Botelho Spagnol, contemplates the hypothesis of tax immunity (article 5, subparagraph LXXIV, of CR / 1988), but, of course, there are several cases of exemption about fees, almost always contemplating needy people, in the application of the principle of contributory capacity.

2013, p. 202). It should be noted that Roberto Ferraz understands that the basis for calculating the fees must be "the cost of the state activity that authorizes the institution" (FERRAZ, 2013, p. 203), but still does not rule out eventual use of the contributory capacity *concerning*, not only at rates but at all other tax species.

As has been said, however, this work does not follow this path of argument, although it may unveil new and interesting horizons. Within the limits outlined here, the possibility of using the fee to serve other purposes besides mere fundraising, which exists and can be verified in several cases besides those exemplified here, is another circumstance that invalidates the thesis that the fees should correspond to the cost of state activity. Often, due to the high cost of state activity, it will not be recommended that the fee reflect this cost, under penalty of making access to state activity extremely difficult. In other cases, however, although the cost of state activity is revealed to be low, the exacerbation of the rate may be justified as a deterrent to unwanted conduct by public policies adopted. Then, plaster the value of the fee at the cost of state activity, because supposedly so determined by the CR / 1988, it is to exclude the legitimate use of extra-fiscality concerning fees, which allows us to reaffirm that it is not necessary, legally, that the tax base calculation of the fee corresponds to the cost of the state activity.

Already closing this topic, it is worth recalling an old lesson from Geraldo Ataliba regarding this repeated statement that the tax must reflect the cost of state activity:

> The legal concept of fee is very simple. The idea of remuneration, consideration, payment, provocation, benefit, proportionality or divisibility of the service to which it eventually corresponds does not belong.
>
> All of these notions belong to the science of finance. They are pre-legal, for that very reason. These are considerations that must be taken into account by the legislator when instituting the tax.
>
> They are not transported to the right. They do not have the most insignificant legal expression (ATALIBA, 1969, p. 205).

In his argument, Geraldo Ataliba reiterates that the "tax measure does not influence the legal nature of the tax exemption or even its enforceability" (ATALIBA, 1969, p. 206). And he concludes: "Faced with a 'disproportionate' rate - non-legal quality - all you can do is criticize the legislator and consider it unfair. But in any case the tax must be paid. It is legal" (ATALIBA, 1969, p. 206).

In the same vein, in a classic work on the subject, Bernardo Ribeiro de Moraes also rejects the supposed need for taxes to be calculated, always, based on the cost of state activity:

> The relationship between the measure of the fee and the cost of the service or the state activity does not influence the concept of the fee. The amount of the fee is not an element that characterizes its legal nature. On the other hand, there is no formula capable of finding the real cost of state activity, which is difficult to ascertain (MORAES, 1976, p. 182).

It is insisted that what is sustained does not imply that there are no quantitative limits on fees. There are clear political, social, and economic limits, which must be considered by the legislator, who does not act only based on legal criteria, as Bernardo Ribeiro de Moraes notes, "[...] it would not have felt, the notorious disproportion between the cost of the service and the global collection of the respective fee "(MORAES, 1976, p. 185). What is sustained is that, in the light of CR / 1988, there are no legal criteria in the interpretation set out in Binding Prece-

dent No. 29 / STF that may obligatorily link the value of the fee to the cost of state activity, with insufficiently subjective criteria being insufficient. as the possible "reasonable equivalence", or "a certain degree of approximation"[11].

4. FINAL WEIGHTING

Based on the arguments set forth here, it is possible to affirm, by way of final consideration, that the constitutional text does not require that the fees have values linked to the cost of the respective state activities, given the setting of an only negative parameter by art. 145, § 2, CR / 1988: rates *cannot have* their own tax calculation base (BRAZIL, 1988).

The guidance signed by the STF, in its Binding Summary No. 29, reinforces what has been stated, preventing it from being necessary, for the legal validity of the fee, that its value be related to the cost of the state activity, since the said binding summary legitimizes the use, by the legislator, of quantitative criteria linked to the taxable person and unrelated to the cost of state activity.

The argument also reinforces the well-known mechanism for stipulating the right amount for fees, values that do not need to be correlated with the cost of state activity, not least because it would be very difficult to stipulate, at the legislative level, the amount of the cost of state activity, which it will vary, not only due to its internal costs but also due to the demand of the state activity itself.

Moreover, the extra-fiscal use of fees is a circumstance that also avoids the requirement that the cost of state activity is the necessary parameter for stipulating the *"quantum debenture"*. There are state activities that, being extremely expensive, would become unfeasible for most of the population, if the required fee included that high cost, as with the *judicial fee*. On the other hand, there are state activities whose cost is not so high, but public policies adopted may recommend increasing the rate, to discourage the use of such state activities, as occurs concerning the *fee for the expedition of the possession of the gun weapon*.

Finally, the lack of legal determination linking the value of the fee to the cost of state activity does not mean that, in the pre-legislative scope, political, social, and economic considerations cannot encourage the legislator to consider, rather, the "approximation" between the value of the tax and the cost of state activity, as a mechanism to legitimize the tax. It is even recommended that the legislator do so, but, after all, to paraphrase Geraldo Ataliba (ATALIBA, 1969, p. 206), before an "expensive" rate, the tax law offers few alternatives to the taxpayer, who can even criticize the legislator, but will have to pay the required amount, because it is "legal".

11 The legal limit that could be invoked, in this tone, would be the prohibition against confiscation (art. 150, subparagraph IV, of CR / 1988), a theme, however, which is also very different from the objective of this article, even due to the difficulties of understanding and application of that fence.

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