REVISTA ESPAÇO PÚBLICO
Revista de Políticas Públicas da UFPE, Recife/PE, v. 9, ano 2024. ISSN Eletrônico 2595-5535

LEGAL CRITERIA FOR ENVIRONMENTAL TAXATION THROUGH "TOURIST" TAXES FOR THE PURPOSE OF ENVIRONMENTAL PRESERVATION

CRITÉRIOS LEGAIS PARA A TRIBUTAÇÃO AMBIENTAL POR MEIO DE TAXAS "TURÍSTICAS" COM FINALIDADE DE PRESERVAÇÃO AMBIENTAL

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ABSTRACT: This article analyzes the legal criteria applicable to environmental taxation through tourist taxes intended for environmental preservation, taking into account the numerous legal challenges regarding the constitutionality of charging this tax with this approach. Using the deductive method, normative characteristics inherent to the "taxes" genre were observed to evaluate the criteria applicable to the institution of the "tourist taxes" species. The result of this research showed that the constitutionality of tourist taxes is conditioned on the adequacy of incidence hypotheses with the peculiar criteria of the two types of taxes existing in the Brazilian legal system, with specific state action being necessary for police taxes, but optionally divisible, while public service fees of specificity and divisibility in state consideration. Furthermore, it was found that it was impossible to impose police fees for potential inspection, as well as fees for the use of public assets. Finally, it is clear that tourist taxes based on police power are constitutional because they meet legal requirements, according to repeated statements by the Federal Supreme Court.

Keywords: Environmental taxation; fees; tourism; environmental public policy.

RESUMO: Este artigo analisa os critérios jurídicos aplicáveis à tributação ambiental por meio de taxas turísticas destinadas à preservação ambiental, tendo em vista os numerosos questionamentos judiciais sobre a constitucionalidade da cobrança desse tributo com esse enfoque. A partir do método dedutivo, foram observadas características normativas inerentes ao gênero "taxas" para a avaliação dos critérios aplicáveis à instituição da espécie "taxas turísticas". O resultado dessa pesquisa apontou que a constitucionalidade das taxas turísticas está condicionada à adequação da hipótese de incidência com os critérios peculiares das duas espécies de taxa existentes no ordenamento jurídico brasileiro, sendo imprescindível para as taxas de polícia um agir estatal específico, mas facultativamente divisível, enquanto as taxas de serviço público necessitam de especificidade e divisibilidade na contraprestação estatal. Além disso, constatou-se a impossibilidade de instituição de taxas de polícia por fiscalização potencial, bem como de taxas por uso de bens públicos. Por fim, verificou-se que as taxas turísticas fundadas no poder de polícia são constitucionais por atenderem aos requisitos legais, conforme pronunciamentos reiterados do Supremo Tribunal Federal.

Palavras-chave: Tributação ambiental; taxas; turismo; políticas públicas ambientais.

1. INTRODUCTION

In a contemporary scenario, in which negative environmental impacts are becoming recurrent across the planet, various sectors, entities and nations come up with plans and strategies to mitigate the impacts of human action on the environment. In recent decades, national and international movements have gained strength with the aim of subsidizing sustainable development actions in an integrated manner.

In national territory, one of the inaugural legislative milestones towards a conciliatory vision between development and sustainability occurred through the publication of Law No. 6,938 in 1981, which deals with the National Environmental Policy and established important mechanisms for environmental preservation, such as the National Environmental System - SISNAMA and control and inspection tools for activities potentially harmful to the environment.

In this context, another salutary legislative milestone at the national level occurred with the promulgation of the Federal Constitution of 1988 (CF) which, among other provisions, imposed on public authorities and the community the duty to defend and preserve the environment for present and future generations, in accordance with art. 225.

Based on this premise, now constitutional, the institute of environmental taxation has revealed itself as a promising mechanism for containing human actions harmful to nature, or even as a way of encouraging those that leave a positive trace on the ecosystem.

For this reason, the imposition of environmental taxes under the heading of "tourism" or for "environmental preservation", especially at the municipal level, has become a frequent practice of tax administration. In several cases, a fee is charged for tourist access to certain regions, cities or locations (usually beaches).

The institution of this tax is often justified due to the large influx of tourists in certain regions, damaging the local ecosystem and bringing negative environmental externalities disproportionate to the number of native inhabitants. Thus, the basic idea is that such externalities must be mitigated or, at least, compensated monetarily to later be reversed in of the affected location through public environmental policies.

However, there are debates about the constitutionality of environmental taxation through "tourist" taxes, including the referral of the matter to the Federal Supreme Court (STF). This is because, in theory, in some cases, the hypotheses of incidence of the taxes mentioned would not meet the criteria established by national legislation.

Given the above, this research has as its central problem the following question: what are the legal requirements for the constitutionality of tourism taxes?

Seeking to answer the problem, the general objective of the article is to analyze the legal adequacy of the institution of taxes on tourism through a constitutional reading. From this perspective, the specific objectives are: i) to analyze the constitutional and infra-constitutional legislation on the topic; ii) verify the position of the Federal Supreme Court regarding the criteria for imposing tourism taxes and; iii) compare the legal criteria with those established by the jurisprudence of the Federal Supreme Court.

The primary hypotheses are that: i) the constitutionality of the institution of tourism taxes depends on the hypothesis of incidence linked to the type of tax and ii) there is a consolidated understanding by the Federal Supreme Court on the subject.

The methodology of this study is designed with a basic purpose, aiming to directly contribute to the understanding and improvement of legal practices related to tourism taxes and environmental preservation. Using a qualitative approach, the article proposes to carry out a descriptive analysis of legal criteria, with the intention of describing the existing legal characteristics and interpretations. The deductive method was used, adopting a logical

progression that starts from general premises to reach more specific conclusions (Pereira, 2016), such as the transition from the characteristics inherent to the taxes genre to the more focused analysis of tourism taxes.

Furthermore, the research is based on a comprehensive bibliographical review, which includes consulting books, scientific articles and doctrines, in addition to the analysis of relevant judgments. This review allows not only the identification of applicable standards and principles, but also reflection on the different interpretations and practical applications, enriching the academic debate and providing support for the actions of legal operators.

Furthermore, this research is justified by its academic and practical relevance, as it seeks to contribute to the social debate regarding forms of environmental preservation, while questioning the plausibility of doing so through the institution of tourism taxes, under the aegis of the Federal Constitution of 1988. Furthermore, this research aims to offer subsidies for the evaluation and improvement in the process of establishing this type of tax, considering its economic, social and environmental impacts in the location of the taxing entity, for taxpayers and for the environment.

Finally, the research was subdivided, in addition to the introduction and final considerations, into three sections. First, the main milestones of environmental taxation were briefly commented on, then the constitutional and infra-constitutional legislation on the subject was analyzed. And, finally, some judgments from the Federal Supreme Court were collated for the purpose of comparison and extraction of jurisprudential positions.

2. CONTEMPORARY MILESTONES IN ENVIRONMENTAL TAXATION AND THE ADVENT OF ENVIRONMENTAL TAXATION THROUGH FEES

Humanity for a long time sought only “development”, without worrying about the ecological consequences of its actions. The development agenda has been so petrified throughout history that, like Brazil, the national flag itself has carried the positivist motto “Order and Progress” since its proclamation (Oliveira et al., 2019).

However, since the last century, the world has witnessed a growing concern with environmental issues. The global scenario is currently marked by unprecedented international awareness about the adverse effects of human activities on the planet, driven by alarming scientific reports on climate change and biodiversity loss.

Under the analysis of German sociologist Ulrich Beck (1986), humanity lives in a Risk Society model, in which the main environmental threats come from human activity itself. For this reason, in recent decades, international events such as the Kyoto Protocol and the Earth Summit in Rio de Janeiro (ECO-92) have brought to light the urgency of concrete actions to mitigate the risks of environmental catastrophes.

Regarding this scenario, Peralta (2015) states that the model of contemporary economic development comes from the First Industrial Revolution, being obsolete due to neglecting environmental issues in its decision-making processes, even though the consequences are reversed to the detriment of humanity itself.

Such neglect can be seen in the dizzying growth of megacities like Shanghai and Mumbai, and the rampant consumption, evidenced by the global expansion of retail chains. This scenario has led to the unsustainable exploitation of natural resources, resulting in pollution, environmental degradation and an imminent ecological crisis, visible in disasters such as the Chernobyl explosion in 1986, the oil spill in the Gulf of Mexico in 2010 and the increasing deforestation of the Amazon.

Given the imminence, if not the beginning, of an environmental collapse, one of the inaugural milestones of international geopolitical mobilization was the Stockholm Conference

in 1972, organized by the United Nations (UN), representing the first coordinated effort to address environmental issues. on a global scale.

In Stockholm, representatives from different countries gathered with the aim of promoting human development policies and the preservation of natural resources. The conference resulted in the “Declaration on the Human Environment”, which established principles for the management of natural resources, aiming for their availability for future generations.

As early as 1987, the World Commission on Environment and Development, also under the auspices of the UN, published the Brundtland Report, also known as “Our Common Future”. This document was a pioneer in addressing the environmental impacts caused by human activity, such as biodiversity loss and ecological disasters, and introduced the concept of "sustainable development" - defined as development that meets the needs of the present without compromising the capabilities of future generations to meet their own needs.

It is undeniable that States, by virtue of their powers of empire, have the capacity to influence collective behavior in different ways, including in favor of sustainable development, if they so wish. However, the range of induction tools available to public administration is wide. For example, it is possible to implement educational measures in the curriculum of educational institutions, apply penalties to polluters or adopt different criteria to encourage actions with a positive environmental impact.

In this context, Farias et al. (2024), when analyzing the advances in Bidding Law 14,133/2021 in Brazil, they highlight some of the ways to promote public policies in favor of sustainable development. They emphasize that, even when contracting services or products, Brazilian public management must consider not only economic criteria, but also environmental impacts.

On the other hand, also observing the impacts of human action on the environment, British economist Arthur Pigou developed the Theory of Externalities. Pigou proposed an alternative form of state intervention in environmental issues: he argued that the government should correct negative externalities, such as pollution, through taxation. In this way, it would be possible to encourage beneficial activities and discourage those that are harmful to society as a whole (Tavares, 2012).

Regarding environmental consequences, Pigou pointed out as negative externalities those that create harmful effects on the community, such as industrial pollution, which negatively affects neighboring communities. For Pigou, when negative environmental externalities are found, state intervention through taxation must occur (Tavares, 2012).

The central idea defended by Pigou was to establish a balance between development and sustainability based on the identification of negative externalities. This policy was called Pigouvian taxation, and gave rise to the polluter-pays principle (Tristão, 2003).

Lima (2012, p. 14) expands this concept, explaining that, under this principle, “the polluting agent must bear the cost of pollution prevention and control measures adopted by the government to guarantee environmental balance”. Furthermore, the author argues that the polluter must not only be held responsible for repairing the damage caused, but must also incorporate the value of environmental protection measures into their production costs, thus promoting a more equitable distribution of costs between polluters and the society.

Thus, governments and international organizations, recognizing the urgent need to promote sustainable development and the green economy, saw environmental taxation as a strategic economic instrument to encourage environmental responsibility and discourage harmful practices. Therefore, environmental taxation emerges as a vital instrument in the management and preservation of natural resources, reflecting the growing global awareness of the importance of sustainability (Tristão, 2003).

In Brazil, the Federal Supreme Court, in 2022, reaffirmed the compatibility of Pigouvian taxation in the Brazilian legal system during the trial of Direct Unconstitutionality Action No. 4787/AP, asserting that:

> Environmental policies that create instruments that impose a surcharge on the use of natural resources, similar to what determines the "polluter/pays" principle, are legitimized from the perspective of an Economic Analysis of Law, in line with the so-called "Pigovian taxes (Brazil, 2022, p.7)

Pigouvian taxation also strengthens the conception of the extra-fiscal function of taxes, which transcends the objective of mere fundraising and is used as tools to promote environmental policies (Peralta, 2015). This may include manipulating tax rates, imposing or eliminating taxes, and allocating revenues to environmental initiatives.

The extra-fiscal function can be observed in several taxes, such as IPTU Verde or IPVA Ecológico, or even in contributions, such as CIDE combustibles. Tristão (2003, p. 73) also highlights that "Among the economic instruments used in public policies to combat pollution, taxes are, without a doubt, those that have been obtaining the best results [...]". However, when the specific aim of environmental protection is set and there is an interest in a linked state activity, tax options become more limited.

This restriction occurs due to several factors, in particular: i) due to the impossibility of linking certain taxes, such as taxes that are unlinked due to the Principle of Non-Affection, or Double Unlinking, preventing the immobilization of collection for certain purposes (Fiorillo, 2017); or ii) due to the predetermined link to the circumstance, purpose, or state activity that gives rise to its institution (Mazza, 2023) – as occurs with improvement contributions, compulsory loans and special contributions.

Thus, the possibility of environmental taxation through fees becomes exponentially attractive, considering, above all, two of the characteristics of this tax: i) legislative competence is common to all federative entities (Kfouri Júnior, 2018) and; ii) it is a tax doubly linked (to state action and to the funding of state activity) with a consideration nature (Machado Segundo, 2023).

Environmental taxes, often referred to as "green taxes", are essential to cover the costs of environmental agencies, but they vary depending on the triggering event that gave rise to them (Pimenta, 2019). The following topics will detail the nuances and possibilities for imposing environmental taxes.

Even so, regarding "tourist" or environmental preservation taxes due to the movement of tourists in a given location, the rationale for the institution is that the tourist flow generates environmental impacts that must be mitigated or compensated monetarily. These resources are then reverted to the benefit of the locality through public environmental policies, exemplifying tax extra-fiscality.

In a study on public policies carried out by Santiago, Melo and Costa (2020), on the south coast of Pernambuco, researchers observed that "One of the main obstacles to strengthening these public policies is disorganized tourism" (p. 28).

Therefore, monitoring tourist movement in certain regions is extremely necessary to preserve the local ecosystem. However, state action certainly demands additional public resources, which have sometimes been paid for through illegal tourism taxes.

3. REGULATORY CRITERIA FOR INSTITUTION OF TAXES ON TOURISM

The Federal Constitution, when opening the chapter of the National Tax System, in its art. 145, item II, discipline that all federated entities may impose fees: "due to the exercise of

police power or the use, effective or potential, of specific and divisible public services, provided to the taxpayer or made available to him" (Brazil, 1988, n.p.).

Very similar is the wording of article 77 of Law No. 5,172 of 1996 – National Tax Code (CTN):

> Art. 77. The fees charged by the Union, the States, the Federal District or the Municipalities, within the scope of their respective attributions, have as their triggering event the regular exercise of police power, or the actual or potential use of public service specific and divisible, provided to the taxpayer or made available to him. (Brazil, 1966, n.p.).

It should be noted that when it comes to competence, the CF defined it as common to all federated entities. Morais (2023) also highlights that fees follow the principle of predominance of interest, and there may also be cumulative competence when certain activities interest more than one federated entity simultaneously.

Furthermore, it is imperative to point out the central difference between the tax and tariff species. For Sabbag (2020), tax and tariff are distinguished depending on whether or not the activity belongs to the state function. In his words, it is necessary to verify "[...] whether the activity specifically carried out by the Public Power constitutes a public service or not" (Sabbag, 2020, p. 113). Therefore, as the service is of a public nature, there is a fee. In turn, the tariff will arise when there is no obstacle to the performance of the activity by individuals.

In short, the public service, necessarily provided by the Public Administration, occurs through fee remuneration, while services provided by private individuals, via tariff. It is also true that, while the fee is considered a tax because it originates from law, the tariff does not have this qualification, as it arises from an administrative contract.

The doctrine lists other differences between the institutes, however, the core of this work is much more about the criteria for each type of tax than the distinction above. For this reason, we will now address them, highlighting, finally, that the tariff is a type of public price, but that these two terms are often used as synonyms.

Regarding the types of fees, both standards (CF and CTN) present two possibilities: police fees and public service fees. The concept of police power, given by the CTN in its article 78, is the object of study by several scholars, as well as by some STF judges, being interpreted in different ways, but with a recurring correlation between police power and the activity supervision of public administration.

For Becho (2015, p. 245) "The police power, authorizing the collection of fees, is the supervisory state action, in a broad sense". In the same sense, but expanding the conceptual range, Mazza (2023, p. 92) states that "[...] police power unfolds in a trinomial consisting of the administrative activities of limiting, inspecting and sanctioning individuals in favor of the interest public". Likewise, Ferreira (2022, p. 91) points out that "The function of the police power is to monitor to prevent or coercively reprimand people who, in some way, undermine the public interest [...]".

In the jurisprudential scope, the STF has also associated the police power in several precedents with state inspection activity, as observed in the Direct Action of Unconstitutionality (ADI) number 5489-RJ of the year 2021: "[...] The competence common political-administrative for the protection of the environment legitimizes the creation of taxes in the form of fees to remunerate the inspection activities of the States." (Brazil, 2021), as well as in Extraordinary Appeal number 1160175 of 2019: "[...] The jurisprudence of the Federal Supreme Court has recognized the constitutionality of fees charged due to environmental control and inspection, as they are charged due to the regular exercise of police power (Brazil, 2019)".

Given this, considering the close relationship between the police fee and the supervisory activities of the public administration, Amaro (2023) states that the police fee can be charged in acts such as granting licenses, authorizations or permits, as they have a supervisory nature. of public power over the private.

Pimenta also exemplifies in a similar way, for the author:

> [...] to police fees, may cover the issuance of police acts of authorization, granting of a right, etc. [...] Ex.: inspection fees, licensing, granting of licenses for the installation of polluting activities (Pimenta, 2019, p. 205).

In summary, police fees may exist in the national legal system in different forms, but always related to the supervision carried out by the public administration over individuals with the aim of restricting practices that are harmful to the public interest.

Another pertinent observation pointed out by Fiorillo (2017), but which has doctrinal controversies, would be regarding the need for the police fee to be linked to a specific and divisible consideration. This interpretation originates from the second type of fee, since service fees undoubtedly require these characteristics by express normative provision.

Amaro argues that "Divisibility (present in the service fee) is not absent from the configuration of the aforementioned police fee, which also corresponds to an action by the State that is divisible and referable to the taxpayer" (Amaro, 2023, p. 23). However, in a joint syntactic-grammatical reading of articles 145, II of the CF and 77 of the CTN, it is clear that the legislator chose to attribute the qualification "specific" and "divisible" only to service fees. This is because, in both wordings, the conjunction "or" separates two hypotheses of incidence of the rate, indicating that they are alternative, non-cumulative and independent.

Furthermore, in the structuring of the provisions discussed here, the terms "specific" and "divisible" are positioned right after the compound noun "public service", in order to adjective them and form a nominal phrase that functions as a nominal complement of the nucleus "a use". Therefore, it appears that the legal wording, in both cases, did not require the characteristics of specificity and divisibility for the police fee.

However, one of the factors differentiating the "rates" genre for taxes is precisely the linking of that tax to a state activity directly related to the taxpayer (Mazza, 2023). Therefore, it would not be feasible, or even constitutional – due to the prohibition of the sole paragraph of art. 77 of the CTN and §2 of art. 145 of the CF – the conception of fees to fund uti universi services – understood as those that benefit the entire community, as these must be funded by taxes (Rosa Junior, 2024).

Therefore, in a teleological interpretation of police fees, it is possible to conclude that specificity needs to be imprinted on the public administration inspection act, since, if there is no specific reason to cause that state action, there would be no justification for the disbursement of an exclusive amount from an administrator. In the words of Luciana Pimenta (2015, p. 34) "I only pay fees when the State does something for me".

The doctrinal controversy regarding this topic is rooted in compliance with the principle of tax legality. This is because, although legislating on tax law is a concurrent competence, it is the Union's responsibility to dictate general rules, as provided for in article 97, item III of the CTN combined with art. 24, I and §1 of the CF. Therefore, the interference of a requirement not expressly provided for in the legislation raises questions about the constitutionality of this requirement.

Despite this, as argued here, the specificity of police fees is independent of legal provision as it is a characteristic of the taxa genre as a whole. It should be noted that the specificity is not only related to the generating event, but also regarding the State's action/compensation. To better understand this position, it will be exemplified with the following hypothetical situation:

A certain municipality, by means of ordinary law, intends to institute a police tax, with the triggering event being "breathing in public square in question, if the triggering event effectively results in state action or specific consideration, which in this case would be unlikely. In this sense, Schoueri asserts that: "In both cases [service or police tax], the tax is paid because someone caused a state expense" (Schoueri, 2023, p. 102).

It should be noted that this same hypothesis of incidence above could be attributed to another tax, such as tax, as its triggering event would be a situation independent of any specific state activity relating to the taxpayer (see article 16 of the CTN). This obligation for specific state action is one of the two links that the majority doctrine attributes to the tax. The second would be regarding the allocation of the revenue, which must be to fund the activity of the taxing entity (Mazza, 2023).

Therefore, what is argued here is that, although not expressly provided for in legal texts, the specificity of state action is an inherent characteristic of taxes of any kind. Furthermore, when this action by the public authorities is in favor of the taxpayer, it is commonly called consideration for the service fee, while if to the detriment of the taxpayer, to limit or restrict the right, simply state action resulting from the inspection of the police fee.

As previously mentioned, activities such as granting licenses, permits, authorizations, or acts of external surveillance and inspection, require individualized state activity, which generates additional costs and which, therefore, can be compensated through police fees, at the measure that are externalized in supervisory acts.

In the study in question, police fees for environmental purposes can be instituted due to the inspection of potentially polluting activities, whether commercial or even touristic. It is reasonable to understand that, for example, the movement of people to certain tourist locations (such as beaches) subjects the region to additional environmental impacts than would otherwise be the case.

Therefore, the specificity in the case of tourist inspection fees is noticeable, as state action is an "autonomous unit of intervention" (article 97, II of the CTN), after all, the public administration will need to move in a peculiar way due to an also specific generating fact - the "extra" urban movement.

It should be noted that, as it is a police fee, there is no need for a specific consideration in favor of the taxpayer, but rather for specific state action, even if limiting or restricting the rights of the person administered. Therefore, the fact that it is based on environmental preservation, which is a diffuse legal good, does not prevent the charging of police fees because there is specificity in state action - it is not just any environmental protection, but a specific protection generated by the movement tourist.

Another important caveat is that the legislation made it possible to collect a fee for the potential use of a certain service - that is, even if there is no actual use of a certain public service, the mere availability of this to the taxpayer would already give rise to the obligation to collect the fee - it is This is what happens, for example, with the garbage collection fee in several municipalities, because, even if the resident has their own solid waste disposal system, they will have to pay the fee (see Binding Summary 19 of the STF).

However, the attribute of potentiality was not expressly attributed to police taxes and, unlike what occurs with the specificity requirement, the possibility of state action being potential is not inherent to this tax type, therefore, following the literality of the norm, the act inspection needs to be effectively carried out, with there being no possibility of collection through "potential inspection" (Machado Segundo, 2018; Mazza, 2023).

Finally, regarding the unnecessary need for police fees to be divisible, it is first highlighted that the CTN attributes to this requirement the meaning of individual measurement of the cost/benefit that the state action/consideration had for the taxpayer. Thus, when thinking, for example, about the solid waste collection fee (service fee), it is possible to divide/predict

the cost of the service for each residence using different criteria (size of the property, number of residents, etc.).

Rosa Junior (2024) also highlights that the divisibility required for public service fees does not need to be determined with strict accuracy, according to the author "The law must maintain a reasonable, discreet or prudent proportionality between the cost of the service and the value of the fee charged" (Rosa Junior, 2024, p. 76).

On the other hand, when the hypotheses of incidence of the police tax are considered and the act of inspection is adopted as a form of externalization, it is clear that the cost generated by the inspection can almost always be apportioned proportionally to the number of taxpayers inspected, that is, will be divisible.

Thus, using the example of a commercial inspection fee, the State's cost (agents, monitoring tools, facilities, etc.) can be divided by the number of establishments existing in that location. Or, in the case of the tourist inspection fee, the State's cost can be measured and divided based on the estimated number of tourists entering the location. The premise is simple: the more subjects subject to surveillance, the greater the state's cost of surveillance.

In this sense, the Federal Supreme Court, in 2022, through Direct Unconstitutionality Action 4,787/AP, when analyzing the divisibility and calculation basis of an inspection fee based on police power, stated that:

> The basis for calculating police fees is not objectively ascertainable, but estimated based on reasonable criteria for measuring the cost of state activity, which must be apportioned among the taxpayers who operate the inspected segment (Brasil, 2022, p. 4).

A distinction is made here between the police fee for inspection, which will almost always be divisible, and the service fee, like the old public lighting fee, which was declared unconstitutional by the STF (binding summary 41) for being non-specific and indivisible, as that the consideration is not directed to a taxpayer and the share of each taxpayer's use of public lighting cannot be measured.

Even so, considering the possible hypothesis of the institution of a tax based on the indivisible police power, the same interpretation given to the principle of tax legality must be applied with regard to the impossibility of assigning a requirement not provided for by law and which is not inherent to the species tax studied. Therefore, state action linked to police power does not need to be divisible due to the absence of normative requirements.

Given these considerations, this topic of constitutional and infra-constitutional analysis concludes with the following fundamental statements divided into two blocks: a) general statements about taxes and b) specific statements about tourism taxes for the purpose of environmental preservation.

(a) General statements about fees: i) fees and tariffs differ depending on whether the service provided is public or private; ii) the CF and the CTN establish two types of fees: 1) police; and 2) public service; iii) no other type of tax can be instituted, due to the principle of tax legality; iv) the service fee must be specific and divisible under the terms of the CTN; v) the police fee is almost always externalized through supervisory acts by the establishing entity; vi) although it is not expressly provided for in the legislation, the police fee must be linked to a specific state action as it is an inherent characteristic of the "fees" genre.

(b) Specific statements about tourism taxes for the purpose of environmental preservation: vii) the tax resulting from tourist movement and based on the police power for inspection is specific, as it demands a peculiar action from the public administration; viii) monitoring of police fees needs to be effective and not merely potential; ix) inspection does not need to be divisible, although this characteristic can often be seen in police fees and x) any tourist tax arising from a public service will need to be specific and divisible.

4. POSITION OF THE FEDERAL SUPREME COURT REGARDING THE CONSTITUTIONALITY OF TOURIST TAXES

It is true that the peculiarities mentioned above generate doctrinal conflicts regarding the possibility of imposing tourism taxes for the purpose of environmental preservation. Likewise, in the last decade, several precedents were formed with favorable and unfavorable theses regarding the constitutionality of the tax institution of this tax.

It turns out that the Federal Supreme Court has not yet taken a binding position on the issue, although it has been constantly reinforcing the constitutionality of tourism or environmental preservation taxes when based on police power.

The distinction between the types of fees and their possibilities of institution is commented in detail in the monocratic decision of Minister Gilmar Mendes in Extraordinary Appeal number 795.463 in 2018:

> It appears, therefore, that the constitutional text differentiates the fees due to the exercise of police power from those resulting from the use of specific and divisible services, only allowing the latter to potentially provide the public service. Therefore, the regularity of the exercise of police power is essential for the collection of the fee. Although its essence of public service is undeniable, the exercise of police power has a unique characteristic, relevant to the field of tax law: it is exercised for the primary benefit of the community. [...] this Supreme Court admitted that the existence of an administrative body constitutes one of the elements demonstrating this requirement, which is not to be confused with admitting the potential exercise of police power." (Brazil, 2018, p.3).

The first point to be highlighted in the decision above revolves around the position of the Federal Supreme Court regarding the impossibility of police fees being derived from a potential activity, because, as presented in the previous topic, the potential was only made available for fees of public service, as worded in article 77 of the CTN and 142, item II of the CF. The minister also explained that the existence of administrative oversight bodies indicates the effectiveness of the exercise of police power.

Another relevant observation extracted from the above decision is about the recognition of police power as a public service, since in both cases there is the presence of state action, with the absence of individual consideration as a differentiating factor between the types of fees. in favor of the taxpayer.

Furthermore, other STF precedents emphasize that it will only be possible to impose environmental preservation fees based on police power. This is because service fees, as previously mentioned, cumulatively need specificity and divisibility, with the latter criterion not being present in the generating facts considered until now when called "environmental preservation fees" or "tourist fees".

It would be extremely difficult to develop a tax that is not based on police power and that is correlated to the entry of tourists into a given location without incurring fees for the use of public goods, which are prohibited in the national tax system due to the lack of legislative authorization. (Pimenta, L., 2019).

The STF's jurisprudence is peaceful regarding the possibility of creating tourism taxes based on police power. In this sense, an excerpt from Minister Edson Fachin's decision in the Extraordinary Appeal with Appeal number 1,308,644 of the year 2021 stands out:

> I highlight that the jurisprudence of the Federal Supreme Court was established to recognize the constitutionality of fees charged for

> environmental control and preservation, due to the regular exercise of police power (Brasil, 2021, p. 2).

Minister Ricardo Lewandowski stated in a similar way in Extraordinary Appeal 738.944/MG in 2014:

> The jurisprudence of the Federal Supreme Court has recognized the constitutionality of fees charged for environmental control and inspection, as they are charged for the regular exercise of police power (Brazil, 2014, p.1).

On the other hand, some courts, such as the TJBA, take a stand against the constitutionality of tourist taxes because they understand that under any modality (police or service) the taxes need divisibility and specificity.

In this sense, the Bahian Court unanimously in 2016 in the Direct Unconstitutionality Action number 00019460720148050000, when deciding on the constitutionality of the fee established in the municipality of Cairu for the entry of tourists into the village of Morro de São Paulo, handed down the following ruling:

> It is common knowledge that the tax type of tax, whether for the exercise of police power or for the provision of public services, has, as a legitimizing element, the character of retribution for a "divisible" or "specific" state action. [...]
> This is not the case with the Environmental Preservation Fee of the questioned Complementary Law, No. 387, of December 27, 2012, of the Municipality of Cairu, which, in accordance with its arts. 1st and 2nd, make it clear that its purpose is the "preservation of the environment", a legal asset of an essentially diffuse nature, as it is not related to any specific holder, but to everyone in general.
> Court of Justice that has previously ruled on the unconstitutionality of the so-called "Tourism Tax" of the Municipality of Cairu, in the Direct Unconstitutionality Action No. 0012740-29.2010.8.05.0000 [...], this action is deemed valid, to declare the unconstitutionality of arts. 1st, 2nd, 3rd and 4th of Complementary Law No. 387, of December 27, 2012, of the Municipality of Cairu, and, by extension, of the other articles of the aforementioned law (Bahia, 2016, p. 4).

In the previous topic of this article, it was demonstrated that specificity is an inherent characteristic of the "fees" genre, although not expressly provided for by the constitutional norm, while divisibility was semantically attributed only to service fees and cannot be required due to the principle of tax legality, so that the institution of a hypothesis of incidence based on police power can be indivisible, but not unspecific.

In view of this, Luciana Pimenta (2019) states that the key point for evaluating the constitutionality of a given tax is the hypothesis of the incidence of the tax in the respective law. Thus, if a "tourist" tax is instituted under the public service modality, divisibility and specificity need to be present, while if it is backed by police power, only the specificity of the consideration needs to be observed due to the inherent nature of the taxes.

In the case of the Environmental Preservation Tax of the municipality of Cairu, founded on the police power, Complementary Law nº 387, of December 27, 2012 defined as a triggering event the "[...] supervision of the use, access and enjoyment of environmental heritage and ecological environment of the Morro de São Paulo District resulting from the traffic and/or stay of visitors" (Cairu, 2012, art. 2º, n.p).

The Court of Justice of Bahia understood that the municipality's consideration was not specific, as it was about preserving the environment and there would be no individual benefit to the taxpayer, but rather a diffuse benefit to the community. It is noted that the court conceives specificity along the lines of the service fee, which requires a specific consideration in favor of the taxpayer.

However, as highlighted in the previous topic, and noticeable in the definition of article 88 of the CTN, the police power aims to restrict or limit rights, so that there would hardly be a benefit for the administrator who committed the triggering event. The Federal Supreme Court, through ADI 4.787/AP, reported by Minister Luiz Fux, took a position precisely with this understanding: "The fee required for the regular exercise of police power imposes on the individual the financing of the state activity that limits him rights, but which benefits the entire community." (Brazil, 2022, p. 3).

Thus, what must be attributed specificity to the police tax is the movement of the public administration, there must be specific state action as a result of the triggering event. Although the fee in question is justified in favor of environmental preservation, which is a diffuse legal good, there is no obstacle to charging police fees, since there is specificity in state action. The public administration will have to, in proportion to the number of tourists entering the region, spend more resources to promote environmental preservation.

Environmental maintenance, even if diffuse in nature, can be taxed when it becomes excessively costly due to a specific event, such as tourist activity or the installation of potentially polluting commercial activities in a given location. This understanding regarding the compensatory function of fees due to state costs can be observed in another section of ADI 4,787/AP, judged in 2022:

> [...] the amount required must be sufficient to cover inspection costs, but also contribute to the absence or mitigation of damage to the community.
> 16. The basis for calculating police fees is not objectively ascertainable, but estimated based on reasonable criteria for measuring the cost of state activity, which must be apportioned among the taxpayers who operate the inspected segment. For budgetary purposes, there must be a minimum planning in relation to state expenses, in which the same planning is required for the purposes of establishing the basis for calculating a fee that aims to fund the administrative police activity of the State (Brasil, 2022, p .4).

In the same sense, the ruling handed down in Direct Unconstitutionality Action 4785/MG, reported by Minister Edson Fachin, also judged in 2022:

> Therefore, it is a tax type governed by the ideal of commutativity or referability, so that the taxpayer must bear the burden of the tax burden in terms proportional to the inspection to which he or she is subjected or to the public services made available for his or her enjoyment. (Brazil, 2022, p. 2).

Therefore, it is concluded that the position of the Federal Supreme Court is congruent with the legal criteria of the CTN and CF regarding the creation of tourist taxes for the purpose of environmental preservation, as it conditions the institution of the tax to the species founded on power of police, and as long as there is specific state action with effective provision of supervision over the tourist conglomerate in the region.

Finally, in a peculiar way, there is a recent case of the institution of a tourist tariff in the municipality of Maraú-Bahia for the entry of tourists into the village of Barra Grande: Municipal Law nº 202/2021 of June 23, 2021, defined as a generating fact the "[...] use and enjoyment of the Historical, Cultural, Environmental and Structural Heritage maintained by the Municipality [...]" (art. 3, Maraú, 2021).

As demonstrated in the previous topic, Brazilian legislation allowed the creation of only two types of fees, those arising from the police power and those from public services, with no space for the institution of fees for the use of public goods. In this sense, Pimenta L. asserts that: “Finally, regarding fees for the use of environmental goods, they are prohibited among us.” (2019, p. 205).

However, it is observed that the municipal law established a tariff and not a fee, so the legal criteria observed in this article would not be applicable as it is not a tax, unless it is demonstrated that it is impossible to delegate the service offered to the individual. In any case, the tariff for the municipality of Maraú has not yet been submitted for consideration by the judiciary, as its demand began in January 2024 and those entitled to propose a Direct Action of Unconstitutionality have not expressed interest in exercising the right of action. Any individual judicialization with an incidental discussion of constitutionality would generate inter parte effects.

Even so, in the municipality of Poconé in Mato Grosso, a tourist tax with a similar incidence to that of Maraú in Bahia was established through Municipal Law 1,869/2017. The standard defined as a triggering event “the use, effective or potential, of the implemented physical infrastructure and access to the natural and historical heritage of the Municipality of Poconé in areas and places of tourist interest [...]” (Poconé-MT, 2017, art. 2, p. 1). Furthermore, paragraph 1 of article 2 added that the use could be effective or potential of municipal infrastructure.

In view of this, the Court of Justice of Mato Grosso ruled that the fee was illegal, based on the lack of evidence of a public service provided to the taxpayer (Interlocutory Appeal 10129533520198110000, 2021). Although the ruling was issued in a preliminary injunction, the reasoning refers to the idea of the impossibility of imposing fees for the mere use of public assets, without specific state compensation, whether through public service or effective supervision.

5. FINAL CONSIDERATIONS

In this study it was possible to analyze and discuss aspects related to environmental taxation and the way tourism taxes are applied for environmental protection purposes. From this, we sought to establish how this taxation seeks to mitigate the impact of human action on the environment and whether the application of such taxes is done properly.

The article begins by highlighting the main legislative milestones regarding the growing environmental degradation seen in the 20th and 21st centuries. Some of the important events that were mentioned: Kyoto Protocol and the Earth Summit in Rio de Janeiro (ECO-92); Stockholm Conference in 1972 and the Brundtland Report (Our Common Future), which aimed to discuss the implementation of a conciliatory vision between development and sustainability, seeking to preserve natural resources in the face of the degradation of the global ecosystem.

Furthermore, the extra-fiscal function of “tourist” taxes was addressed as a mechanism for environmental preservation from the perspective of Pigouvian taxation, as the institution of these taxes has been occurring with the aim of controlling the impacts caused by people (tourists) when entering certain locations, charging amounts due to this urban movement and which, subsequently, must be reverted in favor of the location through public environmental policies.

Next, the article was dedicated to examining the normative aspects of the tourism tax/tariff, starting with the differentiation of both, moving on to explaining the legal requirements of the types of existing taxes - police and public service. It was also highlighted that police fees differ from public service fees due to the “divisibility” attribute being dispensed

with, requiring only "specificity" for those based on police power, even if not expressly required by the CTN and CF, considering that this is a requirement inherent to the type of fees.

Furthermore, it was pointed out that police fees cannot be instituted in view of the potential provision of supervision, considering that the legislation did not make this characteristic possible for the species. In relation to tourist taxes based on police power, it has been demonstrated that they are given specificity as they require a peculiar state action from the public administration, even if to the detriment of the taxpayer, with a specific consideration being required only for public service fees.

Finally, when comparing the normative precepts with the position of the Federal Supreme Court, the congruence of the judiciary was verified, considering that it authorizes the institution of the tax under the type based on the police power, and as long as there is an action specific state-owned company with effective provision of supervision under the tourist conglomerate in the region.

Furthermore, it was clarified that there is no legality in imposing tourist taxes that do not comply with the requirements inherent to the only two types authorized by legislation (police or public servant taxes). Therefore, the creation of taxes on tourist movement that adopt the use of public goods as a generating fact tends to be unconstitutional.

In any case, tourist taxes, when correctly instituted, prove to be a viable legislative instrument for promoting environmental preservation through the linking of tax revenue to public environmental policies that mitigate the environmental impact in the region affected by the entry of tourists without, however, give up the exploration of this economic activity.

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