

Public tax policies and inductive tax rules

Políticas públicas tributárias e normas tributárias indutoras

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DOI: [10.22478/ufpb.2525-5584.2023v8n2.67361]

Recebido em: 17/07/2023
Aprovado em: 13/09/2023

Abstract: Public tax policies (PPT) promote inductive tax standards (NTI), aiming to achieve State objectives and promote tax justice by inducing behaviors. And NTIs, species of the extrafiscal genre, present themselves as forms of intervention in the social and economic domain. The delimitation of the study, in taxes, is based on the principles of equality, contributory capacity, proportionality and essentiality; and analyzes the promotion of PPTs using NTIs as a means. It is in this context that the question emerges: What is the constitutional basis and the relationship between PPTs and NTIs? And as an objective, it proposes to know the fundamentals and identify their points of equivalence. The qualitative methodology is carried out based on document analysis and literature review. The investigation revealed that amid the double limitations – tax and economic – of NTIs, equality and contributory capacity lose intensity, but are not completely removed, seeking compatibility, as extra-fiscality presupposes taxation, and the tax can be used as an instrument for achieving public purposes, not only linked to fundraising, through the promotion of PPTs defined based on a public problem, demonstrating the relationship between PPTs and NTIs.

Keywords: Extrafiscality; Inducing tax rules; Tax public policies.

Resumo: As políticas públicas tributárias (PPT) promovem normas tributárias indutoras (NTI), visando concretizar objetivos do Estado e promover justiça fiscal pela indução de comportamentos. E as NTIs, espécies do gênero extrafiscal, apresentam-se como formas de intervenção sobre o domínio social e econômico. A delimitação do estudo, nos impostos, tem como base os princípios da isonomia, capacidade contributiva, proporcionalidade e essencialidade; e analisa a promoção de PPTs tendo como meio as NTIs. É nesse contexto que emerge a questão: Qual a fundamentação constitucional e a relação entre as PPTs e as NTIs? E como objetivo, se propõe a conhecer os fundamentos e identificar seus pontos de equivalência. A metodologia qualitativa é realizada a partir da análise de documentos e revisão de literatura. A investigação revelou que em meio à

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dupla limitação – tributária e econômica – das NTIs, a isonomia e a capacidade contributiva perdem intensidade, mas não são por completo afastadas, buscando a compatibilização, pois a extrafiscalidade pressupõe a fiscalidade, e o tributo pode ser usado como instrumento para a realização de finalidades públicas, não só vinculadas à arrecadação, por meio da promoção de PPTs definidas a partir de um problema público, demonstrando a relação entre as PPTs e as NTIs. [Texto em LS, 12 pts, justificado e espaçamento simples.

Palavras-chave: Extrafiscalidade; Normas tributárias indutoras; políticas públicas tributárias.

1. Initial Considerations

Law is an instrument for achieving the goals pursued by the State, and this instrumental vision brings it closer to the idea of regulating social life, being present in the different areas of collective and individual life, including public tax policies. By establishing them, oriented and designed to solve a public problem, the State is using means that aim to achieve constitutional objectives and promote fiscal justice, inducing behavior to achieve the State's purpose in the public interest. This gives rise to inductive tax rules, which, in the context of taxes, have a collection function and a tax justice function (Schoueri, 2005).

Inductive tax rules are presented as rules that aim to induce taxpayer behavior, as in the case of the Rural Property Tax (RPT) exemption for those who preserve green areas, and/or as a means of promoting health, when, through the taxes levied, they induce lower consumption, such as the Tax on Industrialized Products (TIP) and on the Circulation of Goods and Services (CGS), by imposing rates according to the essentiality of the products and services, being higher for those that are superfluous (alcoholic beverages, perfumes, etc.) and lower for those considered more essential.) and lower for those considered more essential (food and medicines).

In the end, the realization of the State's purpose – attributed to the convenience and opportunity of the Public Administration – is achieved through the promotion of final public policies – end-activity policies – which are aimed at society; and public tax policies, which are also end-activity policies, but which promote the institution of inductive tax rules; or they can also contribute to revenue, funding the implementation of final public policies. Public tax policies should not be confused with public management policies, which are middle-activity policies and promote instrumental actions and

measures that enable management conditions, making the Public Administration proficient.

This article is limited to understanding the role of the science of Tax Law in state intervention in the economic and social order – an approximation with Economic Law –, in the field of extra-fiscality through public tax policies that promote inductive tax rules, which induce taxpayer behavior, having as limits and foundations the principles and values set out in the Federal Constitution of 1988 (FC/88).

Taxation can affect society and the economy through direct or indirect induction or tax planning. Inductive tax rules are presented as forms of state intervention in the social and economic domain. This situation grows as the government uses taxes to stimulate or discourage behavior.

For Martha Toribio Leão (2015, p. 21), inductive tax rules are species of the extra-fiscality genre and have an inductive effect on the social and economic domain, serving as an instrument for achieving constitutional objectives. Inductive use – in tax rules – which doctrine and jurisprudence find challenging to conceptualize and distinguish from other tax rules, is not only permitted but encouraged by the constitution. This effect coexists in tax rules, to a greater or lesser extent, and not in isolation. This inducing effect would be related to "[...] the notion that the very incidence of taxation is not neutral on the economy [...] after all, taxation is linked to human behavior, and the incidence of taxation becomes a factor to be considered in the decision itself [...]" (2015, p. 15).

Luis Schoueri (2005, p. 43-46) makes an essential distinction between rules of direction and induction, where the difference lies in the degree of freedom granted to the administrator. While the former binds a single consequence to a given hypothesis, the latter provides alternatives, giving stimuli/disincentives that act on their field of will, leading them to adopt the behavior desired by the legislator.

The inductive tax rule, a type of tax rule, neither obliges nor prohibits but encourages (induces) the adoption of behaviors, given the possibility of some consequent, such as an advantage (e.g., tax reduction) or disadvantage (e.g., tax increase), influencing the conduct of taxpayers. These tax rules have a dual structure, with the hypothesis of incidence and its consequence.

The concept of an inductive tax rule is presented by Leão (2015, p. 136) as a species of the genre "tax rules," whose determining criterion for its legitimacy is not the ability to pay but a certain public purpose of induction, distinct and independent from the

mere collection, presupposing the adoption of lawful alternative conduct, in the face of the taxpayer's right to freedom. Therefore, the inductive rule, which is not sanctioning, goes far beyond establishing a tax obligation; it establishes an alternative, which will be encouraged/induced through the stimulus (Bernardes; Lemos, 2017, p. 107-120).

Inductive tax rules are recognized by doctrine and legislation, with repercussions on other types of taxes. Still, the scope of this work will only be limited to taxes, using the principles of tax equality, contributory capacity, proportionality, and essentiality as a reference point in the search for an understanding of inductive tax rules and their relationship with public tax policies. By introducing purposes other than the primary one of collection, extra-fiscal taxes end up causing a restriction on the principle of contributory capacity insofar as they alter the main criterion of balance between taxpayers (Bernardes; Lemos, 2017, p. 23).

Having conceptualized inductive tax rules, the subject of the study seeks to understand the promotion of public tax policies – based on the normative density of constitutional principles – using inductive tax rules as a means, which induce taxpayer behavior due to taxes' extra-fiscality (social and economic) function. In this context, a question arises, which will guide and instigate the construction of the answer we intend to present: What are the constitutional basis and the relationship between public tax policies and inductive tax rules?

Regarding methodology, the approach to the problem is qualitative, based on document analysis and a literature review. The article is organized into sections, with the first section covering the institutes of public policy and public tax policy; the second section deals with the fiscal and extra-fiscal function of tax rules; and finally, the third section focuses on the inductive tax rules that play a leading role.

2. Public policies and public tax policies

There are various concepts of public policies and their relationships, and the role of institutions, especially the State, in defining development strategies and organizing community life. However, to overcome incapacity, the State needs to redefine its role, no longer as a hegemonic agent, but above all as an articulator of collective actions based on expanding the public sphere, forming the basis for the agreed establishment of public policies. The term "public policies" was recently introduced into the FC/88, in articles 216-A and 227, just over two decades after its enactment.

Thus, public policies are a set of government instruments or actions. In this context of public policies, public tax policies emerge since the preamble to our "guiding Constitution" already shows the intention to create an economic and social order. This state is not neutral, with programmatic rules. A state that is not just limited to regulating the market but directing it through instruments – directing tax rules – and with an active stance to achieve the objectives set out by the constitution, especially in articles 3 and 170 of the FC/88 (Nusdeo, 1995).

Therefore, social, and economic goals should also serve as guidelines for tax rules, albeit in a complementary way, carrying out a "cyclical tax policy" (Torres, 1986, p. 637), and we humbly choose to replace Torres' expression with "public tax policies", due to the conceptualization itself, which encompasses the approach to public policies in the current context.

The absence of a leading role in public tax policies, as well as an understanding of their programs, which should be oriented, presenting guidelines for tackling a public problem, can lead to incomprehensible and conflicting misunderstandings in the context of a public policy, as is the case with Ordinance No. 08/91 of the Ministry of Finance, which prohibits the import of used vehicles, and Bill No. 237/2020, presented in the federal legislature authorizing the import of used cars. The question remains as to which public tax policy the State is promoting.

Therefore, due to the complexity of its object, the achievement of such tax public policies requires the concatenation of various administrative axes and, consequently, can be analyzed from different perspectives, making it understand a network of possibilities that must converge on the same magnetic north, otherwise, in the absence of public policies, different paths will be traced without any orientation and convergence of public purposes. This is the role of public policies, especially tax policies.

Thus, it is the extra-fiscality function that has the effect of inducing taxpayer behavior, decreasing or increasing the tax to be paid, as is the case with property taxation, in the case of IPTU or IPVA, when the taxpayer is induced to invest in solar panels on his property (generating sustainable energy) or to purchase less polluting vehicles; or even, in the case of discouraging the consumption of cigarettes, alcoholic beverages, stimulating a healthy behavior of the taxpayer, who will not need to use the SUS.

At this specific point, according to Sacha Calmon Coêlho (2009), knowing what is superfluous or not, especially in extra-fiscality, is of unusual importance because when

we look back, we see public tax policies with specific intentions and purposes, which have guided and established guidelines for the development of these inductive tax rules. The goal of public tax policies using a tax rule is to give direction to a public intention and respond to a public problem seen as collectively relevant. This intentionality, in concrete terms, is related to the purpose of the rule and its effectiveness since there is a lack of this effectiveness:

[...] In other words, the lack of practical verification of the expected effects on the economic and social order affects the very validity of the rule [...] if the rule is not capable, in practice, of achieving the desired extra-fiscality objectives, it will prove to be disproportionate, as there will no longer be any justification for using taxation as an instrument of intervention (LEÃO, 2015, p. 23).

Furthermore, the very division and isolation of the sciences, in this case between Tax and Economic Law, may be an answer to the difficulty in giving the extra-fiscality of inductive tax rules their due importance, given that these rules have not only a fiscal function but also an extra-fiscal one, serving as an instrument of state intervention in the social and economic order. It is this inductive aspect of tax rules – which have fiscality in their DNA and do not dispense with the regime laid down for tax rules – that deserves to be highlighted in this study, because as well as providing for the fundamental duty to pay tax, they also provide for the duty to pay extra-fiscal tax.

Thus, there should be no differentiation between inductive tax rules (extra-fiscality) and collection tax rules (fiscal). Still, they should be treated only as tax rules, since, as a means, either would have a function, present to a greater or lesser degree, of collection and induction. The recognition of these two fiscals and extra-fiscality functions invokes proportionality – which will be discussed later – indicating a combination of principles, such as the ability to pay and the principles of the economic and social order (art. 3 and 170, FC/88).

3. The fiscal and extrafiscal function of tax rules

The extra-fiscality, along with taxes, has changed historically, according to the different features that the State has taken on from the other models of economic and social policies, whether in liberal, social-democratic, or neoliberal versions. Taxes have performed economic, social, and political functions since their inception, emerging as a mechanism for intervening in people's behavior, whether by collecting or inducing it. In ancient times, taxation was already seen as an instrument of extra-fiscality when taxes were imposed on luxury goods, single people, and beards, among others, which aimed

not only to raise revenue but also to discourage the consumption of luxury goods, not starting a family or wearing a beard, either because Tsar Peter I of Russia couldn't grow a big beard, or because his citizens looked less Western.

Regarding the extra-fiscality function of taxes, Alfredo Augusto Becker (2007, p. 623) explains that "the main purpose of many taxes will not be that of an instrument for collecting funds to cover public expenses, but that of an instrument of state intervention in the social environment and the private economy." The fiscal and extra-fiscal functions of taxes, which are not mutually exclusive, as they coexist in inductive tax rules, can dominate either one or the other, and there is no need to speak of a law that is exclusively fiscal.

Thus, the extra-fiscality function does not mean the abandonment of tax collection since it is conveyed through a tax rule. Still, instead, an addition of a process to that said, guided by the principles that govern the power to tax. Also, due to extra-fiscal, it must be added to the guidelines, programs, and purposes to be carried out by the State and society, informed by the constitutional precepts of articles 3 and 170 of the FC/88.

According to Pimenta, Lima, and Moura (2017, p. 92), this association of matrices from different constitutional subsystems – tax, social and economic – is what corroborates the existence of extra-fiscal in inductive tax rules since the understanding of part of the doctrine leads to the conclusion that the use of a tax instrument for the priority realization of a non-tax interventional/regulatory purpose requires integrated observance of the principles and rules that may apply in each subsystem. In this sense, Leão refers to Moschetti's doctrine:

Therefore, the close relationship between the tax system and the economic system is evident when it comes to inductive tax rules. The legal regime specific to inducement tax rules, therefore, involves both the principles and regulations relating to the economic and social order and those relating to tax law (LEÃO, 2015, p. 63).

Therefore, the extra-fiscality phenomenon is legitimized because it primarily aims to fulfill constitutional purposes other than the mere collection function of taxes. The intervening effects, through the induction of the extra-fiscality rule, are natural and ultimately lead to revenue for the treasury; however, what must be retained is the primary intention of the extra-fiscality law, which is to achieve its social or economic purpose. An extra-fiscal function, stimulating, inducing/inhibiting behavior, giving concrete form to public tax policies (Pimenta; Lima; Moura, 2017, p. 97).

Tax extra-fiscal and its social and economic effect are introduced right from the opening articles of the FC/88, as in the case of Article 1, which, in addition to presenting the structure of the Democratic State of Law, imposes its foundations, such as the dignity of the human person, the social values of work and free enterprise, which are guiding principles for all the values protected by the FC/88; and, from which others derive, such as Article 170, when it brings free economic initiative, recognized by the Constituent, because business activity is fundamental for the growth of the State.

Therefore, state activity is eminently instrumental, which occurs in terms of taxation in two senses: the first about collection, seeking to enable the realization of finalistic public policies, to give concrete form to the State's objectives, and the second, in favor of the social and economic interest, when taxation can also be used in terms of inducing behavior, as mentioned above, through inductive tax rules, which limit tax imposition in an exercise of negative tax competence, which occurs primarily through immunities.

Thus, extra-fiscality represents a public tax policy to the extent that taxes are used to achieve public – social, and economic – goals. These purposes, as a rule, are performed by stimulating or discouraging certain behaviors, for example, as a means of environmental protection in the RPT exemption for those who preserve green areas or when there is a reduction in the IPVA rate for less polluting vehicles; or in the protection of national industry, by increasing the rates of import or export tax; or even in the increased rates for products that are not essential, excessive or harmful to health; and finally, as an instrument to stimulate consumption, as in the reduction of TIP rates for the purchase of white goods and vehicles. In other words, the tax is a means of achieving one of the two desired ends- fiscal or extra-fiscality - or even both.

In this environment of tax extra-fiscal, in article 170 of the Federal Constitution of 1988, it is possible to locate the purposes that legitimize extra-fiscality as an inducer of social and economic effects, which can be promoted – the purposes – through public tax policies, which will be materialized in the inductive tax rules. The principles of national and economic sovereignty give legitimacy to the modernization of the economy and the search for independence from more developed economies, ensuring a dignified life for all and enabling economic development.

In the quest to understand public tax policies and their relationship with inductive tax rules, the approximation between tax law – taxation – and economic law – intervention

– is part of this study because alongside taxation and intervention, free initiative and competition express values of financial freedom, not subject to any state restriction except by law, since free competition is nothing more than the manifestation of freedom of initiative, with the valorization of work as a realization of the principle of human dignity.

Free competition and initiative can indeed be interfered with by tax law, as in the case of exemptions, tax incentives, and immunities that favor the State's objectives, as well as being conveyed through inductive tax rules. Still, within the weighting of constitutional values and principles – and in this weighting, the focus of proportionality will play an important role, which will be the subject of consideration throughout this study.

The pursuit of full employment, which stems from the constitutional foundations set out in the FC/88, brings as a value, in addition to free initiative, work to provide and create work for all. This principle leads the FC/88, in paragraph 9 of article 195, to admit differentiated rates in social contributions to give concrete expression to this value through a payroll tax exemption. This is a public tax policy, which is instrumentalized through an inductive tax rule. It can also be seen in the case of the quest to reduce regional and social inequalities, dealt with by the constituent in section III of article 3, enabling tax and financial mechanisms to solve these inequalities while at the same time providing, in section I of article 151, for the principle of geographical uniformity, allowing for tax benefits.

Furthermore, the prohibition of taxes with a confiscatory character, annihilating the property right, stems from a choice made by the constituent based on a public tax policy, in which private property and its social function are defined as a fundamental right in sections XXII and XXIII of article 5 of the FC/88, and areas II and III of article 170 include these values in the spectrum of the economic order, being corroborated by section IV of article 150 of the FC/88.

In addition to consumer protection, as provided for in Article 5 (XXXII) of the Federal Constitution of 1988, the safety of the environment for the dignified existence and perpetuation of species has also been enshrined as a fundamental value, conditioning productive activity on respect for an ecologically balanced environment, using ecologically inducing taxes on taxpayers' behavior, either by encouraging them to carry out actions – installing solar panels, buying less polluting vehicles, carbon offsetting – or by discouraging harmful behavior.

Finally, among other principles, and to ensure a dignified existence for all, in keeping with social justice, the FC/88 guarantees the defense of public health in article 6 and item II of article 23, by increasing or reducing the tax burden on certain products, which are sometimes encouraged to be consumed, and sometimes discouraged, as they are harmful to public health; as well as the defense of the family, in article 226 of the FC/88, in the case of IRPF deductions, all with an extra-fiscal purpose, promoted by public tax policies and instrumentalized through inductive tax rules.

In this context, the existence of inductive tax rules is enshrined, whether "positive" or "negative," permeated by the extra-fiscality purpose and compliance with constitutional principles. The doctrine leaves no doubt as to the application of the principle of contributory capacity to extra-fiscality in "tax" inducing rules, albeit indirectly, to carry out the control of the tax rule of incidence on a compatible manifestation of wealth without affecting the existential minimum and affronting the principle of non-confiscation.

In this way, the ability to pay, a sub-principle derived from the principle of equality, ensures that the taxpayer is aware of how much wealth they have so that they can be taxed and, consequently, guaranteed the maintenance of the minimum necessary for survival.

4. Inductive tax rules

Martha Toribio Leão (2015, p. 42-43), when conceptualizing inductive tax rules, states that they are located in the field of alternative recommendations and do not result in a penalty arising from an illegal act, acting as stimuli or disincentives in taxpayers' behavior. They are instruments that can be used to promote social and economic objectives and are placed halfway between tax law and financial law.

While most taxes strive for neutrality as much as possible, in this case, taxes that are "[...] marked by extra-fiscality have the purpose of aggravating this effect, so that it represents a stimulus that causes a behavior change" (Leão, 2015, p. 43).

Fernando Aurélio Zilveti (2005, p. 26), stating that "induction is the antithesis of neutrality e," corroborates that the induction of the taxpayer's conduct is to act by the social and economic purpose intended by the public tax policy. Lobo Torres (1986) concludes by saying that extra-fiscality is a deliberate and conscious stimulus by the legislator, referring to a finalist and interventionist dimension of the tax using an instrument, the inductive tax rule. In other words, extra-fiscality is characterized by the

deliberate will of the legislator to adopt a tax rule with a function that is not only fiscal but also extra-fiscality and induces behavior on the part of the taxpayer, who is the recipient of the tax rule. Since every tax has some inductive effect – not just accidental, but purposeful – this effect is also considered when the taxpayer makes a decision.

In this context of understanding the inductive tax rule, in a preface to Leão's work (2015, p. 12-13), Shoueri questions whether it would be tolerable to have an inductive tax rule which, with a clear tax collection bias, respected the ability to pay, but which "incidentally discriminated against taxpayers in such a way as to induce them to behave contrary to the economic order"; and concludes, in response, that in the case of the "[...] inductive effect, [an] examination of proportionality should be considered [...]" since the tax rule touches on guarantees such as property and freedom, and it would be intolerable for tax rules to connect on securities such as property and liberty.]" since the tax rule touches on guarantees such as property and freedom, and it would be intolerable for inductive tax rules to serve only to increase revenue, deviating from their initial purpose – extra-fiscality –, and violating constitutional guarantees in disproportion to proportionality, which is nothing more than the relationship between the means (inducing tax rule) and the end (inducing – extra-fiscality – effectiveness), since it is more appropriate than looking for the purpose of the law to check whether the inducing effectiveness is pursued by the rule that conveys it.

Shoueri goes on to say that when examining proportionality, it is necessary to take into account three stages: i) adequacy, in which it is analyzed whether the tax rule lends itself to achieving the extra-fiscality purpose that justifies it; ii) necessity, in which it is asked whether there would be the possibility of restricting fundamental rights to a lesser degree, including considering non-tax measures; and, finally, iii) proportionality in the strict sense, in which it is asked whether the rule is reasonable, considering the relationship between means and ends.

Thus, contrary to the public tax policies that guide it, an inducing tax rule would not meet the proportionality/necessity test. Furthermore, when the inducing tax rule achieves its purpose, its inducing effect (effectiveness) becomes unnecessary, considering that the behavior no longer needs to be induced, making the inducing tax rule unnecessary in terms of proportionality/adequacy (Leão, 2015, p. 14-15).

To achieve this inductive purpose of the rule, the legislator can use the technique of aggravation, inducing and burdening the taxpayer more severely. This aggravation can

occur through the institution of a previously non-existent tax or its increase, reaching the undesired behavior, or it can also use advantages for the taxpayer, such as incentives (exemption) for taxpayers who adopt the behaviors desired by the legislator (PASCALI; DELIGNE, 2017, p. 52-53).

José Casalta Nabais corroborates this understanding when he states that:

Extra-fiscality, in the proper sense, encompasses the legal and fiscal rules of taxation (tax and tax increases) and non-taxation (tax benefits), whose main function is not to raise revenue but to pursue economic and social objectives (2012, p. 695).

To understand inductive tax rules, their alternative behaviors to which taxpayers are induced, and their inductive effect with an extra-fiscal purpose within a conjecture and expectation to have social and economic effectiveness, Leão (2015, p. 130-155) suggests the following criteria: compliance with the principle of equality; effectiveness control; compliance with the principle of proportionality; the complementarity of tax law and its subsidiary application; and fulfillment of the purpose.

Inductive tax rules can be found throughout the legal system, such as exemptions and tax incentives at the legal level; and, in the FC/88, immunities stand out, as they are a negative rule of competence, which is directly linked to the promotion of the objectives outlined by the Constitution to Governments.

The following are examples of inductive tax rules at the legal exemption level: exemptions for the development of regions or to prevent the imbalance of competition by encouraging micro and small businesses; differentiated rates in the case of progressive IPTU and RPT, both of which expressly provide for an incentive to use the urban property or a disincentive to the underutilization of productive areas, in attention to the constitutional social function of property; differentiated rates for the IPVA, based on use, or for the IPTU itself, according to the location and service of the property; green IPTU; green IPVA; and green CGS, which encourages taxpayers to use sustainability tools by reducing rates.

There are also Import Taxes (IT), Export Taxes (ET), Taxes on Industrialized Products (TIP), and Taxes on Financial Transactions (TFT), all of which have a regulatory and interventionist nature and are instruments of the State to intervene in the social and economic order.

Therefore, the function of the inductive tax rule is different from the collection rule. Still, the instrument is the same: the law that establishes a tax species, as in the

present analogy, in which the car, a vehicle to drive to a specific place, can have Santa Rosa and/or Salvador as its destination; in this way, it is the inductive tax rules – cars/instrument/means – that have as their purpose – destination – the collection (fiscal) and/or the induction (extra-fiscality) of a particular behavior.

It is in this context that, for Leão (2015, p. 60), the duty imposed by the "inductive tax rule must be treated as a tax duty" since "every extra-fiscal tax is necessarily subject to the legal-tax regime," there being "no difference in legal essence between tax and extra-fiscal taxes" since they are "first and foremost of a tax nature." And "before their characterization as rules with the clear objective of influencing the behavior of taxpayers (using the term inducements), these rules are taxes," carrying out an "inductive purpose through tax incidence." This explains "why, to issue these rules, it is essential that the entity has tax jurisdiction" and does not leave aside the constitutional limitations on the power to tax.

Thus, inductive tax rules are doubly limited rules, combining, within constitutional proportionality, the principles and limits of tax law with economic law, corroborating Moschetti's reference in Leão:

[...] MOSCHETTI warns that the extra-fiscality use of taxes is doubly limited: extra-fiscal tax rules must respect not only the limits relating specifically to tax power (respect for the ability to pay, which means compliance with economic capacity and the collective interest deducible from constitutional principles) but also those that refer to the material fields indirectly influenced by them (2015, p. 53).

In this sense, it would be incomprehensible to disassociate the limitations on the power to tax, especially the principles and values enshrined in the FC/88, from these tax rules, even if they are of an extra-fiscality nature because they are vehicles for instituting taxes and should be governed by the principles that guide Tax Law and Economic Law, to a greater or lesser extent, duly adjusted to the necessary proportionality that they are subjected to in the face of the involvement of specific limitations and restrictions on freedom, property and equality, but due to the promotion of other public purposes.

This "wall" of limitations on the power to tax is solidly built with some "brick" principles, such as the principles of legality, equality, ability to pay, non-retroactivity, and anteriority, among others. However, they have many mitigations because of extra-fiscality in the face of the need to regulate the market for social and economic purposes,

such as the principle of prohibition of confiscation, which sets explicit limits on arbitrary discrimination, praising property rights, and must be a burden that can be borne by the taxpayer, without reaching the existential minimum that compromises dignified existence, with the regular satisfaction of vital needs.

Finally, in item I of article 151, the constituent law expressly makes it possible for tax rules to have an inductive effect by allowing "[...] the granting of tax incentives designed to promote the balance of socio-economic development between the country's different regions".

In this constitutional context, the social duty to pay taxes emerges, as in the case of a farmer who produces wheat on his property and exports it due to the more favorable trade balance, enjoying immunity for shipping this product. However, the same farmer pays more for wheat flour because it is imported from Argentina and manufactured in Brazil. It can be seen that the beneficiary of the inductive tax rule (immunity) that encourages Brazilian producers to export is the exact target of the inductive tax rule that discourages imports (IT) of products produced in Brazil, seeking to protect its domestic market. The question that emerges is: What will the public tax policy be?

Another example would be generating jobs in the automobile industry when the IT tax is raised, protecting the domestic market. The same taxpayer/consumer of the imported vehicle (who chooses to buy an imported car) benefits from employment and income generation in the automotive industry where he is employed.

Such examples corroborate Casalta Nabais' (2012) maxim that it is a fundamental duty to pay taxes, as in the case of smokers, whose high tax burden on cigarettes is a disincentive and, at the same time, a contribution to the health system if the State funds their treatment.

Leão (2015, p. 91), in his work dealing with the above-mentioned inductive tax rules, highlights a relevant aspect when he says that by "[...] establishing a purpose other than merely collection, these taxes end up departing, to a certain extent, from the criterion defined by the constituent for the differentiation of taxpayers, that is, contributory capacity". However, he states that:

[...] we will face a new purpose and, consequently, another criterion that differentiates between taxpayers, even though the ability to pay continues to play a role [...]. This different purpose, which brings with it an other criterion, must be controlled by the principle of equality insofar as it is a tax that restricts each citizen's rights to property, freedom, and equality (2015, p. 91-92).

In tax rules with the sole purpose of collecting taxes, the FC/88 has chosen contributory capacity as the criterion or measure for comparing taxpayers. And the bar (ability to pay) and the purpose (equal distribution of the tax burden) are close.

In this way, rules with a tax collection purpose must be evaluated by the ability to pay, and inductive rules that pursue a concrete public goal, stimulating/discouraging behavior, must be analyzed, taking into account the promotion of this purpose since inductive tax rules are justified by the goal of intervening in the social and economic order.

In this way, the tax, as a social divider of state costs and public services and goods financing, loses its intensity and becomes an instrument for promoting different state purposes. As the criterion of economic capacity loses its prominence in the field of extra-fiscality, the principle of equality begins to use a differentiation criterion linked to the extra-fiscality purpose since the difference in tax burden will take into account not only (or instead, not as a general criterion) the ability to pay, but the fulfillment or not of the extra-fiscality purpose pursued. (Leão, 2015, p. 94).

When it comes to understanding tax rules, Shoueri (2005) clarifies that the applicability of contributory capacity to inductive tax rules will act alongside other principles in a relationship of integration since they serve to achieve the same constitutional purpose, taking the latter position since inductive tax rules do not lose their tax nature.

In the same vein, Costa (2012) states that extra-fiscality reduces the effectiveness of the ability-to-pay principle since its observance is not entirely removed – it becomes more "elastic," according to Horvath (2002, p. 92) – since the legislator cannot neglect to pay attention to the limits required by ability-to-pay, such as maintaining the minimum standard of living, non-confiscation, and non-restriction of other constitutional rights.

For Londe and Guedes (2017, p. 226-227), it is from the moment that the criterion of economic capacity loses prominence in the field of extra-fiscality that the principle of equality begins to use a differentiation criterion linked to the extra-fiscality purpose since the difference in tax burden will take into account not only the contributory capacity but the fulfillment of the extra-fiscality purpose to be achieved. Thus, even though taxation can be linked to a social and economic sense, there must be a limit to the sacrifice imposed

in the name of the public purpose, however expensive it may be to society since the prohibition on taxing the existential minimum is also related to the ability to pay.

According to Leão, there is a double limitation, in addition to that related to Tax Law and Economic Law, about Moschetti, since allowing.

[...] discriminatory treatment of formally equal economic capacities, in the name of the collective interest, does not mean giving the legislator unlimited power. [...]. It is, in fact, a new limit for the legislator since, for this type of rule, as already mentioned, the limitation is twofold: both economic capacity and collective demands [...] (LEÃO, 2015, p. 112).

On the legitimacy of the ability to pay and its permeability in inductive tax rules, Leão (2015, p. 113) concludes that "economic capacity cannot be dispensed with, since this would mean emptying what the main foundation of the tax is and, consequently, would end up making the tax a denaturalized figure."

Once the issue of the ability to pay has been overcome, Fábio Canazaro presents the principle of essentiality from another point of view, which is no less important but contributes to understanding the legal nature of these inductive tax rules. He argues that equality and ability to pay have essentiality as a criterion, which is elevated by the author to the category of a principle, with selectivity as a taxation technique.

Thus, the rules are given a better meaning through their systematic interpretation. Essentiality is moved from a taxation technique to a principle, alongside the ability to pay – a limitation on the power to tax – since the legislator would not be "free to identify or conceptualize what is and what is not essential" (Canazaro, 2015, p. 153).

Since it is their guarantee, Selectivity has become an essential principle of tax justice for the legislator and the taxpayer. The legislator, when stipulating tax rates on a discretionary basis through a judgment of convenience and opportunity – presupposing a public tax policy – must be guided by proportionality and reasonableness since essentiality has a minimum content, by item IV of article 7 of the FC/88, which lists the basic needs that the minimum wage must meet. An example of the control of this minimum was the *Americanas/SC* case (RE 714.139/SC).

For Canazaro (2015, p. 154), tax essentiality is a principle. The legislator is not free to identify or conceptualize what is and what is not essential as an indicative factor to promote equality since two duties derive from the fundamental principle of equality: the duty of equal and diverse treatment and tax essentiality, which is characterized as a

limitation on the power to tax, in which tax equality and the ability to pay are express limitations on the power to tax.

Therefore, it is the existence of the primary purpose of influencing behavior that characterizes the inductive tax rule, and according to Schoueri (2005, p. 30), "the tax rule, by inducing behavior [...] must take into account its social and economic effects".

So, how does one identify an inductive tax rule? These rules are induced by a public tax policy to promote a solution to a social and economic problem.

It's worth noting that from its cause to its purpose, the inductive tax rule aims to induce behavior due to its extra-fiscal function. In an economic and social conjecture, this function has the inductive effect of achieving the purpose (expectation) promoted by the public tax policy, which is instrumentalized by the inductive tax rule.

Therefore, while we can affirm the evidence that taxation influences taxpayers' behavior, regardless of whether it is fiscal or extra-fiscality in nature, since the inducing tax acts as a reward for the taxpayer, who starts to act by the promotion of a specific purpose, it is public tax policies that, based on a public problem, promote alternatives to overcome this problem through the instrument that are the inducing tax rules.

5. Final considerations

Having concluded the research, it is pertinent to systematize the inferences drawn regarding the role and relationship between public tax policies and inductive tax rules.

In this sense, article 3 of the Federal Constitution of 1988 lists several fundamental objectives to be pursued by the State; to achieve these objectives, the State uses taxes as a way of raising funds to put public policies into practice and often also to intervene in the social and economic environment. This tax collection is of great importance to the State because there is only a point in providing for various social rights by actually implementing them through public policies, especially public tax policies.

Later on, in article 170, when dealing with the economic order, the constituent law highlights the following as the purpose of the State: "to ensure a dignified existence for all, by the dictates of social justice" and "by valuing human work and free enterprise." Thus, extra-fiscality is inserted to establish a just society in which the human person is valued and their dignity safeguarded.

This taxation, carried out using inductive tax rules, translates into an essential instrument in the realization of these objectives and principles enshrined in the FC/88, stimulating or inducing behavior, acting together not only in the economy but also in

sociology, politics, culture, the arts, etc., because they are tax rules that operate on the economic order, and which must follow the governing principles of both the tax order and the economic order, and must not exceed the limits imposed by the regulations of private property, prohibition of confiscation, free competition, tax legality, ability to pay, among countless others.

A vital paradox that stands out is the collection of revenue from inductive tax rules, since by stimulating/discouraging behavior, they can reduce payment depending on the situation. However, introducing this tax law is not solely and exclusively intended to raise revenue but rather to induce behavior.

Thus, the extra-fiscality promoted by public tax policies and instrumentalized through inductive tax rules emerges as a possible alternative connection between the State and the taxpayer in the search for the common public interest.

In addition, this investigation revealed that amid the double limitation – of Tax Law and Economic Law – of inductive tax rules, equality and the ability to pay lose their intensity but are not entirely removed. Compatibility is sought since it is impossible to admit that there is no relationship between extra-fiscality, equality, and ability to pay.

Therefore, by establishing a purpose other than pure collection, these taxes end up departing, to a certain extent, from the usual criterion for imposing tax rules, with the tax no longer being chosen solely as a social divider of state costs and the financing of public services and goods, but becoming an instrument for promoting different state purposes, led by inductive tax rules, which respond to the public problem that gave rise to a public tax policy, promoting the inductive tax rule to induce taxpayer behavior.

Therefore, it has become clear that, since taxation is an instrument with both fiscal and extra-fiscality functions, it cannot be seen as the only state instrument for promoting public purposes but must act in a complementary and subsidiary manner. It is a choice, within the scope of public tax policies, whereby the government chooses to stimulate or discourage a taxpayer's behavior rather than invest, as in the case of granting tax incentives for the purchase of electric vehicles, as a way of meeting the dictates of a public environmental tax policy, in the sense of ecological and balanced development, which can make it possible to reduce the price of these vehicles, boosting the increase in their production in national territory.

Thus, corroborating the fundamental duty to pay (extra)tax, since extra-fiscality presupposes taxation, and tax can be used as an instrument to achieve public purposes not

linked solely to tax collection through the promotion of defined public tax policies based on a public problem, the existence and relationship between public tax policies and inductive tax rules is demonstrated.

References

Bernardes, F. C., & Lemos, J. F. (2017). Análise da extrafiscalidade na estrutura da norma jurídica tributária. In V. de Souza Lobato (Ed.), *Extrafiscalidade: Conceito, interpretação, limites e alcance* (pp. 107-121). Belo Horizonte: Fórum.

Canazaro, F. (2015). *Essencialidade Tributária: igualdade, capacidade contributiva e extrafiscalidade na tributação do consumo*. Porto Alegre: Livraria do Advogado.

Coêlho, S. C. N. (2009). *Curso de Direito Tributário brasileiro*. Rio de Janeiro: Forense.

Costa, R. H. (2012). *Capacidade Contributiva* (4ª ed.). São Paulo: Malheiros.

Horvath, E. (2002). *O Princípio do Não Confisco no Direito Tributário*. São Paulo: Dialética.

Leão, M. T. (2015). *Controle da extrafiscalidade*. São Paulo: Quartier Latin.

Londe, C. R. O., & Guedes, F. A. (2017). Eventuais efeitos sancionatórios da extrafiscalidade e sua (in)adequação ao ordenamento jurídico pátrio. In V. de Souza Lobato (Ed.), *Extrafiscalidade: Conceito, interpretação, limites e alcance* (pp. 207-228). Belo Horizonte: Fórum.

Nabais, J. C. (2012). *O Dever Fundamental de Pagar Impostos: contributo para a compreensão constitucional do estado fiscal contemporâneo*. Coimbra: Almedina.

Nusdeo, F. (1995). *Fundamentos para uma codificação do Direito Econômico*. São Paulo: Revista dos Tribunais.

Pascali, A. de, & Deligne, M. de S. P. (2017). Poder judiciário e o controle das normas tributárias. In V. de Souza Lobato (Ed.), *Extrafiscalidade: Conceito, interpretação, limites e alcance* (pp. 49-66). Belo Horizonte: Fórum.

Pimenta, D. de M., Lima, L. R. de, & Moura, R. B. de. (2017). O alcance e os limites da extrafiscalidade. In V. de Souza Lobato (Ed.), *Extrafiscalidade: Conceito, interpretação, limites e alcance* (pp. 87-105). Belo Horizonte: Fórum.

Schoueri, L. E. (2005). *Normas tributárias indutoras e intervenção econômica*. Rio de Janeiro: Forense.

Torres, R. L. (1986). *Sistemas Tributários*. Rio de Janeiro: Forense.

Zilveti, F. A. (2005). Variações sobre o princípio da neutralidade no direito tributário. *Direito Tributário Internacional*, 19, 24-40. Recuperado de <https://revista.ibdt.org.br/index.php/RDTA/article/view/1701/1187>

