


Control of revenue waiver by the Federal Court of auditors in the light of the principle of effectiveness

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ABSTRACT

Revenue waivers, or tax expenditures, are as old as taxation itself. The objective is to carry out a theoretical debate on the control of revenue waiver by the Courts of Auditors in the light of the principle of effectiveness. For this, a bibliographic study was carried out in order to understand the different theoretical dialogues of the authors who deal with the theme in question. For this, articles, books, thesis, dissertations, in the databases of Google Scholar, SciELO, CAPES thesis and dissertation database and the TCU platform were consulted. Revenue waiver is the act in which the public manager grants incentives or benefits of a tax, financial and credit nature to citizens. Since the waiver of revenue is justified by the intention to move the action of the agents who choose to adopt this or that conduct, taking into account, among other factors, the reduction of the tax burden that would normally be imposed on them, the efficiency of the tax policy depends on the capacity of the measure to, in practice, induce the behavior of individuals. It is concluded that despite the benefits reaped by the rulers, they must observe that the act of renouncing revenues must be accompanied by the compensatory legal measures provided for this purpose, under penalty of such act not being validated by the national legal system.

Keywords: Courts of Auditors, Resignation, Revenue, Principle of effectiveness.

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INTRODUCTION²

The State uses taxation to collect the necessary resources for activities of public interest. In this sense, taxation can also represent a fundamental instrument for the promotion of other actions, through norms that have different functions parallel to collection, such as the inductive function, which aims to provoke certain behaviors as a response to impulses conveyed by the norm itself, which will directly influence the economic and social order. called extra-taxation (Souza, 2020).

Taxation is, therefore, a means of implementing economic and social policy or granting a tax benefit to an individual. The so-called indirect tax expenditures define the extra-fiscal tax rules that are introduced to grant exemption or reduction of the tax burden levied on a specific sector of the economy with the purpose of achieving economic policy. In other words, indirect tax expenditures are justified by revenue waivers (Queiroz, 2019).

Thus, governments apply public resources basically according to two major aspects: public expenditure, which represents the most well-known way of using the revenues earned, and the renunciation of revenue, which is characterized, in essence, by the intentional refusal of the government to exercise its collection power (Mendes, 2012).

Revenue waivers, or tax expenditures, are as old as taxation itself. However, the Brazilian legislation, from a normative point of view, has not established a concept for tax benefit or revenue waiver. For the purposes of law enforcement, the rule that came closest to this topic was the Fiscal Responsibility Law (Complementary Law 101/2000), which presents in paragraph 1 of article 14 an exemplifying list of items that are considered as revenue waivers (Oliveira, 2020).

In this sense, the waiver of revenue can be understood both as a remission of subsidy, amnesty, and exemption from credit, as well as a change in the tax rate or modification in the calculation basis – which generates a reduction in fees and contributions. When applied responsibly, revenue waivers can be considered a public policy (Nóbrega; Figuerêdo, 2002; Oliveira, 2020).

In addition, the Federal Court of Auditors will be able to verify whether the revenue waiver has achieved its purpose, which is to achieve a social benefit, in general, if the volume of revenue actually waived at the end of the period corresponds to the projected volume and if this amount compromises public accounts (Mendes, 2012; Souza, 2020).

The Federal Court of Accounts was created in 1891, during the Republic, so it has more than a century of existence. This institution, due to federative symmetry, was initially designed to monitor the budget execution carried out by public managers (Grosser, 2019).

Thus, renouncing revenue linked to federal taxes is a competence of the Union that can only be exercised through constitutional or legal provisions, and the basis on infra-legal norms is

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prohibited. The other political entities competent to institute taxes (states and municipalities) also have the legitimacy to renounce revenues arising from their own tax impositions, but this type of waiver is not the object of this work, which will be limited to the federal sphere (Almeida, 2001).

Considering the importance of the subject in question, which is also addressed throughout the Brazilian legal framework: constitutional, legal and infra-legal, it is evident the need for studies as a way to offer new possibilities of information in this area. It is also essential to mention that the Federal Constitution of 1988, in its articles 70 and 165, § 6, establishes control over revenue waivers, with the clear objective of promoting the financial balance of the union, states and municipalities (Almeida, 2001; Oliveira, 2020).

In the case of legal norms, effectiveness consists in the ability to achieve the objectives expressed therein, which ultimately become the realization of the legal dictates intended by the legislator. That is why it is said that the legal effectiveness of the norm designates the quality of producing, to a greater or lesser extent, legal effects, by regulating, from the outset, the situations, relationships and behaviors that it envisages. In this sense, effectiveness refers to the applicability, enforceability or enforceability of the rule, as a possibility of its legal application (TCU, 2019).

In this sense, the effectiveness can be technical, social or legal. Technical effectiveness refers to legislative technique, i.e. when one standard depends on another to be applied or when certain equipment is required. In the event that the additional standard is missing or the equipment does not exist, the standard lacks technical effectiveness. Social efficacy or effectiveness refers to the production of the consequences desired by the elaborator of the norms, which is verified when the conduct contained in the prescriptions of the norm is complied with by the addressee. As for legal effectiveness, this is the property of the legal fact of causing the intended effects in the prescriptions of the norm, that is, if the fact described in the hypothesis of the norm occurs, the effects cannot fail to occur automatically and infallibly (at least in terms of language) (TCU, 2019).

However, it is worth mentioning that the effectiveness of a standard may suffer limitations or even depend on another standard to be realized. This is the case of rules of limited effectiveness, which, despite erecting a provision for conduct, assert that a certain concept or factor will be dictated by a complementary rule, or under the terms of the law, when the law has not yet been enacted (TCU, 2019).

In view of the contextualization of the theme presented so far, the discussions carried out in this article aim to seek a theoretical debate on the control of revenue waiver by the Federal Court of Accounts in the light of the principle of effectiveness.

For this reason, the article was prepared using a bibliographic study in order to understand the different theoretical dialogues of the authors who deal with the theme in question, consulting articles,



books, thesis, dissertations, in the databases of Google Scholar, SciELO, CAPES thesis and dissertation database and the TCU platform.

The syntheses of the studies that were read in full are available in the discussion below, highlighting the most relevant points that are consistent with the proposed objective of this study.

COURT OF AUDITORS OF THE UNION: CONCEPTS AND LEGAL SYSTEMS

The Federal Court of Accounts is the external control body of the federal government and assists the National Congress in the mission of monitoring the country's budgetary and financial execution and contributing to the improvement of Public Administration for the benefit of society. To this end, it aims to be a reference in the promotion of an effective, ethical, agile and responsible Public Administration (Brasil, 2016).

The Court of Auditors is responsible for the accounting, financial, budgetary, operational and patrimonial supervision of the country's public bodies and entities regarding legality, legitimacy and economy. In addition to the constitutional and exclusive competences of the TCU, article 71 of the CF/88, in turn, establishes the role of the Federal Court of Accounts as an auxiliary body of the National Congress with regard to the function of external control, whose inspection activities cover, in the words of Law 8,443/92 (article 1, § 1), revenue waivers (Brazil, 2016).

Revenue waiver is the act in which the public manager grants incentives or benefits of a tax, financial and credit nature to citizens. The first refers to indirect government expenditures resulting from the tax system itself (Brasil, 2021).

Regarding the concept of revenue waiver, Nóbrega and Figueiredo (2002) state that:

To renounce revenue is to stop receiving amounts that could be used to carry out expenses aimed at various rights and the implementation of public policies, hence the need to be limited, so that they are carried out only when necessary in the public interest. Article 14, § 1 of the Fiscal Responsibility Law lists the modalities of revenue waivers, namely, amnesty, remission, subsidy, presumed credit, exemption on a non-general basis, change in the tax rate or modification in the calculation basis that generates a discriminated reduction of taxes and contributions, in addition to other benefits that correspond to differentiated treatment. It is understood that the list present in article 14, § 1 is only illustrative, since any differential treatment resulting from a benefit is also considered a waiver of revenue, as it may affect the balance between revenues and expenses (Nóbrega; Figueiredo, 2002, p. 40).

Still on this subject, the TCU states that:

The waivers of tax revenues constitute a relevant portion of public resources allocated to meet economic and social objectives, either by encouraging economic sectors or geographic regions, or by compensating taxpayers in the face of insufficient state action. As it is a source of funding for public policies, like the budget, it deserves due attention from the Legislative Branch regarding its correct allocation and application (TCU, 2021, p. 4).

Thus, a piece of information that is always important to mention is the fact that, when the revenue waiver is applied responsibly, it is considered public policy. Revenue waiver is an



instrument that has been applied in several countries as a way to improve the economy through tax incentives (Nascimento, 2012). In this direction:

[...] instruments available to the Government to promote the development of the economy and enable the increase of jobs in a certain area of the territory where they are applied. They imply a reduction in the amount owed by the taxpayer who has the status of beneficiary, through exemption, amnesty, remission and other concessions allowed by law (Nascimento, 2012, p.115).

So, as a way to ensure the generation of more jobs, and consequently improve the economy, tax incentives are granted from the renunciation of revenues. However, such benefits are often suspected that the expenses are not satisfactorily justified, which compromises revenue management (Queiroz, 2019).

The waiver of revenue is, therefore, a mechanism that stimulates economic behaviors aimed at social interests, not representing a threat to public finances. On the contrary, when applied responsibly, it is positive, however, its indiscriminate and impersonal concession can be harmful to the public coffers and public purposes. The damages resulting from indiscriminate concessions of tax incentives were recurrent in Brazil in the 90s with the so-called tax war, with the lack of cooperativism among the entities of the Federation, mainly States and Municipalities, which, through horizontal competition, sought resources, encouraging the installation of industries in their territories, based mainly on the granting of tax benefits (Nóbrega; Figuerêdo, 2002, p. 28-29).

THE CONTROL OF REVENUE WAIVERS BY THE FEDERAL COURT OF ACCOUNTS

Since the waiver of revenue is justified by the intention to move the actions of the agents who choose to adopt this or that conduct, taking into account, among other factors, the reduction of the tax burden that would normally be imposed on them, the efficiency of the tax policy depends on the capacity of the measure to, in practice, induce the behavior of individuals (Queiroz, 2019).

Another issue to be highlighted concerns the absence of prior evaluation when creating or extending tax benefits, with the objective of analyzing the best format for public policy, considering the defined objectives, the administrative and regulatory structure available and the cost to society. In other words, in general, *no ex ante evaluation is carried out* to verify whether it would be more appropriate to promote public intervention through the public budget or via tax waivers (Oliveira, 2020). Moraes et al (2024, p. 9) define that "the public budget reflects the priorities and political options of government officials towards the various agents existing in the political community".

Recently, the TCU responded in Ruling 2692/2021 to a query formulated by the Federal Senate on the rules of the Fiscal Responsibility Law regarding the waiver of revenue and its effects on the Annual Budget Law (TCU, 2021).

Basically, in item 9.3.1 of the ruling, it clarifies that, if the waiver is instituted based on item I of article 14 of the Fiscal Responsibility Law (as provided for in the LOA and without affecting the fiscal targets established in this law), the offset of item II is only dispensable if the budgetary-



financial effects of the waiver occur as of the exercise of the LOA. For example, if a waiver is created in year X1, whose budgetary-financial impacts were considered in the LOA of year X2 and do not impact the fiscal targets of year X2, X3, X4, etc., such waiver does not need to be offset. Item 9.3.2 of this judgment states that, once it is proven that the waiver was considered in the LOA and that it will not affect the fiscal result targets, no compensation measures are required (TCU, 2021).

Taking into account only the year 2020 in Brazil, there are 120 items of tax expenditures in force, that is, more comprehensively, there are several tax expenditure mechanisms in the Brazilian context. Thus, public policies financed through tax waivers that aim to meet economic, social or regional development objectives. Examples of these policies are: the incentive to research, development and innovation, created by Law 8.248/1991, known as the Information Technology Law; the National Program for Cultural Support (Pronac), object of Law 8.313/1991, known as the Rouanet Law; University for All Program (Prouni), created by Law 11.096/2005; and the certification of charitable social assistance entities (Cebas), regulated by Law 12,101/2009 (Oliveira, 2020).

However, in the case of revenue waivers, the Government no longer receives certain amounts to which it would be entitled. If, on the one hand, such a measure can be justified for reasons of specific public policies, there is no denying, on the other hand, that such waiver implies, at first, a limitation of the State's financial capacity to meet other demands of society arising from the need to satisfy other rights (Oliveira, 2020).

Regarding the effectiveness of the rule specifically, Law 13,606/2018 provides the following express provision:

Art. 38. The Federal Executive Branch, with a view to complying with the provisions of item II of the *caput* of article 5 and article 14 of Complementary Law No. 101, of May 4, 2000 (Fiscal Responsibility Law), shall estimate the amount of the tax waiver and the costs arising from the provisions of item II of the *caput* of article 2. in item II of the *caput* of article 3, and in arts. 14, 15, 18, 19, from 20 to 24, from 26 to 28, from 30 to 33 and 36 of this Law, shall include them in the statement that accompanies the annual budget bill, pursuant to paragraph 6 of article 165 of the Federal Constitution, and shall include in the subsequent budget proposals the amounts related to said waiver (TCU, 2020).
Sole paragraph. The benefits contained in item II of the *caput* of article 2, item II of the *caput* of article 3 and arts. 14, 15, 18, 19, from 20 to 24, from 26 to 28, from 30 to 33 and 36 of this Law will only be granted if the provisions of the *caput* of this article are met, including the demonstration by the Federal Executive Branch that the waiver was considered in the revenue estimate of the annual budget law, in the manner established in article 12 of Complementary Law No. 101, of May 4, 2000 (Fiscal Responsibility Law), and that it will not affect the fiscal result targets provided for in the annex to the budget guidelines law (TCU, 2020).

The control of revenue waivers is a major challenge for the recovery of fiscal stability, assuming an increasing trajectory in relation to GDP from 2006 onwards, reaching levels above 4% of GDP from 2014 onwards. The analysis of the compliance of the institution or expansion of tax revenue waivers considers the provisions of article 14 of Complementary Law No. 101/2000 (TCU,



2020).

Article 150, § 6, of the Federal Constitution requires that revenue waivers be granted only by a specific law that exclusively regulates the matter or the respective tax. At the same time, article 113 of the ADCT requires that the legislative proposal that creates or alters revenue waivers must be accompanied by an estimate of its budgetary and financial impact. In the same vein, article 14 of the LRF establishes that the granting or expansion of a tax benefit must be accompanied by an estimate of the budgetary-financial impact in the year in which it begins to take effect and in the two following years and must comply with the provisions of the Budget Guidelines Law (LDO) (TCU, 2020).

In addition, it requires the demonstration that the waiver has been considered in the revenue estimate and that it will not affect the fiscal targets provided for in the LDO or, alternatively, the indication of compensation measures, in the form of an increase in revenue from the increase in rates, expansion of the calculation basis, increase or creation of a tax or contribution (TCU, 2020).

Federal revenue waivers in 2017 reached the projected amount of R\$362.9 billion, which corresponds to 31.4% of net primary revenue and 5.5% of GDP. Of this amount, R\$278.7 billion refers to tax benefits (4.3% of GDP) and R\$84.2 billion to financial and credit benefits (TCU, 2018).

In 2018, total benefits reached the projected amount of R\$314.2 billion, corresponding to 25.6% of net primary revenue and 4.6% of GDP. There were R\$ 292.8 billion in tax benefits (4.3% of GDP) and almost R\$ 21.4 billion in financial and credit benefits (TCU, 2019).

Regarding the regionalization of federal revenue waivers in 2018, the figures show that the distribution followed the same pattern as in previous years, with the highest participation in the Southeast region, with 48.7% of the total waivers in 2018, while the Midwest region had the lowest participation, in the percentage of 10.0%, as shown in the following table (TCU, 2019).

Also referring to the year 2018, tax exemptions were instituted, whose estimated impact on collection, according to the calculation of the Federal Revenue Service of Brazil (RFB), reached the amount of R\$ 4.2 billion. The estimates for the waivers to be instituted in the coming years are: R\$ 10.4 billion in 2019, R\$ 10.0 billion in 2020 and R\$ 5.3 billion in 2021 (TCU, 2019).

In 2019, federal revenue waivers reached the projected amount of R\$348.4 billion, which corresponds to 25.9% of net primary revenue and 4.8% of GDP, of which R\$308.4 billion in tax benefits and R\$40 billion in financial and credit benefits. Regarding the regionalization of federal revenue waivers in 2019, there was a greater participation of the Southeast Region, which accounted for 48.7% of the total waivers, while the North and Midwest Regions had the lowest participation in the total benefits, with a percentage of 11.2% each (TCU, 2021).

Federal revenue waivers reached the projected amount of R\$343.2 billion in 2020, which corresponds to 28.5% of net primary revenue and 4.6% of GDP, of which: R\$317.2 billion in tax



benefits and R\$26 billion in financial and credit benefits. Regarding the regionalization of federal revenue waivers in 2020, there was a greater participation of the Southeast region, which accounted for 48.7% of the total waivers, while the Midwest region had the lowest participation in the total benefits, with a percentage of 10.2% (TCU, 2021).

The per capita distribution of tax benefits indicates a low impact of revenue waivers on the reduction of regional and social disparities, or even a negative impact, accentuating them. This can be attributed, essentially, to the mechanism of generating tax waivers, usually associated with production and income, resulting in a lower participation of economically less developed regions. Thus, this system is not in line with the purpose of reducing regional and social inequalities, established both as a fundamental objective of the Republic and as a principle of the economic order, as provided for in arts. 3rd, item III, and 170, item VII, of the Federal Constitution (TCU, 2021).

It should be noted that regarding the granting and expansion of revenue waivers instituted with a view to confronting the pandemic, the validity of the measures is restricted to the duration of the state of calamity (TCU, 2021).

FINAL THOUGHTS

It was possible to observe during the course of the theme that the renunciation of revenues has as its main purpose the promotion of the economic and social development of certain areas and activities where it is implemented.

Through this mechanism, governments encourage the creation of new companies, or expand existing ones, increasing the supply of jobs and the *per capita* income of the population, in order to reduce social inequalities, relieving the low-income population.

Its purpose is to promote and provide a financial basis for the realization of programs, projects and activities of interest to society, aimed at promoting the balance of socioeconomic development in the different geoeconomic regions of the country, the development of strategic economic segments and the favoring of certain groups of taxpayers, among other relevant public objectives.

Thus, the act of renouncing public revenue is, in essence, a government policy like all others implemented with the objective of performing the functions inherent to the political entities that constitute the different spheres of government, whether federal, state or municipal.

Despite the benefits reaped by the rulers, they must observe that the act of renouncing revenues must be accompanied by the compensatory legal measures provided for this purpose, under penalty of such act not being validated by the national legal system.

Although the TCU has analyzed the measures adopted for revenue waivers, it has not evaluated their effectiveness in the face of the budgetary and financial impact.



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