Transparency and access to information relating to tax incentives: historical challenges and recent advances

Transparência e acesso à informação de dados relativos a incentivos fiscais: desafios históricos e avanços recentes

Transparencia y acceso a la información relacionada con los incentivos fiscales: desafíos históricos y avances recientes

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Abstract: this article aims to point out the main challenges and advances in the transparency of information on tax incentives, including at the level of beneficiary taxpayers. This study has a predominantly theoretical character, when using the deductive method, which includes a review of bibliography and literature and analysis of legislation on the subject; but it also involves an empirical part, developed based on the inductive method, referring to the collection and analysis of data on the attitude of Tax Administrations regarding requests for access to information on tax incentives relevant to the largest beneficiaries of the respective federated entities. It is also a juridical-descriptive, juridical-comprehensive and juridical-exploratory research. Confirming the hypotheses raised, the results of this study indicate that the main obstacles to transparency in this matter have long been the lack of a uniform methodology for calculating revenue waivers, especially for subnational entities, as well as the interpretation given by the Administrations Tax authorities that individualized taxpayer-level information on tax incentives enjoyed by the taxpayer is protected by tax secrecy. The main conclusions of this study, however, indicate that recent and important constitutional, legislative and normative advances have been produced to ensure greater transparency in terms of tax incentives, including the express overcoming of the obstacle of tax secrecy that prevented greater control in this issue.

Keywords: public policies; extrafiscality; tax breaks; tax expenditure; transparency.

Resumo: este artigo tem por objetivo apontar os principais desafios e avanços à transparência de informações sobre incentivos fiscais, inclusive em nível de contribuintes beneficiários. Este estudo apresenta caráter preponderantemente teórico, ao se utilizar do método dedutivo, que compreende revisão de bibliografia e de literatura e análise da legislação sobre o tema; mas também envolve parte empírica, desenvolvida com base no método indutivo, referente a coleta[1] e análise de dados sobre a postura de Administrações Tributárias acerca de pedidos de acesso a informação sobre incentivos fiscais pertinentes aos maiores beneficiários dos respectivos entes federados. Trata-se, ainda, de pesquisa de caráter jurídico-descritivo, jurídico-compreensivo e jurídico-exploratório. Confirmando as hipóteses levantadas, os resultados deste estudo apontam que os principais

1. This article presents partial results from research being developed within the Graduate Program in Law and Public Policy at UFG (PPGDP-UFG), funded by this program and partner organizations, on the control of results and critical analysis of the constitutional adequacy of ICMS tax incentive policies and programs in Goiás. The results presented here will be consolidated and later presented in the final dissertation.

óbices à transparência nessa matéria consistem, de longa data, na falta de metodologia uniforme para o cálculo de renúncia de receitas, notadamente para os entes subnacionais, bem como na interpretação dada pelas Administrações Tributárias de que informações individualizadas em nível de contribuinte sobre incentivos fiscais por ele fruídos são protegidas por sigilo fiscal. As principais conclusões deste estudo, porém, indicam que recentes e importantes avanços constitucionais, legislativos e normativos foram produzidos para assegurar maior transparência em matéria de incentivos fiscais, inclusive com a superação expressa do óbice do sigilo fiscal que impedia maior controle nessa temática.

Palavras-chave: políticas públicas; extrafiscalidade; incentivos fiscais; renúncia de receitas; transparência.

Resumen: este artículo tiene como objetivo señalar los principales desafíos y avances en la transparencia de la información sobre incentivos fiscales, incluso a nivel de contribuyentes beneficiarios. Este estudio tiene un carácter predominantemente teórico, al utilizar el método deductivo, que incluye una revisión de bibliografía y literatura y análisis de la legislación sobre el tema; pero también involucra una parte empírica, desarrollada con base en el método inductivo, referente a la recolección y análisis de datos sobre la actitud de las Administraciones Tributarias frente a las solicitudes de acceso a la información sobre incentivos fiscales relevantes para los mayores beneficiarios de las respectivas entidades federativas. Es también una investigación jurídico-descriptiva, jurídico-comprehensiva y jurídico-exploratoria. Confirmando las hipótesis planteadas, los resultados de este estudio indican que los principales obstáculos para la transparencia en esta materia han sido durante mucho tiempo la falta de una metodología uniforme para el cálculo de las exenciones de ingresos, especialmente para las entidades subnacionales, así como la interpretación dada por las Administraciones Tributarias. que la información individualizada a nivel de contribuyente sobre los incentivos fiscales que disfruta el contribuyente está protegida por el secreto fiscal. Las principales conclusiones de este estudio, sin embargo, indican que recientes e importantes avances constitucionales, legislativos y normativos se han producido para asegurar una mayor transparencia en materia de incentivos fiscales, incluyendo la superación expresa del obstáculo del secreto fiscal que impedía un mayor control en esta materia.

Palabras clave: políticas públicas; extrafiscalidad; incentivos fiscales; renuncia de ingresos; transparencia.

INTRODUCTION

Tax incentives are long-standing public policy instruments used by governments to relieve tax burden that would be levied on private agents to achieve constitutionally relevant goals.

The major challenge, however, is knowing whether and to what extent this ideal is fully realized, or if tax incentives end up having as their sole or main effect a mere reduction in tax burden for the exclusive or preponderant benefit of private agents to the detriment of public interest in fundraising for public policy financing.

Hence, our research question concerns the perceived lack or insufficiency of transparency towards citizens or even oversight bodies regarding information and data on tax incentives once it undermines the potential benefits of tax incentives due to the ensuing limitation on control (both institutional and social). In this regard, this study seeks to identify the main challenges and advances in terms of data and information transparency regarding tax incentives, including individual taxpayer-level data.

Two hypotheses are raised, namely: a) the main obstacles to tax transparency consist of the lack of a uniform methodology for calculating tax expenditures between the different federal entities, for waivers practiced by States, Federal District and Municipalities, as well as the denial of access to individualized taxpayer-level information on tax incentives enjoyed for allegedly being protected by tax secrecy; b) as for the obstacle of tax secrecy, recent and important normative and legislative advances have been developed to allow greater transparency. Both are confirmed in this paper.

Both a theoretical and empirical approach were adopted as the research genre (DIAS, GUSTIN and NICÁCIO, 2020, p. 74-76). Its theoretical part consists of a bibliography and literature review and analysis of legislation to summarize the state of the art on

this topic; the empirical is based on collecting and analyzing data on the requests for access to information made to the Brazilian Internal Revenue Service (SRFB) and two state Tax Administrations, to know whether taxation and finance agencies still resisted granting access to individual information about taxpayers who were beneficiaries of tax incentives on the date information was collected.

As for the type of research (DIAS, GUSTIN e NICÁCIO, 2020, p. 82-85), this can be considered a legal-descriptive (or legal-diagnostic), legal-comprehensive (or legal-interpretative), and legal-exploratory study, as it seeks to describe the main challenges regarding tax incentive transparency; verify potential advances based on interpretation of the main constitutional, legal and normative changes; and, finally, encourage debate, reflection, and further research on the topic.

These approaches are quite useful for exploring such a topic given the recent publication of several national regulations which directly impacted tax transparency, in particular Decree No. 10,209/2020, article 4, § 4º, of the Constitutional Amendment (CA) No. 109/2021, and article 45 of Complementary Law (CL) No. 178/2021, which added item IV to art. 198 of the Brazilian Revenue Code (CNT).[2]

First, we present the theoretical framework on public policies, steering tax, tax incentives, and tax expenditures. Next, we discuss the main challenges to tax transparency, particularly access to individual taxpayer-level data. Finally, we present the main constitutional, legislative, and normative advances that could potentially increase tax transparency for both oversight bodies and society in general.

1. PUBLIC POLICIES, STEERING TAX, TAX INCENTIVES AND TAX EXPENDITURES

Public policy can be defined as "a set of decisions and actions adopted by public agencies and society organizations, intentionally coherent with each other, which, under state coordination, are intended to address a political problem" (SCHMIDT, 2018, p. 127). It has two fundamental elements, namely: "public intentionality and response to a public problem" (SECCHI, 2014, p. 2).

By means of public policy, therefore, the State responds to socially relevant issues of public (interest of the whole collectivity) or collective (interest of a certain social segment) character, even these responses are unable to serve all or bring adequate solutions to the perceived problem (SCHMIDT, 2018, p. 123-127).

In Political Science, one of the main typologies developed to understand public policies is the "process model" (DYE, 2009, p. 106), better known as the "cycle of public policies," thus named for presenting public policies as a true cycle within which state action is developed.

Given the lack of consensus in the literature about the name and the number of stages in this cycle, we adopt the most widespread perspective of dividing it as follows: a) perception and definition of problems; b) elaboration of decision-making agenda; c) development of programs and projects; d) implementation of the policies elaborated; and e) monitoring and evaluation of actions implemented (SCHMIDT, 2018, p. 131; RAEDER, 2014, p. 128).

These phases are neither separate nor rigidly sequential chronologically, "more important than the sequence the cycle presents is understanding that public policy consists of stages with specific characteristics" (RAEDER, 2014, p. 127). Regarding the last phase, monitoring and evaluating the policy, it is important to note:

> Evaluation a policy consists in scrutinizing the successes and failures of its implementation process. It promotes feedback and can determine the continuity, change, or termination of the policy. Evaluation is a judgment, an attribution of value. It is never neutral or purely technical. Even if economic in its scope, the evaluation model should consider the general characteristics of the government, the program proposed to voters, the values that guide politicians and managers, the relations stablished internally and externally. (SCHMIDT, 2018, p. 137)

One cannot ignore, however, the lack of a culture where public authorities constantly evaluating their acts and programs on a large scale so that, based on consistent and methodologically adequate studies, they can guide administrative action. But the realization of fundamental and social rights such as health, education, public security, and countless others will more effective the more data and empirical basis the State, in a broad sense, has about its own actions.

2. The Brazilian Constitution and its constitutional amendments, as well as national and federal laws and decrees mentioned throughout this article, can be accessed at the website: <http://www4.planalto.gov.br/legislacao/>. For this reason, there is no specific mention in the references.

In this regard, we can also argue the existence of a fundamental right to good public administration, that is, right to an "effective and effective [public administration], adequately fulfilling its duties with transparency, sustainability, commensurate motivation, impartiality and respect to morality, social participation, and to full responsibility for its omissive and commissive conducts" (FREITAS, 2014, p. 21).

Since public policies, which are intended to solve political problems, require political decisions, these "[...] demand clear and objective information, aimed at elucidating the desired goals and values, to instrumentalize the objectives defined by each public policy and reinforce it legitimacy" (SILVA, 2012, p. 68).

Interestingly, this discussion, one more restricted to the doctrinal field, has now expressly entered the Brazilian legal system through AC No. 109, of March 15, 2021, which promotes several changes in the text of the permanent body of the Constitution and in the respective Transitory Constitutional Provisions Act (ADCT).

One such change was the inclusion of § 16 in art. 37, establishing that "the bodies and entities of the public administration, individually or jointly, must conduct evaluation of public policies, including disclosure of the object to be evaluated e the results achieved, as provided by law." It also added § 16 to art. 165, providing that budget laws must now observe "the results obtained from the monitoring and evaluation of public policies set forth in § 16, art. 37 of this Constitution."

On the other hand, public policies, and this discussion on the importance of monitoring and evaluation, are usually associated with the idea of state expenses, given the belief that public policies are financed through public resources (or spending); after all, rights are expensive, and that is why everyone pays taxes (HOLMES and SUSTEIN, 2019).

But is this also applicable to tax expenditures? What is its relationship with public policies? Here is where the idea of steering taxes gains prominence in the discussion. Steering tax basically consists in using the tax instrument "for objectives that are separate from the revenue collection, even if they do not necessarily exclude it," that is, Tax Law is put at the service, or as an instrument, of the realization of fundamental rights (CORREIA NETO, 2015, p. 93).

Governments can interfere in the economy by orientation or induction. In the former by stipulating regulation and obligations which, if unfulfilled, entail sanctions to individuals; in the latter by means of so-called "rewarding sanction" or inducing rules, by which public entities grant a certain advantage or incentive to individuals who conduct state-approved activities (SCHOUERI, 2005). This last aspect can be considered the core of steering tax.

It is from within steering tax, by means of inducing tax rules, that tax incentives emerge.[3] There are different ways of understanding tax incentives, between broader and narrower conceptions. This study adopts the narrower definition, by which incentives are special provisions included into tax rules to favor and foster private activities that are in line with public interest that, simultaneously, imply a reduction in taxpayer's tax burden (CORREIA NETO, 2015, p. 131-133).

Understood in this perspective, tax incentives are tied to the concept of tax beak[4]. In the United States of America, since the late 1960s, the aspect of tax expenditure had already been perceived by Stanley S. Surrey, then Assistant Secretary of the US Treasury Department, who named the phenomenon tax expenditure (HELLMUTH and SURREY, 1969), expression that was better developed in later work (SURREY, 1973; McDANIEL and SURREY, 1974). A free translation to Brazilian Portuguese would be "gastos tributários," adopted since 2003 by SRFB (CORREIA NETO, 2015, p. 150).

In Brazil, the concept of tax expenditure is, to this day, object of debate between Financial Law scholars. The starting point for understanding this category is found in art. 14, § 1, of Complementary Law No. 101/2000 – Fiscal Responsibility Law (LRF), in verbis:

> Art. 14. [...].
>
> [...].
>
> § 1 Tax expenditure comprises **amnesty,**

3. For the purposes of this study, we will preferably adopt the expression "tax incentives"; however, references can be made to other similar expressions such as "tax benefits," according to Correia Neto (2015, p. 37-38): "[...] we will use, at first, indistinctly the expressions 'tax favor,' 'tax stimulus,' 'tax relief,' 'exoneration,' 'relaxation,' 'tax incentive' and 'tax benefit,' preferably the latter two, most common in Brazilian legislation [...]. We do ignore the existence of differences, pointed out by doctrine, between some of these ideas [...]. We will not make use any of such distinctions, as they seem to be of no immediate use in Brazilian law. They would be useful if the legislation imposed different conditions or effects to the two concepts, which is not seen in practice. In the Federal Constitution and, broadly speaking, also in the infra-constitutional legislation, "benefits" and "tax incentives" are synonymous, perfectly interchangeable, without affecting the meaning of the sentence."

4. The Brazilian expressions "renúncia de receitas tributárias," "renúncia de receita," "renúncia fiscal," "renúncia tributária" and others used throughout the text were all translated as "tax expenditure."

> **remission, subsidy, presumed credit, concession of exemption in a non-general character, changes in tax rate or modification of the calculation basis that implies a discriminated reduction** of taxes or contributions, and other benefits that correspond to **differentiated treatment**.
>
> [...]. [emphasis added]

This provision lists a series of tax phenomena that characterize tax expenditure, for some of which the legislator makes a point of adding adjectives to be considered as such. Thus, amnesties, remissions and presumed credits fit into the concept of tax expenditure without major difficulties, but the same cannot be said for exemptions or changes in the tax rate or calculation basis.

When comparing the above transcribed provision with the Federal Budget Guidelines Laws, Oliveira (2015, p. 921) argues that, to constitute a tax expenditure, the benefit must result in differentiated treatment and discriminated tax reduction, as an exception to the reference tax system, with the scope of the rule restricted to a certain group of taxpayers. Thus, broad tax relief measures, because they reach all taxpayers, should not be confused with one-off measures that imply differentiated treatment for certain groups, so that the requirements of LRF art. 14 would only apply to the latter.

Tax incentives and tax expenditures, understood in their narrow sense, are like faces of the same coin, which emphasize different aspects of the same reality (CORREIA NETO, 2015): while the first reveals the "positive" aspect (the incentive to taxpayers for public interest purposes), the other presents the "negative" aspect (the tax expenditure involved).

Therefore, throughout this study, when reference is made to the expression "tax incentives," the phenomenon should be understood broadly, that is, the tax incentive and expenditure involved.

Tax incentives have a natural aptitude to serve as public policy instruments, insofar as they are conveyed by legislative diplomas, to the extent that they use Tax Law institutes to achieve objectives foreseen in the constitutional system and, in general, contemplated by the other branches of Law.

One of the underlying purposes of granting tax incentives, notably ICMS, is to stimulate regional development, which in theory would be achieved as follows: the State reduces the tax burden on companies that set up and/or produce in its territory and, in exchange, "receives" back this tax expenditure in terms of generating jobs and income for the population, sometimes accompanied by the collection of part of the tax would otherwise be due.

The use of tax incentives as a development tool has been discussed for decades (DORIA, 1977; MONTEIRO, 1975). However, tax incentives are not a "blank check" from governments to be granted at their pleasure; they are subject to limits and control, although both the doctrine and the institutions still deal incipiently with this issue. We can basically highlight two types of control, one of legal-formal nature and the other final.

The legal-formal control, or compliance, assesses whether the constitutional, legal, and regulatory requirements for the concession and use of tax incentives have been met. As parameters of this control, we highlight the rules provided in § 6 of art. 150 of the CRFB, in art. 14 of the LRF—now also partially incorporated in art. 113 of the ADCT—and, in the specific case of ICMS, also in art. 155, § 2, XII, "g" of the CRFB, besides other constitutional, legal and regulatory requirements.

In turn, final control assesses whether the tax incentive is achieving the desired results (social, economic, environmental, etc.). This is a more complex analysis, close to a "success control" (ASSIS, 2020, p. 230), mainly because it is not limited to the exclusive domain of Law and involves other related fields of knowledge, notably Economics. It emphasizes the need to apply proportionality as one of the main control parameters of the rule granting tax incentives (ASSIS, 2020; CARVALHO JUNIOR, 2018; PINHO, 2017b).

Therefore, it is essential to understand tax incentives as public policy instruments that entail tax expenditure, in the terms of LRF art 14, § 1, and are subject to legal-formal and final control, even though pragmatically realizing this control remains an immense challenge.

2. DATA TRANSPARENCY RELATED TO TAX INCENTIVES: MAIN CHALLENGES TO ITS IMPLEMENTATION

Publicity is an explicit constitutional principle guiding all administrative activity (CRFB, art. 37, caput), according to which "the Administration's actions must deserve the widest possible dissemination among administrators, and that is because its basis lies in providing them with the possibility of con-

trolling the legitimacy of the administrative agents' conducts" (CARVALHO FILHO, 2017, p. 51). One branch of publicity consists in the "ex officio administrative action of disclosing information of public interest" (CARVALHO FILHO, 2017, p. 51), known as active transparency.

One major milestone in favor of the implementation of a culture of administrative transparency in general, as a fundamental right, is Law No. 12,527/2011, known as the Law on Access to Information (LAI), which establishes the observance of publicity as a general precept and secrecy as an exception (art. 3, I). The law also states that public authorities and entities are responsible for ensuring transparent management of information, to provide broad access to it and its dissemination (art. 6, I), and for disclosing information of collective or general interest in an easily accessible place (art. 8, caput).

Transparency assumes greater relevance within public finances, since it is a legal duty to "release to the full knowledge and monitoring of society, in real time, detailed information on budgetary and financial execution, in electronic media of public access," according to art. 48, § 1, II, of Complementary Law No. 101/2000 (Fiscal Responsibility Law – LRF). Transparency is one of the pillars of responsible fiscal management (LRF, art. 1, §1).

Also of note is the recent Law No. 14,129/2021, which establishes principles, rules, and instruments for Digital Government and for increasing public efficiency. This law establishes "transparency in the execution of public services and monitoring the quality of these services" (art. 3, IV) as one of the principles and guidelines of Digital Government and public efficiency.

Moreover, it foresees that in promoting active transparency, public authorities must observe the publicity of non-personal databases as a general precept and secrecy as an exception (art. 29, § 1º, I), in a sensible change to the similar rule provided in LAI, art. 3, I, regarding the General Personal Data Protection Law (LGPD). Besides, to make the disclosure of public interest information compatible with personal data protection, art. 36 of Law 14.129/2021 states that:

> Art. 36. Data management agencies may make available in active transparency data from individuals and companies for the purposes of academic research, and monitoring and evaluation of public policies, provided that data protected by confidentiality or with access restriction, pursuant to Law No. 12,527 of November 18, 2011 (Law on Access to Information), are anonymized beforehand.

Beyond these provisions, there is also the so-called "passive transparency," understood as that provided by provocation when citizens submit requests for access to information. The right of access to information of private, collective, or general interest, acquires an even higher status in the legal system, as an eternity clause (CRFB, arts. 5, XXXIII, and 60, § 4, IV). Federal and state laws on access to information regulate the exercise of this right (Law No. 12,527/2011, arts. 10 and following).

However, when it comes to tax incentive data and information, several challenges hinder its disclosure, particularly the lack of uniform criteria nationwide for estimating tax expenditure and their disclosure, as well as the restrictive interpretation that the state treasuries—and the SRFB—made about tax secrecy (until at least February 2020).

As for the first aspect, although there may also be distortions at the federal level, the biggest challenge consists in the need to establish minimally uniform criteria for calculating tax expenditure of subnational entities, to allow a minimum comparability between different federal entities. After all, "in Brazil, incentive concessions via ICMS are extremely considerable, in such a way that national statistics omitting these data at least hinder a more serious analysis of the issue" (FIGUEIREDO and NÓBREGA, 2006, p. 127).

A study on ICMS tax expenditure in Brazil, coordinated by Afonso (2014), already showed concern with the lack of transparency in this matter, notably due to the lack of minimum standardization regarding information disclosure, publication of gross tax expenditure amount in the respective budget pieces by some member states, among other issues. The study also points out that the country's two largest economies—the States of São Paulo and Rio de Janeiro—adopted different concepts and procedures for estimating ICMS tax expenditure, which hindered comparability between the different member states.

This reality persists to this day, as each member state has its own methodology for calculating the respective tax expenditure, so that control over the criteria used in relation to what could be accounted for and disclosed in this regard to achieve a greater degree of transparency is still quite timid—or even

non-existent. SRFB's own methodology for calculating "tax expenditures" is not without its critics (UNAFISCO, 2021).

Incidentally, a research conducted in the states of Amazonas, Bahia, Ceará, Goiás, Paraná, Pernambuco, Rio de Janeiro, Rio Grande do Sul, Santa Catarina and São Paulo evaluated as "low" the degree of transparency of these member states regarding disclosure, whether in active or passive transparency, of information related to tax incentives (PINHO, 2017a).

This study used as instrument the requests for access to information submitted to the respective federal entities, in their respective transparency portals, in the months of April and June 2016, with details about the incentive programs and individualized data per beneficiary legal entity.

One argument for denying access to the requested information was precisely the protection of tax secrecy on this information; another argument was that providing the requested information would require additional work of data analysis, interpretation, or consolidation, based on laws and/or infra-legal acts of the states surveyed which reproduced the provisions of art. 13, III, of Decree No. 7.724/2012, which regulates the LAI at the federal level. It almost four years after data collection for that study, and we see no substantial changes in this scenario.

In requests for access to information[5] made in February 2020, on the ombudsman portals of the States of Rio de Janeiro and Minas Gerais, we requested information on the ten companies that received the most ICMS tax incentives in their respective territories from 2015 to 2019, including company name, CNPJ, individualized values per company, and type of benefit enjoyed.

In both cases, however, the claim of tax secrecy continued to be the basis for denying access to these individualized data. In the State of Rio de Janeiro, the denial was upheld in the 1st administrative appeal instance, whereas in Minas Gerais, it was upheld in the 2nd administrative appeal instance, after which no new appeals were filed.

Also in February 2020, a request for access to information[6] requested data from the SRFB on the 20 legal entities that received/enjoyed the most federal tax incentives from 2015 to 2019, specifying the respective CNPJ, name/company name, values of incentives per year, possible economic and social counterparts required, inspection reports, and any decisions ratifying or opposing these reports. These were also denied based on tax secrecy, response maintained in the 1st administrative appeal instance, after which no new appeals were filed.

Importantly, it is not only citizens who have difficulty in having their requests for passive transparency answered, as previously reported, but also oversight bodies. The Final Report of the CPI on Tax Incentives held by the Legislative Assembly of the State of Goiás (CPI-IF/ALEGO), approved in March 2020, had already pointed out this situation, albeit in a generic sense:

> 10.2. Worst, however, is that not even oversight bodies, such as the TCE/GO, CGE/GO, and MPGO, have been granted access to this individualized information, under the same argument of fiscal secrecy, despite their express supervisory powers foreseen in the Federal and State Constitutions (CRFB, arts. 70, 74, 127, and 129, III, VI, and IX; CE/GO, arts. 25, 29, and 117, III, V, and VIII) and in the respective governing legislation.
>
> This is because any secrecy cannot inhibit the inspection activities of the competent agencies, since considering an information confidential should have the effect, at most, of transferring to other agencies the obligation to preserve this secrecy when performing their inspection duties, pursuant to § 2 of art. 198 of the CTN (GOIÁS, 2020, p. 441-442, original emphasis removed).

More specifically and directly, in response to a citizen's request for access to information made to the General Ombudsman's Office of the State of Goiás[7], the State Comptroller General (CGE/GO) expressly stated not having access to individualized data related to credit enjoyed by legal entities—also called "tax credit" in some state laws—, given the opposition of tax secrecy by the State Secretariat of Economy of

5. If this article is approved, the author undertakes to inform the number and date of protocol, and other information considered relevant by the Committee, regarding the requests for access to information analyzed in this work, to compose the final version of the article. This was not done on this occasion to avoid questioning the possibility of identifying the author.

6. See note 3.

7. See note 3.

Goiás, which corroborates previous study on limitations to internal control in this area (TORQUATO-FERNANDES, 2016).

In the case of Goiás, we must highlight that the granted credit consists precisely of the most representative kind of tax incentives found in the total volume of tax expenditures, as inferred from a simple reading of the budget guideline laws and the annual budget published since 2018 (GOIÁS, 2021a).

This is alarming data, because the CGE/GO is unable to control the largest portion of ICMS tax expenditure in Goiás, simply because it lacks access to information that would allow this control more effectively way at the taxpayer-level regarding this type of tax incentives.

All these empirical data indicate, within the limitations of the inductive method, that at least until February 2020, the treasury bodies still resisted giving citizens and, in some cases, even oversight bodies access to individualized taxpayer-level information on tax incentives, as pointed out in the Final Report of the CPI-IF/ALEGO and the CGE/GO response above.

Thus, several obstacles have historically stood in the way of transparency regarding tax incentives, notably the absence of a national methodology that would allow such calculation to ensure a methodologically adequate comparison between different member states, and the opposition to tax secrecy by state tax authorities and by the SRFB in the not-too-distant past.

3. TRANSPARENCY OF TAX INCENTIVE DATA: MAIN ADVANCES FOR ITS IMPLEMENTATION

Despite the above scenario, we highlight three constitutional, legal, and normative innovations that could increase the level of tax incentive transparency at the national or federal level, namely Decree No. 10,209/2020, CA No. 109/2021, and CL No. 178/2021.

At the federal level, Decree No. 10,209/2020 provides for the request of information and documents and on the sharing of information protected by tax secrecy. Produced from meetings between the Federal Court of Accounts (TCU), the Comptroller General of the Union (CGU), and the Ministry of Economy throughout 2019, the text seeks to equate the impasse between the need for access to information for fiscal and financial audits under the responsibility of those control bodies and respect for tax secrecy (CAETANO and NOGUEIRA, 2020, p. 73).

This normative act allows CGU and TCU access to data and information protected by tax secrecy, provided that certain requirements and procedures are observed, to certify the indispensability of using the requested data and information for audit purposes, and to ensure that secrecy is maintained in the process of transfer from one body to another.

This measure was not designed specifically to solve the control deficit of tax incentives, but rather a broader problem that was—and still is to some extent— the lack of access by control bodies to information protected by tax secrecy, even for audits and other oversight work of these agencies. Regardless, and despite the fact that this measure does not solve the deficit of active transparency and social control regarding tax incentives, it at least has the potential to strengthen the control bodies, by ensuring them the basics for exercising their constitutional powers: access to data and information, without which any control work is severely hampered and/or limited.

In line with the final control of tax incentives, relevant provisions were brought by CA No. 109/2021. In § 4 of its article 4, determined the President of the Republic to issue a complementary law to address "objective criteria, performance goals, and procedures for granting and changing incentives or benefits of a tax, financial, or credit nature for legal entities which result in decreased revenue or increased expenditure" (item I) and "rules for the mandatory periodic evaluation of the economic and social impacts of the incentives or benefits referred to in item I of this paragraph, with unrestricted disclosure of the respective results."

In the State of Goiás, articles 44, § 2, and 45, III, of Complementary Law No. 138/2018 already established the need to have well-defined counterparts to the legal entities receiving tax incentives, focusing on the moderateness of the tax expenditure involved and the extent of convergence in regional development to be obtained, upon annual evaluation by the Tax Administration on economic, technological, environmental, and spatial indicators, in addition to compliance with the goals established in the projects in terms of volume of ICMS collection and number of jobs generated in the local market. This is a prai-

seworthy legislative foresight, which has recently become positive in similar terms in art. 4 of CA No. 109/2021 to the CRFB.

In 2019 and 2021, the Mauro Borges Institute of Statistics and Socioeconomic Studies of Goiás (IMB/GO) published reports on ICMS state tax expenditures, including an extremely critical approach to Goiás' current model of tax incentive policy. Nevertheless, it is understood that the work of the IMB/GO, while relevant, is not to be confused with that aimed at fulfilling the provisions of the state legal provisions mentioned above (GOIÁS, 2019 and 2021b).

Finally, the last relevant legislative change occurred with the publication of CL No. 187, published on December 17, 2021, whose article 45 amends the wording of article 198 of the CTN to exempt from tax secrecy information related to "tax incentives, expenditures, benefits, or exemption whose beneficiary is a legal entity." It is important to note that the legislator, aware of the intense doctrinal debate about the reach of each of the aforementioned legal categories, expressly established them side by side as exceptions to tax secrecy, so that none of them would remain in the shadows.

This legislative change comes at a good time and removes the main reason, repeatedly raised by tax authorities, to deny access to detailed taxpayer-level information in this matter: tax secrecy.

The misinterpretation that was given to tax secrecy in the cases above in the new provision consisted of a serious distortion created by Tax Law, in a reading disassociated from Financial Law, from the Science of Finance and from the approach on public policies in general, and which tax lawyers have made little effort to combat. Now, the issue has been properly addressed by the legislator at the source of the issue, Tax Law itself, by amending the CTN, although we understand that even before the aforementioned legal amendment, publicity and transparency should be the rule in this matter.

It is interesting to reflect on whether, after CL No. 187/2021, Decree No. 10,209/2020 lost its practical usefulness in relation to information that is now expressly recognized by the national legislator as being subject to wide disclosure, as in the case of tax incentives, expenditures, benefits, or exemption whose beneficiary is a legal entity.

The answer in principle would be affirmative, but it remains important for control bodies to have regulations—in the absence of express law—that recognize their right to access classified information when necessary and essential to the performance of their institutional duties.

CONCLUSIONS

Understanding tax incentives as a public policy instrument shows that these are not an end in themselves; rather, they are designed to solve policy problems as the public policy instrument that they are. Therefore, they must be subject to permanent control, both legal-formal and final, to assess whether the requirements established by the legal system have been met and whether the incentives are—or continue to be—fulfilling the purposes for which they were granted (economic, social, environmental, etc.).

This need for control becomes even more evident when the tax expenditure inherent to these incentives is analyzed, since they weigh on the state budget, to the extent that the government potentially fails to collect more taxes to induce a certain economic activity that might bring benefits equal to or greater than those achieved with the traditional taxation rule.

Tax incentives are used as instruments of regional development in virtually all units of the federation. But the diversity and complexity of the legislative and regulatory system on tax incentives in general imposes the need for greater transparency, both active and passive, to ensure an increasingly effective control.

However, there have been important and recent constitutional, legislative, and regulatory advances at the national level, such as Decree No. 10,209/2020, CA No. 109/2021, and CL No. 178/2021. The first allows the CGU and TCU access to confidential information when necessary for exercising their respective institutional powers; the second requires a supplementary law to establish criteria for monitoring and evaluating tax incentives; and the third expressly rules out the protection of tax secrecy regarding information on tax incentives, benefits, expenditures and exemption whose beneficiary is a legal entity.

Although challenges to control still persist in this matter, these relevant changes in the legal system should allow control bodies and society in general to

have access to amounts enjoyed individually by corporate beneficiaries, audit reports and other data and information relevant to tax incentive control, which until then were not available to society or even some control bodies, although this access should already have been made available.

Finally, despite these advances, the lack of a national methodology or minimum elements to standardize tax expenditure calculation practiced by sub-national entities remains, making it extremely difficult to systematize the topic. Perhaps this should be the next research subject of interest and may even deserve attention from the national legislature itself, aiming to promote greater tax transparency.

REFERENCES

AFONSO, José Roberto Rodrigues (coord.). *A renúncia tributária do ICMS no Brasil*: documento para discussão nº 327. Washington, WA: Banco Interamericano de Desenvolvimento, fev. 2014. Disponível em: <https://joserobertoafonso.com.br/renuncia-tributaria-do-icms-afonso-et-al/>. Acesso em: 16 set. 2021.

ASSIS, Karoline Marchiori de. A adequação como pressuposto de validade da norma de incentivos fiscais e a insuficiência da Ciência do Direito para esse controle. In: CYRINO, Rodrigo Reis; NEVES, Rodrigo Santos (coord.) *Temas de Direito Constitucional*. Vol. 2. Rio de Janeiro, RJ: Lúmen Juris, 2020, p. 207-238.

CAETANO, Adriana; NOGUEIRA, Gilberto Souza. O sigilo fiscal e a prestação de contas da Presidência da República. *Revista do TCU*, Brasília, n. 146, p. 56-76, jul./dez. 2020. Disponível em: <https://revista.tcu.gov.br/ojs/index.php/RTCU/article/view/1674>. Acesso em 13 abr. 2021.

CARVALHO FILHO, José dos Santos. Manual de Direito Administrativo. 31. ed. São Paulo, SP: Atlas, 2017.

CARVALHO JUNIOR, Nilson Elias de. Aplicação do dever de proporcionalidade aos incentivos fiscais concedidos pelos Estados brasileiros. *Revista Eurolatinoamericana de Direcho Administrativo*, Santa Fe, vol. 5, n. 1, p. 139-156, ene./jun. 2018. Disponível em: <https://doi.org/10.14409/redoeda.v5i1.8528>. Acesso em 20 fev. 2021.

DIAS, Maria Tereza Fonseca; GUSTIN, Miracy Barbosa de Sousa; NICÁCIO, Camila Silva. *(Re)pensando a pesquisa jurídica*: teoria e prática. 5. ed. São Paulo, SP: Almedina, 2020.

DÓRIA, Antônio Roberto Sampaio (coord.). *Incentivos fiscais para o desenvolvimento*. São Paulo, SP: José Buschatsky, 1975.

FIGUEIREDO, Carlos Maurício; NÓBREGA, Marcos (org.). Renúncia de receita; guerra fiscal e *tax expenditure*. In: FIGUEIREDO, Carlos Maurício; NÓBREGA, Marcos. Responsabilidade fiscal: aspectos polêmicos. Belo Horizonte, MG: Fórum, 2006, p. 109-133.

FREITAS, Juarez. *Direito fundamental à boa administração pública*. São Paulo: Malheiros, 2014.

GOIÁS. Assembleia Legislativa do Estado de Goiás (ALEGO). CPIs ativas. CPI dos Incentivos Fiscais. Relatórios e Atas: *Relatório Final*. Goiânia, GO: ALEGO, 2020. Disponível em: <https://portal.al.go.leg.br/legado/cpi/ver/id/33>. Acesso em 16 set. 2021.

GOIÁS. Goiás Transparente. Planejamento e Orçamento. *Peças do Orçamento*. 2021a. Disponível em: <http://www.transparencia.go.gov.br/portaldatransparencia/planejamento-e-orcamento/pecas-do-orcamento>. Acesso em 24 dez. 2021.

GOIÁS. Secretaria de Estado da Casa Civil. *Lei Complementar nº 138, de 18 de janeiro de 2018*. [...]. Goiânia, GO, 2018. Disponível em: <https://legisla.casacivil.go.gov.br/pesquisa_legislacao/101125/lei-complementar-138>. Acesso em 16 set. 2021.

GOIÁS. Secretaria-Geral da Governadoria. Instituto Mauro Borges de Estatísticas e Estudos Socioeconômicos.

Estudos do IMB. *Incentivos fiscais e o Estado de Goiás*: uma análise de impacto e do custo econômico dos programas fomentar/ produzir e crédito outorgado. Goiânia, GO: IMB/GO, 2019. Disponível em: <http://www.imb.go.gov.br/index.php?option=com_content&view=article&id=1791&catid=8&Itemid=208>. Acesso em 16 set. 2021.

GOIÁS. Secretaria-Geral da Governadoria. Instituto Mauro Borges de Estatísticas e Estudos Socioeconômicos. Estudos do IMB. *Relatório Renúncia de receita – 2020*. Goiânia, GO: IMB/GO, 2021b. Disponível em: <https://www.imb.go.gov.br/files/docs/publicacoes/estudos/2021/Relatorio_Renuncia_Fiscal_2020.pdf>. Acesso em 16 set. 2021.

HELLMUTH, William Flo; SURREY, Stanley S. *The tax expenditure budget*: response to professor Bittker. *National Tax Journal* (The University of Chicago Press), Chicago, vol. 22, n. 4, dec. 1969, p. 528-537. Disponível em: <www.jstor.org/stable/41791686>. Acesso em 10 jun. 2021.

HOLMES, Stephen; SUSTEIN, Cass S. *O custo dos direitos*. Trad. Marcelo Brandão Cipolla. São Paulo, SP: WMF Martins Fontes, 2019.

McDANIEL, Paul R.; SURREY, Stanley S. *The tax expenditure concept and the budget reform act of 1974*. Boston College Industrial and Commercial Law Review, Boston, vol. XVII, n. 5, p. 679-737, jun. 1976. Disponível em: <https://lawdigitalcommons.bc.edu/bclr/vol17/iss5/1>. Acesso em 15 jun. 2021.

MONTEIRO, Maria Elêusis de Alencar. *Incentivos fiscais e desenvolvimento regional*. Brasília, DF: Ministério do Interior, 1977.

OLIVEIRA, Weder de. *Curso de Responsabilidade Fiscal*: Direito, Orçamento e Finanças Públicas. 2 ed. Belo Horizonte: Fórum, 2015.

PINHO, Bruno *et al. Transparência das políticas públicas de renúncia fiscal*: uma análise sob a ótica de dados abertos. In: X Congresso Consad de Gestão Pública, Painel 30/03 – Inovação e Criatividade no Governo Eletrônico: Novas Formas de Produção de Tecnologia no Setor Público, Brasília, 5 a 7 jul. 2017a. Disponível em: <http://consad.org.br/wp-content/uploads/2017/05/Painel-30_03.pdf>. Acesso em 16 set. 2021.

PINHO, Mariana Corrêa de Andrade. *Controle jurídico dos incentivos fiscais*. 2017. 132 f. Dissertação (Mestrado em Direito) – Programa de Estudos Pós-Graduados em Direito, Pontifícia Universidade Católica de São Paulo, São Paulo, 2017b.

SILVA, Rogerio Luiz Nery da. Políticas públicas e Administração Democrática. *Revista Sequência: Estudos Jurídicos e Políticos, Florianópolis*, nº 64, p. 57-84, jul. 2012. Disponível em: <http://dx.doi.org/10.5007/2177-7055.2012v33n64p57>. Acesso em 04 out. 2020.

SCHOUERI, Luís Eduardo. *Normas tributárias indutoras e intervenção econômica*. Rio de Janeiro, RJ: Forense, 2005.

SECCHI, Leonardo. *Políticas públicas*: conceito, esquemas de análise e casos práticos. 2. ed. São Paulo, SP: Cengage Learning, 2013.

TORQUATO-FERNANDES, Andressa Guimarães. Limitações ao controle interno para a fiscalização de benefícios fiscais em face do sigilo fiscal. In: BLIACHERIENE, Ana Carla; BRAGA, Marcus Vinícius de Azevedo; RIBEIRO, Renato Jorge Brown. (org.). *Controladoria no setor público*. São Paulo: Fórum, 2016, v. 1, p. 343-355.

UNIÃO NACIONAL DOS AUDITORES FISCAIS DA RECEITA FEDERAL DO BRASIL (UNAFISCO). Privilegiômetro tributário. *Nota Técnica Unafisco nº 21/2021 – Da noção constitucional de gastos tributários à concretização dos privilégios tributários*: conceitos e premissas que amparam o Privilegiômetro Tributário com dados para o ano de 2021 (atualização da Nota Técnica nº 19/2020). Disponível em: <https://privilegiometrotributario.org.br/Nota_tecnica_Unafisco_No%2021_2021.pdf>. Acesso em 29 dez. 2021.

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