

# Reflection about public finance standards: a focus on the concession of benefits through revenue foregone

## Abstract

The Brazilian society is experiencing changes in the public equity management model. Part of these changes is due to the enactment of the Fiscal Responsibility Law (LRF), which created strict rules for revenue foregone. Analyzing public finance standards that set limits and conditions to achieve fiscal management responsibility, particularly regarding the concession of benefits through revenue foregone, is highly relevant as a social contribution. The aim in this study is to reflect on the doctrine and jurisprudence of the Brazilian Federal Court of Auditors (TCU) and of the State of Minas Gerais, which establish restrictive conditions for revenue foregone. The research is characterized as exploratory and the documentary sources include legislation, doctrine and jurisprudence of the Federal Court of Auditors and the Minas Gerais State Court of Auditors, with a view to supporting inferential observations about the theme. The study results indicate some advances in terms of revenue foregone in Brazil: 1) the LRF represents the first advance by imposing restrictions on the concession of this benefit; 2) the National Treasury created the revenue deduction method, thus promoting greater disclosure of these amount; 3) the Courts of Auditors supervise compliance with the limits set for revenue foregone.

**Key words:** Reflection; Public Finance: Revenue Foregone.

## Romualdo Douglas Colauto

Ph.D. in Production Engineering (UFSC), Professor at Universidade Federal do Paraná (UFPR). **Contact:** Av. Prefeito Lothário Meissner, 632, Jardim Botânico, Curitiba, PR, Brazil, CEP: 30.460-070. E-mail: [rdcolauto@ufpr.br](mailto:rdcolauto@ufpr.br)

## Carla Márcia Botelho Ruas

B.Sc. in Law (UFMG), Specialist in Governmental Accounting (UFMG), Senior Lawyer at Paulo Eduardo Mello Advogados Associados. **Contact:** Rua Santos Barreto, n. 58, 11<sup>th</sup> floor, Bairro de Lourdes, Belo Horizonte, MG, Brazil, CEP: 30170-070. E-mail: [carlambruas@gmail.com](mailto:carlambruas@gmail.com)

## Rita de Cássia Teixeira Pires

B.Sc. in Business Administration, Economics and Accountancy (UFMG) and Specialist in Governmental Accounting (UFMG). **Contact:** Rua Camapuã, 585, Barroca, Belo Horizonte, MG, Brazil, CEP: 30430-450. E-mail: [rita@nupad.ufmg.br](mailto:rita@nupad.ufmg.br)

## Paulolino Pereira

Specialist in the Public Area (UFMG) Professor at Universidade Federal de Minas Gerais (UFMG). **Contact:** Av. Antônio Carlos, 6.627, Pampulha, Belo Horizonte, MG, Brazil, CEP: CEP: 31270-901 E-mail: [paulolin@face.ufmg.br](mailto:paulolin@face.ufmg.br)

## 1. Introduction

Supplementary Law 101/00, called the Fiscal Responsibility Law (LRF), was issued to change the way public finances have historically been managed in Brazil, inserting the current principles of fiscal management transparency and responsibility into the legal order. This legislation established accountability in fiscal management, presupposing planned and transparent action, including the prevention of risk and the correction of deviations that are capable of affecting the balance in public accounts through compliance with: (1) revenue and expense balance targets; (2) compliance with limits and conditions for revenue foregone; (3) creation of staff expenses; (4) social security and others; (5) consolidated and security debts; and (6) credit operations, including revenue acceleration, guarantee concession and registration in residuals payable. Thus, the limits and conditions imposed for revenue foregone need to be observed, a benefit granted by public administrators to encourage economic-social activities.

Leiria (2005) underlines that the establishment of public finance standards for the sake of fiscal management responsibility determines that public managers be confronted with the imperative need for administrative planning, that is, an administration with previewed objectives, with beginning, middle and end, as public finance standards are linked to fiscal responsibility.

Fiscal responsibility in public management means compliance with standards and limits for public finance management, including accountability about how much of and how the resources resulting from the taxes society pays were spent. In addition, fiscal management responsibility means saying that, if this scope of good public finance management is not complied with, public managers will be held responsible for their bad management, submitted to the respective penalties applicable.

Balanced public accounts require planned administration, efficient and systematic control of budgetary resources, including their consequent monitoring and assessment. If this is not the case, managers can be held accountable in the field of fiscal responsibility because of reckless management. Responsibility means the quality of being responsible, which means the condition of being accountable for a certain event that is subject to pertinent legal rules (Martins & Nascimento, 2001).

Public managers cannot use foregone revenue indistinctly, covering up interests under the pretense of encouraging the development of a given economic sector. To give an example, the Federal Government's recent fiscal policy can be discussed, reducing IPI (Tax on Manufactured Products) tax rates for some products to try and dribble the global economic crisis. It should be investigated whether this revenue foregone was in compliance with legal limits, as well as whether it entailed positive effects in the economy.

The aim in this study is to reflect on the doctrine and jurisprudence of the Federal Court of Auditors and of the State of Minas Gerais, which establish restrictive conditions for revenue foregone. It is highlighted that there is no intent in this research to take a stand against the use of revenue foregone, but merely to investigate the limits and conditions for its concession established in the Constitution of the Republic and in Supplementary Law 101/00, besides providing an inferential analysis about the doctrine and jurisprudence of the Federal Court of Auditors and the State of Minas Gerais related to the theme.

## 2. Study method

This research is characterized as an exploratory study, using secondary sources, with a logical-deductive approach. Tripodi, Fellin and Meyer (1981, p.64) explain that the main goal of exploratory studies is to "develop, clarify and change concepts and ideas, with a view to providing researchable hypotheses for further investigation". Thus, the aim is to get to know public finance standards on foregone revenues in depth, as established in the Federal Constitution, in Supplementary Law 101/00 and in infra-legal standards about fiscal management responsibility standards.

Concerning systematic procedures to describe and explain the phenomena, the study was developed in an environment in which the qualitative approach was recommended. According to

Richardson (1999), the qualitative method is characterized by the non-use of statistical instruments to analyze a problem. A bibliographic research was used to develop the study, as well as a documentary research focused on Brazilian legislation, on the doctrine and jurisprudence of the Federal Court of Auditors and the Minas Gerais State Court of Auditors to support a reflection on the theme foregone revenues.

### 3. Characteristics of Supplementary Law 101/00 in Fiscal Management

Supplementary Law 101/00 relates to fiscal management responsibility, particularly the necessary involvement of revenues, expenses and their balance. Lino (2001) describes that the main premise is planning to direct all governmental actions, including both the collection of resources and the realization of expenses, which should always be subject to strict containment, or particularly to the strict imposition of public spending limits, ranging from staff to indebtedness and actions to improve the governmental apparatus. In this respect, Supplementary Law 101/00 can be an instrument to accomplish the Brazilian society's aspirations, as an efficient internal and external supervision and control system, especially considering political and social aspects.

Sanctioned and enacted on May 4<sup>th</sup> 2000, Fiscal Responsibility Law was aimed at altering the public resource management mechanisms, inserting the principles of fiscal management responsibility and transparency into the legal order. Lino (2001) highlighted the Federal Government's deliberate effort to transmit the idea to the general public that Supplementary Law 101/00 would be capable of achieving the Brazilian society's main objective: put an end to corruption, fight against dishonest administrators, in short, solving problems related to the due and correct application of public resources.

Art. 1 of Supplementary Law 101/00 states that fiscal management responsibility presupposes planned and transparent action, preventing risks and correcting deviations capable of affecting the public account balance through compliance with revenue and expense targets and limits and conditions for foregone revenues, creation of staff, social security and other expenses, consolidated and security debts, credit operations, including revenue acceleration, guarantee concession and registration in residuals payable. In that sense, Motta and Fernandes (2001, p. 243) explain that:

fiscal management responsibility is planned and transparent action; preventive and corrective action of risks and deviations that can affect the public account balance; compliance with revenue and expense balance targets; compliance with limits and conditions for tax collection previews and their realization, revenue foregone, and creation of staff, social security and other expenses, consolidated and security debts, credit operations, including revenue acceleration, guarantee concession and registration in residuals payable. (Motta & Fernandes, 2001, p. 243).

To achieve fiscal management responsibility, managers need to consider how to manage the resources resulting from the revenues collected, so that public expenses are incurred within these limits, and mainly so that the quality of public spending is in accordance with society's expectations. Nunes (2002, p. 13) emphasizes the need to plan expenses, to guide the actions of today's managers by the consequences of these actions for future generations. No attempts should be made to obtain the gain of expenses at present while transferring the burden to the future, whether to the next year, next mandate or future generations. Funding new expenses with inflation, tax rises, debt increases, budget revenue acceleration, guarantees, residuals payable and revenues foregone should be avoided. Also, creating expenses for the future without funding previews should be avoided, particularly in the staff and social security areas, as well as the accumulation of hidden deficits.

The intent of this instrument was to regulate political-management issues in public management, presenting the limitations and prohibitions public managers are obliged to comply with, with a view to pre-

serving the financial balance of public accounts and the transparency of administrative procedures through different management instruments. According to Khair (2000), Supplementary Law 101/00 rests on four axes to fulfill its function as a public finance regulator: planning, transparency, control and accountability.

In that sense, planning is improved by the creation of new information, targets, limits and conditions for foregone revenues, generation of expenses, staff expenses, social security expenses, debts, credit operations, budget revenue acceleration (ARO) and the concession of guarantees. Transparency is achieved through the large-scale dissemination of five new fiscal management monitoring reports that permit identifying revenues and expenses: (1) Fiscal Policy Attachment; (2) Fiscal Target Attachment; (3) Fiscal Risk Attachment; (4) Summary Budgetary Execution Report; and (5) Fiscal Management Report. Control is enhanced through greater transparency and information quality, requiring more effective and continuous supervision by the Courts of Auditors. Managers should be held accountable whenever rules are not complied with, through the suspension of voluntary tasks, guarantees and the hiring of credit operations, including ARO. Those responsible will be subject to the sanctions established in the Penal Code and Fiscal Responsibility Law.

#### 4. Normative Variables Outlined in Supplementary Law 101/00

One of the important aspects to be highlighted in that each city, state and Union has its own quantifications and limits to promote management that is compatible with the fiscal responsibility concept. Supplementary Law 101/00 merely presents the general lines, granting each political entity the autonomy to legislate according to its specific needs. And these aspects outlined in Supplementary Law 101/00 are only put in practice when three regulatory instruments are issued: the Pluriannual Plan (PPA), the Law of Budgetary Guidelines (LDO) and the Annual Budget Law (LOA). These regulatory instruments have been defined in Federal Constitution Art. 165, as well as in Supplementary Law 101/00.

Art. 3º of Supplementary Law 101/00 deals with the PPA. It was blocked though, which only left the definition in Art. 165 of the Federal Constitution, according to which the law that establishes the pluriannual plan should regionally set the guidelines, objectives and targets of the federal public administration for capital and other resulting expenses, as well as for expenses related to continuing programs.

In other words, the PPA contains the intended management planning of a given political entity for a four-year period. The LDO then, according to the Federal Constitution, should include the targets and priorities of the federal public administration, provide orientations for the elaboration of the LOA and discuss changes in tax law. Supplementary Law 101/00 also establishes that the LDO should deal with other control mechanisms, including: balance between revenues and expenses, contract limitation, cost control and result assessment of programs funded with budgetary resources, which should include the Fiscal Target Attachment and the Fiscal Risk Attachment, currently regulated in the Technical Manual for the Elaboration of Fiscal Statements, approved by National Treasury Decree 462, issued in August 2009.

In the Fiscal Target Attachment, annual targets are set in current and constant amounts, related to revenues, expenses, nominal and primary results and public debt amounts, for the year they refer to and the next two years. It should contain, for example, a statement of estimated foregone revenues and their compensation and of the expansion margin of continuing compulsory expenses, as well as a statement of annual targets, based on a calculation history and method that justify the intended results, comparing them with the results of the previous three years, and evidencing their consistency with the premises and objectives of the Brazilian economic policy.

The Fiscal Risk Attachment helps to evaluate contingent liabilities and other risks capable of influencing public accounts, and should inform about the necessary measures if they come true. In other words, the LDO presents a more objective planning for each financial year, in which the governmental planning outlined in the PPA gains more visible outlines. Highlighting this characteristic, Supplementary Law 101/00 emphasizes the importance of the LDO and grants it a fundamental role in the analysis of fiscal management responsibility.

The LOA makes this all concrete, previewing revenues and setting public expenses in accordance with previous planning. Thus, it is only by analyzing these three regulatory instruments, under each political entity's competence, that one can dimension how public management is conducted. What Supplementary Law 101/00 proposes are general standards, which political entities are obliged to comply with, using these planning instruments to quantify and give form to the limits imposed on public managers. In that sense, one needs to clarify that, in the present study, these general standards will be analyzed, as specified in the legislation in force. It should be kept in mind, however, that fiscal responsibility can only be analyzed if, besides these general standards, the PPA, LDO and LOA are also included in the analysis.

## 5. Concept and Legal Aspects Of Foregone Revenues

In Art. 150, the Federal Constitution prohibits unequal treatment between taxpayers in equivalent situations. Nevertheless, it admits the concession of fiscal incentives to promote a balanced socioeconomic development among different Brazilian regions. In that context, foregone revenues derive from a situation in which the Public Power, based on a generic or specific legal authorization, gives up part of the revenues it would be entitled to collect due to economic or institutional political reasons, aiming to encourage certain productive segments, stimulate regional development or enhance the competitiveness of strategic sectors. Typical examples of such waivers are: tax exemptions, amnesties and subsidies. Almeida (2001, p. 54) explains revenues foregone as a government policy:

the act of foregoing revenues is essentially a government policy like any another, put in practice to execute the functions inherent in the political entities that constitute the different governmental spheres: federal, state and municipal. This is a longstanding public policy in the international sphere, whose application has spread across countries on all continents, without any distinction in terms of socioeconomic development level and government regimen, aimed at promoting the financial support needed to accomplish programs, projects and activities of interest to society and balanced socioeconomic development among the country's different geo-economic regions, to develop strategic economic segments and to favor certain groups of contributors, among other relevant public objectives (Almeida, 2001, p. 54).

Foregone revenues represent an economic policy instrument. One may say that it is an instrument for the State to intervene in the economy and, as such, depends on Public Management acts in its different competency spheres. A very good illustration is the federal government's reduction, in some cases even to zero, of the IPI rate on cars, and later on construction material and domestic appliances, in the attempt to find a way around the global economic crisis that started in the United States of America in 2008. In December 2008, Decrees 6687 and 6696 were issued, zeroing or reducing rates on motor vehicles until March 2009. Then, on March 30<sup>th</sup> 2009, Decree 6809 was issued, extending the benefit on cars and including other products, particularly from the civil construction and domestic appliance branches.

The Federal Constitution establishes that any subsidy or exemption, calculation base reduction, presumed credit concession, amnesty or remission, related to taxes, fees or contributions, can only be granted through a specific federal, state or municipal law, which exclusively regulates the subjects listed above. Art. 153, §1, of the Federal Constitution, however, creates the possibility of a rate reduction for some taxes under federal responsibility through a simple Executive Decree. When the federal government reduced the IPI, it used this prerogative, issuing decrees that changed the IPI rate on different products. Besides the IPI, the Union can change tax rates on the importation of foreign products; on the exportation of Brazilian or nationalized products; and in credit, exchange and insurance or securities operations, without the need to issue a law.

Martins and Nascimento (2001) explain that the expression "foregone revenues" means waiving the right on a certain tax, as a result of abandonment or express giving up by the federal entity compe-



tent for its establishment. Thus “always import based on abandonment or voluntary giving up, according to which the holder of a right ceases to use it or announces that (s)he does not want to use it” (Plácido & Silva, 1997, p. 701). This act derives from the concession of tax incentives. These incentives, in principle, are instruments the Public Power has at its disposal to promote economic development and permit increased jobs in a certain territorial area where they are applied. They imply a reduction of the amount due by the contributor who is in the condition of beneficiary.

According to Supplementary Law 101/00, foregoing revenues comprises amnesty, remission, subsidy, presumed credit, granting of non-general exemption, rate change or modification of the calculation base to imply a distinguished reduction of taxes or contributions, and other benefits corresponding to distinguished treatment. As observed in the concept introduced in Supplementary Law 101/00, the forms of foregoing revenues are presented in further detail than in the Federal Constitution, including concepts like: presumed credit; rate change and calculation base modification. In generic terms, amnesty means the partial or complete loss of the infractions the debtor of the tax incurred in.

## 5.1 Legal limits and conditions for foregone revenues

Foregone revenues actually refer to the use of a tax for extra-fiscal purposes, with a view to reaches social, economic or political-administrative objectives. After the enactment of Supplementary Law 101/00, the balance of public accounts became imperative, and compliance with result targets fundamental to bring down deficits. The Union, the states, the Federal District and cities are responsible for establishing, previewing and actually collecting all taxes within its constitutional competency, in accordance with Art. 11 of Supplementary Law 101/00. Each government sphere needs to adequately explore its tax base and, consequently, be able to estimate its revenues. Thus, those in power cannot make decisions to reduce revenues which will compromise the health of public finance or make the public entity’s going-concern unfeasible.

To widen the control on fiscal exemption, the federal Constitution determines that the LOA project needs to contain a regional statement about the effect on revenues and expenses deriving from tax, financial and credit exemptions, amnesties, subsidies and benefits. The intent of elaborating this statement is to enhance budgetary transparency, so as to assess the actual effects of the economic policies promoted through foregone revenues. Art. 14 of Supplementary Law 101/00 sets the legal limits and conditions to promote foregone revenues without affecting the health of public finances, as follows:

the concession or expansion of tax incentives or benefits that result in foregone revenues should be accompanied by estimates of the budgetary-financial impact in the year it should come into force and the two subsequent years, comply with budgetary legal determinations and with at least one of the following conditions: (I) statement by the proponent that the exemption was considered in the budgetary law’s estimated revenues, in the form of Art. 12, and that it will not affect the fiscal result targets established in the attachment to the budgetary law; and (II) be accompanied by compensation measures, during the period mentioned in the main section, through increased revenues, resulting from rate increases, expansion of the calculation base, mark-up or creation of a tax or contribution (Supplementary Law 101, 2000, art. 14).

Revenues foregone through amnesty, remission, presumed credit, non-general exemption, rate change of some tax or calculation base modification, resulting in lower public revenues, should be accompanied by estimates of the budgetary-financial impact in the year it should come into force and the two subsequent years. In addition, to comply with the premises of Supplementary Law 101/00, each decision-maker should demonstrate that the exemption complies with the determinations in the LDO.

Public managers need to demonstrate that the exemption was considered in the estimated revenues mentioned in the LOA and that it will not affect the fiscal result targets established in the respective attachment to the LDO. If that is not possible, revenues can only be foregone if compensation is present,

that is, increased revenues through higher rates, a broader calculation base, a mark-up or creation of a tax or contribution.

In case the second alternative is true, the act that implies exemption will only come into force when compensation through increased revenues has been guaranteed. This procedure is an important support mechanism in compliance with fiscal targets and in the allocation of revenues to different expenses in the LOA.

If the determinations of Supplementary Law 101/00 are not complied with, this will entail several consequences for the federal entity as well as for the public manager. What the federal entities (Union, states or cities) is concerned, voluntary transfers to entities that do not establish, preview and actually collect all taxes are prohibited. As regards public managers, Law 8.429/92 defines the granting of administrative or fiscal benefits without compliance with the legal or regulatory formalities applicable to the kind, as well as acting negligently in tax or income collection as acts of administrative improbity that infringe on public finance.

The legally established consequences for public managers with unethical behavior are strict: complete reimbursement of damage; loss of goods or values illegally added to his/her equity, if that is the case; loss of public function: suspension of political rights between five and eight years; payment of civil fine corresponding to up to twice the value of the damage and prohibition to close contracts with the Public Power or receive tax or credit benefits or incentives, whether direct or indirectly, even if intermediated by a legal entity of which (s)he is the majority partner, for a five-year period.

As for mayors, Decree-Law 201/67 ranks the granting of loans, support or funding without the authorization of the Chamber or against the law as a responsibility crime. And, in that case, the penalty imposed is between three months and three years of confinement, as well as the loss of the public function and inability to exercise any public function, whether elected or nominated, during a five-year period, without prejudice to the civil reparation of the damage caused to public or private property.

It is important to highlight that, in accordance with Art. 14, §3 of Supplementary Law 101/00, all of these limits and conditions are not applicable to the Union if it intends to change tax rates on the importation of foreign products, exportation of Brazilian or nationalized products, industrialized products and credit, exchange and insurance or securities operations. Hence, to reduce the rates of the IPI and all these taxes, the Union is not obliged to observe the restrictions imposed on foregone revenues through Art. 14 of Supplementary Law 101/00, but can do this through a mere Executive Decree, without the need for legal authorization.

## 5.2 Doctrine about revenues foregone

Public managers can elect direct costing and investments in certain programs or projects, or can encourage policies through indirect spending. That is, the non-receipt of tax revenues owed to them. When Public Management chooses the economic policy based on foregone revenues, it should be investigated in detail that these refer to indirect fiscal spending. Thus, the main problem appointed in the doctrine is how to measure the fiscal loss. That is the case because it is not simple to determine the actual loss public entities will incur when foregoing certain tax revenues.

In the search for greater transparency in public management, the Federal Constitution establishes that the budgetary law project should be accompanied by a statement about the effect on revenues and expenses deriving from exemptions, amnesties, remissions, subsidies and financial, tax and credit benefits. Nevertheless, the way the budgetary-financial impact of foregone revenues is evidenced does not reveal the actual amounts of the resources foregone, the beneficiaries of these actions and, mainly, the actual results when compared to the objectives of the government plans. This means that, although the Constitution had this intent, the mechanisms created by law do not provide sufficient levels of public management transparency.

Almeida (2001, p. 55) presents some possible solutions for this dilemma: (a) elaboration of a specific budget of revenues foregone, structured in the form of the tax budget; (b) improvement of the demonstrative chart elaborated by the Secretary of the Treasury, including the benefits linked to social contributions, and evidencing, besides the effect on revenues, the effect on expenses resulting from exemptions, amnesties, remissions, subsidies and financial, tax and credit benefits, as well as the effect on revenues and expenses resulting from subsidies and financial and credit benefits; (c) inclusion of this chart as an attachment to the tax budget of the Union and the Secretary of the Treasury's measurement of the amounts actual foregone, in each financial year, for analysis in comparison with estimated amounts, with a view to adjusting the estimation method the entity adopts.

As a result of these countless criteria, the Secretary of the Treasury, together with the Federal Budget Secretary of the Ministry of Planning, Budget and Management, issued different Decrees. Joint Decree No. 2 is in force, issued in August 2009, which determines the calculation and disclosure method of the amount of revenues foregone. Thus, the Decree imposes the obligation to account for the nature of the revenues foregone, against a deduction of revenue (reduction of revenue account). Consequently, and driven by the doctrine that has been discussing this subject for a long time, mechanisms were created to improve the survey of data about foregone revenues, as of yet without the possibility to assess whether they will actually be effective.

Another question discussed by the doctrine relates to the fiscal war the federal entities can promote among them, disputing the attention of businessmen and, in other words, disputing investments for their region through the concession of incentives. The effects of this fiscal war may end up enhancing regional inequalities.

According to Lino (2001), Supplementary Law 101/00 was not aimed at preventing or avoiding the fiscal war; or, if it was, its intent was not successful. That is so because the figure of foregone revenues, as outlined in that law, only normalizes the hypotheses of extinction, exclusion or reduction of tax credit, logically presupposing the previous existence of this credit, which in turn needs a tax event. In the fiscal war, however, the only thing that exists is the promise, that is, it will only affect future events. Consequently, it does not affect the budget in the period during which the incentive is promised and, therefore, is not aimed at inhibiting the fiscal war.

The doctrine raises a concern about the quality of the fiscal policy that is to be developed based on the revenues foregone. Martins and Nascimento (2001, p. 103) express that it is certain that "foregone revenues can be used to stimulate business activities, and should definitely be permeated by rational compensations, which should not impair the economy as a whole and the interests of the taxpayer society". Better, its concession should in no way be driven by electoral political motives, on the authority of the governmental corporation in power.

Besides concerns with measuring the amount of revenues foregone in one of these fiscal policies, attention is due to its goal, whether the objective is actually to promote an economic activity that is important to society, or merely to privilege personal and electoral interests. Martins and Nascimento (2001) point towards the need for governmental actions that are compatible with society's interests, with a view to achieving the ideal of justice.

### 5.3 Case Law of the Federal Court of Auditors and the Minas Gerais State Court of Auditors

Despite the constitutional relevance and premises of fiscal responsibility, the Federal and State Courts of Auditors have indicated the need to improve surveillance, especially regarding the measurement and monitoring of actual benefits for society resulting from the development of a public policy for the concession of fiscal benefits.

The Federal Court of Auditors (TCU), for example, analyzed the system of tax and social security benefits of the Secretary of the Treasury (SRF), Social Security Secretary/MPAS and National Social Security



ty Institute (INSS), during the financial years between 1997 and 2003. This relates to Process 003.924/2003-0, in which the Plenary Session of the TCU, on January 28<sup>th</sup> 2004, issued Agreement 38/2004, published in the Official Newspaper of the Union on February 6<sup>th</sup> 2004. The aim was to supervise the foregone revenues registered between 1997 and 2003, with a view to analyzing the consistency of estimates and identifying revenues that serve as a source of resources to handle the expected rises in the minimum wage, public payroll, as well as to analyze the impact of revenues foregone by the Union during the most recent years on the federal budget. It was verified, for example, that the SRF started actually calculating (real values) the revenues foregone only as from the year 2001. That is so because no actual data on revenues foregone are available for financial years before 2000.

In the financial year 2000, the TCU found that the SRF estimated R\$18.04 billion in tax benefits, while only R\$ 14.86 billion of these estimated values could be calculated, corresponding to 82.36% of that value. The amounts of revenues foregone that were actually verified added up to R\$15.62 billion, representing an additional 5.11% over the estimated values. The amounts of many of these benefits were unavailable according to the TCU, such as luggage, micro and small-sized companies, ships, tax on rural territorial property, additional freight to renew mercantile navy, among others. In 2001, the SRF estimated tax benefits at R\$19.33 billion, but was only able to calculate R\$18.27 billion of the estimated values, corresponding to 94.51%, which means saying that the amounts for some of these benefits were unavailable. The actually verified amounts added up to R\$19.09 billion, totaling an addition 4.48% over the estimated amounts.

Despite verifying these improprieties, the TCU was able to verify that the share of revenues foregone in 2000 in the revenues administered by the SRF corresponded to 11.35% and 1.45% of the Gross Domestic Product (GDP). In 2001, the share of revenues foregone in the revenues administered corresponded to 10.69% and 1.49% of the GDP. Hence, the share of actual benefits in the revenues administered negatively varied by 0.5% between 2000 and 2001, while the share in the GDP positively varied by 2.68% in the same period.

The TCU also found that it was impossible to analyze how revenues foregone have behaved with regard to the previews in budgetary laws. That is so because the amounts the SRF presents, for example, for the tax benefits in the statement accompanying the bill for the federal budget went through a range of methodological changes over time. Hence, no reasonable conclusions could be inferred in this respect.

In addition, the TCU verified that revenues foregone, according to the justifications presented by the SRF and Social Security employees responsible for surveys and calculations, as well as for the analyses applied to the set of data, are marked by a characteristic strictness and stability over time, in function of the fixed and undetermined deadlines in the original legislation. That is due to the fact that most benefits have no expiry data, but are undetermined. This Court appointed that, when the audit was done, about 97 bills were going through the National Congress on the initiative of parliament members, which could affect the volume of federal revenues foregone. In addition, errors were appointed in the determination of revenues foregone. They concluded that efforts have been made, through deliberations based on audits, to orient the SRF with a view to improving the definition of revenues foregone, in the attempt to achieve a more evident, transparent and reliable image of the expenses that are implicitly incurred in through the tax system.

The Minas Gerais State Court of Auditors (TCEMG) took a stand about revenues foregone in its response to consultation 694.469, forwarded by the President of the Municipal Chamber of Visconde do Rio Branco, in which he questioned whether moratorium fines represent public revenues and whether its reduction by up to 100% corresponds to foregone revenues, in disagreement with Art. 14 of Supplementary Law 101/00.

Initially, the TCEMG clarified that the consuler did not specify the nature of the moratorium fine he was referring to. It was explained that the moratorium fine can be fiscal, when it represents a sanction due to delayed compliance with the main obligation, with a view to inhibiting the loss tax authorities incurred as a result of the delayed receipt of the tax payment. On the other hand, the fine may be adminis-

trative instead of fiscal, representing a sanction due to an illegal action, and which therefore is not part of fiscal revenues. The Court affirmed that moratorium fines are indeed public revenues, and that amnesty for fiscal moratorium fines, resulting from the delayed payment of a tax (tax, fee or contributions), means the exclusion of credit, that is, the foregoing of fiscal revenues. Hence, when the administrator grants such reduction, compliance with the requirements of Art. 150 of the Federal Constitution is due (concession based on specific and exclusive law on the matter), as well as with the conditions established in Art. 14, paragraphs I and II of Supplementary Law 101/00, as it entails a distinguished treatment of the administration.

In this case, the TCEMG expressed that the administrator should comply with three conditions. First, the budgetary-financial impact should be estimated in the year it comes into force and the next two years. Second, compliance is due with the determinations of the LDO and, finally, with at least one of the following conditions: statement by the proponent that the exemption was considered in budgetary law revenue estimates, in the form of Art. 12, and that it will not affect the fiscal result targets previewed in the attachment to the LDO; or a statement that the exemption will be accompanied by compensation measures, for the period mentioned, through increased revenues, resulting from increased rates, expansion of the calculation base, mark-up or creation of a tax or contribution. Finally, it was highlighted that, if the Administration reduces an essentially administrative instead of fiscal moratorium fines, this measure will not be subject to the conditions established in Supplementary Law 101/00.

Another consultation the TCEMG answered relates to the foregone revenues formulated by the Municipal Government of Paraopeba. It was inquired, among other aspects, whether the City could grant exemption from the payment of the Real Estate Transmission Tax (ITBI), through an authorization law, with a view to creating jobs, and whether this exemption would characterize revenues foregone in the light of Supplementary Law 101/00. The TCEMG answered that the hypothesis clearly involves foregone revenues and that, therefore, compliance is due with Art. 14 of Supplementary Law 101/00, in accordance with Art. 150 of the Federal Constitution. However, the Court highlighted:

Besides the statement about the effective return to society, *in casu*, the creation of jobs, the concession of the benefit needs to be accompanied by all studies and documents established in Art. 14 of the Fiscal Responsibility Law, that is, the estimated budgetary and financial impact of the exemption, the study that the exemption does not affect the fiscal targets established in the LDO, not those set for the compensatory municipal tax collection increase.

It should be mentioned that, above all, the Administration should possess the guarantee that, as a result of the tax exemption, a certain specific minimal number of jobs will be created, as the exemption leads to a drop in revenues, and it is but fair for the city to have this certainty in advance. As indicated in Art. 14 of Supplementary Law 101/2000, exempting companies from tax charges is legal, provided that it is substantially demonstrated that public finances will not suffer any loss, as the budgetary equilibrium is a *conditio sine qua non* for healthy tax management. (TCEMG)

Hence, when a manager gives up public resources, (s)he takes responsibility towards society, as well as the Court of Auditors which, in accordance with the Constitution, possesses the constitutional competency to supervise the tax exemption process, including the efficacy of the measure the Administration has adopted. Thus, the Minas Gerais State Court of Auditors underlines the responsibility of public managers who decide to adopt the revenue exemption policy, appointing that society should truly feel the benefits of this program.

## 6. Reflexive Appointments About Pronouncements Related to Revenues Foregone

Soon after the enactment of Supplementary Law 101/00, regulators started to discuss the implementation of a calculation method to measure the amount that actually was not collected as a result of

the economic policy based on revenues foregone. This issue was left unanswered for a very long time. On April 28<sup>th</sup> 2005, when the National Treasury issued Decree 303, the determination form of the amount left uncollected was defined. With their inquiries, academic studies encouraged the National Treasury to improve the measurement process of the amount of revenues foregone, favoring greater transparency in Public Administration, as one of the main scopes of Supplementary Law 101/00.

Despite advances in the measurement of actually foregone revenues, the need for further research continues. In Brazil, no system exists to control and monitor the socioeconomic results actually achieved as a result of revenues foregone, in order to assess society's satisfaction level and, consequently, the effectiveness of this policy. Thus, like in a program the administration directly invests its resources in, when a tax benefit is granted, the effectiveness of the fiscal program needs to be verified.

The doctrine should play an important role in this discussion by creating mechanisms according to which the achievement of a certain fiscal incentive program's objectives can be assessed, as well as whether the product of this program was able to at least satisfy part of society. Assessing results is a legal requirement, as Art. 4 of Supplementary Law 101/00 imposes the inclusion into the LDO of standards and guidelines to promote outcome assessment mechanisms for programs funded with budgetary resources. In this case, when elaborating its LDO, each entity needs to establish the method that is to be used in the assessments of Government programs for implementation, including the monitoring method of fiscal revenue exemption policies.

The doctrine also appoints that Supplementary Law 101/00 is not aimed at putting an end to the fiscal war. In fact, no legal device whatsoever exists that contributes to avoid it. By adopting a range of requisites for the concession of fiscal incentives, Supplementary Law 101/00 requires that this process be accomplished with greater rationality, planning and transparency. This ends up undermining damage by public managers' concession of benefits far beyond what public finances allow. Indirectly, therefore, it is believed that Supplementary Law 101/00 is capable of containing the warlike climate among states and among cities in terms of fiscal war, as decisions can only be made if in accordance with the respective political entity's financial situation.

As for the jurisprudence observed, the Federal Court of Auditors' agreement under analysis indicates an interesting fact: no data are available about revenues foregone in financial years before 2000. This demonstrates the absence of control and transparency before the enactment of Supplementary Law 101/00. If not even the actual amounts of revenues foregone were controlled, it is impossible to verify the quality of this public policy political entities put in practice, which is not in the least subject to surveillance.

The TCU made many observations that demonstrate that plenty of ground remains to verify the actual amounts of revenues foregone. To give an example, the difference verified between the estimated value of tax benefits granted and the actually verified amounts of revenues foregone may be attributed to errors in the methods applied to estimate any revenues that were not collected. By the way, the different methodological changes the statement accompanying the bill for the federal budget was subject to over time were indicated as a harmful point as, due to these, the way revenues foregone behaved in comparison to the previews in budgetary laws could not be analyzed.

On the other hand, it cannot be forgotten that the constant modifications were put in practice to achieve greater financial information transparency and quality, which shows to be a praiseworthy initiative. However, besides the disclosure of the revenues foregone, the TCU's agreement clearly reveals that the spectrum of the discussion about this theme should be broadened, with a view to promoting permanent changes in the maintenance and concession of fiscal benefits. It is not enough to create mechanisms to verify the amount of revenues foregone when the quality of the fiscal policy is not assessed.

Moreover, the agreement reveals that fiscal benefits tend to be granted for an undetermined period of time. This differs from the initial idea of fiscal benefits, changing it from an incentive into a permanent benefit. Therefore, issues like the duration of the benefits should be discussed, which should only be granted until their goal has been achieved, or until a certain situation has been rectified. The TCU itself found that, at the time of the audit, about 97 bills were still going through the National Congress, which could affect the volume of revenues foregone.

The discussion on the quality of these fiscal policies should be broadened with a view to inhibiting these situations of benefits granted for an undetermined period, and indiscriminately to many sector, which will not always provide returns. This need to create mechanisms to verify society's satisfaction with a fiscal benefit program is clear in the consultation answered by the Minas Gerais State Court of Auditors, in which a municipal government intends to exempt a company from paying ITBI, under the pretext that it was promoting the creation of jobs.

In fact, the consultation is impressive because the ITBI is a municipal tax, whose taxable event is the transmission *inter vivos*, for any bond, chargeable, of real estate, naturally or by physical accession, and of actual rights on property, except warranties, as well as the assignment of rights on their purchase. Hence, it is hard to believe that the exemption of this kind of tax, charged on such a specific operation like the transmission of real estate *inter vivos*, can create jobs.

This consultation demonstrates how public revenue exemption policies are put in practice in Brazil without planning, without an in-depth analysis of their actual impacts. Therefore, the Minas Gerais State Court of Auditors so strongly appointed that "above all, the Administration should receive the guarantee that, as a result of the tax exemption, a certain and determined minimal number of jobs will be created", emphasizing the responsibility the public manager and the Court of Auditors are assuming towards society by choosing this public policy.

Finally, by granting exemption from the IPI on motor vehicles in December 2008, the federal government was at first unable to prevent car manufacturers from continuing their mass dismissal plans. The manufacturers received incentives for the consumption of their products, but continued downsizing. Then, large factories were obliged to maintain their employees.

Another direct consequence of the federal government's policy was the immediate reduction of states', the Federal District's and cities' revenues. According to the federal constitution, part of the product deriving from the collection of income tax and IPI, taxes collected by the Union, should be transferred to the states, Federal District and cities. These are the Participation Fund of States and the Federal District (FPE) and the City Participation Fund (FPM). Thus, when IPI revenues dropped, FPE and FPM transfers were drastically reduced, which has put many cities in an absolutely delicate financial situation. In the large majority of Brazilian cities, the FPM corresponds to most of their revenues, so that this decrease has aroused protests all over the country. The city has the closest contact with citizens and is responsible for providing health, education and social services, among others. Hence, if this situation continues, the population may be deprived of basic and essential services.

## 7. Final Considerations

The aim in this study was to reflect on the doctrine and jurisprudence of the Federal and Minas Gerais State Courts of Auditors, which set restrictive conditions for revenues foregone. Thus, the researchers looked for foundations in the Federal and Minas Gerais State Courts of Auditors that set restrictive conditions for revenues foregone. The study appointed some advances in the area, a public policy administrators in Brazil have widely used. Supplementary Law 101, issued in 2000, is the first of these advances, setting constraints for the concession of this benefit. Then, after identifying difficulties to measure the amounts of revenues foregone, the National Treasury created the revenue deduction method, thus promoting further disclosure of these amounts. In addition, the Courts of Auditors have been supervising compliance, or not, with the limits set in Supplementary Law 101/00 for revenues foregone.

A long road still lies ahead. First, the Courts of Auditors continue elaborating still very incipient analyses on the theme, without further depth, without any further inquiries. It is interesting that most pronouncements have been issued in the federal sphere, by the Federal Court of Auditors. In the Minas Gerais State Court of Auditors, little material on the theme was found, showing that it has not been thoroughly discussed at state and municipal level in Minas Gerais, nor subject to annual audits, although it is present in State arrangements.



Moreover, it is unknown how Courts will supervise the method the National Treasury has put in practice, which was aimed at further disclosure of the amounts the political entity did not collect. That is so because most of these entities have not complied with this method, which continue elaborating their laws as established before Decree 303, issued on April 28<sup>th</sup> 2005. Now, if not even the amounts of revenues foregone are correctly verified, even less efforts are verified to analyze these policies in qualitative terms. In other words, no initiative are identified to analyze the objectives of these exemption polities, whether they were achieved or not, whether the population is satisfied with the program or particularly benefitted without having produced any large political-social consequences.

As a suggestion for future research, case studies on the socioeconomic outcomes certain revenue exemption policy have actually achieved are recommended, with a view to assessing society's satisfaction level and the effectiveness of this policy.

## 8. References

- Almeida, F. C. R. de. (2001, abril/junho). A renúncia de receita como fonte alternativa de recursos orçamentários. *Revista do Tribunal de Contas da União*, 32(88), 54-65.
- Constituição da República Federativa do Brasil: promulgada em 5 de Outubro de 1988*. (2004). (30a ed.). São Paulo: Saraiva.
- Decreto-Lei nº 201, de 27 de fevereiro de 1967*. (1967). Dispõe sobre a responsabilidade dos Prefeitos e Vereadores, e dá outras providências. *Diário Oficial da República Federativa do Brasil*. Brasília, DF: Poder Executivo.
- Decreto nº 6687, de 11 de dezembro de 2008*. (2008). Altera a Tabela de Incidência do Imposto sobre Produtos Industrializados - TIPI, aprovada pelo Decreto no 6.006, de 28 de dezembro de 2006, e dá outras providências. *Diário Oficial da República Federativa do Brasil*. Brasília, DF: Poder Executivo.
- Decreto nº 6696, de 17 de dezembro de 2008*. (2008). Altera a Tabela de Incidência do Imposto sobre Produtos Industrializados - TIPI, aprovada pelo Decreto nº 6.006, de 28 de dezembro de 2006. *Diário Oficial da República Federativa do Brasil*. Brasília, DF: Poder Executivo.
- Decreto nº 6809, de 30 de março de 2009*. (2009). Altera a Tabela de Incidência do Imposto sobre Produtos Industrializados - TIPI, aprovada pelo Decreto nº 6.006, de 28 de dezembro de 2006. *Diário Oficial da República Federativa do Brasil*. Brasília, DF: Poder Executivo.
- Lei Complementar nº 101, de 04 de maio de 2000*. (2000). Estabelece normas de finanças públicas voltadas para a responsabilidade na gestão fiscal e dá outras providências. *Diário Oficial da República Federativa do Brasil*. Brasília, DF: Poder Executivo.
- Lei nº 4.320, de 17 de março de 1964*. (1964). Estatui Normas Gerais de Direito Financeiro para elaboração e controle dos orçamentos e balanços da União, dos Estados, dos Municípios e do Distrito Federal. *Diário Oficial da República Federativa do Brasil*. Brasília, DF: Poder Executivo.
- Lei nº 8.429, de 02 de junho de 1992*. (1992). Dispõe sobre as sanções aplicáveis aos agentes públicos nos casos de enriquecimento ilícito no exercício de mandato, cargo, emprego ou função na administração pública direta, indireta ou fundacional e dá outras providências. *Diário Oficial da República Federativa do Brasil*. Brasília, DF: Poder Executivo.
- Portaria Conjunta nº 2, de 06 de agosto de 2009*. (2009). Aprova o Volume I - Procedimentos Contábeis Orçamentários da 2ª edição do Manual de Contabilidade Aplicada ao Setor Público - MCASP, e dá outras providências. *Diário Oficial da República Federativa do Brasil*. Brasília, DF: Secretaria do Tesouro Nacional e Secretária de Orçamento Federal do Ministério do Planejamento, Orçamento e Gestão.



- Portaria nº 303, de 28 de abril de 2005.* (2005). Aprova a 2ª edição do Manual de Procedimentos da Receita Pública. Diário Oficial da República Federativa do Brasil. Brasília, DF: Secretaria do Tesouro Nacional.
- Portaria 462, de 06 de agosto de 2009.* (2009). Manual de Demonstrativos Fiscais. Aprova os volumes II - Procedimentos Contábeis Patrimoniais, III - Procedimentos Contábeis Específicos e IV - Plano de Contas Aplicado ao Setor Público, da 2ª edição do Manual de Contabilidade Aplicada ao Setor Público, e dá outras providências. Diário Oficial da República Federativa do Brasil. Brasília, DF: Secretaria do Tesouro Nacional.
- Khair, A. A. (2000). *Gestão fiscal responsável simples municipal: guia de orientação para prefeituras* (Ministério do Planejamento, Orçamento e Gestão). Brasília: BNDES.
- Leiria, A. C. N. (2005). *Lei de responsabilidade fiscal: comentários e terminologia*. Caxias do Sul: Plenum.
- Lino, P. (2001). *Comentários à lei de responsabilidade fiscal: lei complementar nº 101/2000*. São Paulo: Atlas.
- Martins, I. G. da S., & Nascimento, C. V. do. (2001). *Comentários à lei de responsabilidade fiscal*. São Paulo: Saraiva.
- Motta, C. P. C. M., & Fernandes, J. U. J. F. (2001). *Responsabilidade Fiscal: Lei Complementar 101 de 4/5/2000* (2a ed.). Belo Horizonte: Del Rey.
- Nunes, S. P. (Org.). (2002). *Exercícios Práticos da Lei de Responsabilidade Fiscal para Municípios*. Brasília: MP, ESAF, BB.
- Richardson, R. J. (1999). *Pesquisa Social: métodos e técnicas* (3a ed.). São Paulo: Atlas.
- Silva, D. P. e. (1997). *Vocabulário jurídico* (13a ed.). Rio de Janeiro: Forense.
- Tribunal de Contas da União - Secretaria Geral das Sessões . (2004). *Ata 2 da Sessão Ordinária para análise do Processo 003.924/2003-0*. Retrieved September 12, 2010 from [portal2.tcu.gov.br/portal/pls/portal/docs/2047436.PDF](http://portal2.tcu.gov.br/portal/pls/portal/docs/2047436.PDF)
- Tripodi, T., Fellin, P., & Mayer, H. (1981). *Análise da pesquisa social*. Rio de Janeiro: Francisco Alves.