TAX

ADENE AND TAX BENEFITS THAT ARE COSTLY AND FOR A CERTAIN PERIOD OF TIME

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May costly tax benefits be canceled at any time and with retroactive effect? A remarkable case in this respect, which we discuss in depth in this article, involves benefits granted on the basis of the legislation that created the now extinct Sudene (Northeast Region Development Authority), succeeded by Adene (Northeast Region Development Agency) and, later, by Nova Sudene.

Created in 1959 by Law No. 3,692, Sudene's purpose was, since its inception, to implement an auspicious Northeast Region development plan, aiming to reduce regional and social inequalities, which was also worth mentioning in article 3, III of the 1988 Federal Constitution: "The fundamental objectives of the Federative Republic of Brazil are: (...) III - to eradicate poverty and substandard living conditions and to reduce social and regional inequalities."

In 1998, Law No. 9,690 changed the area of coverage of Sudene to also include within the concept of the "Northeast Region" the Jequitinhonha Valley and the North of the State of Espírito Santo.

After three years, Provisional Presidential Decree No. 2,156/2001 extinguished Sudene and created Adene with the same nature as a federal autonomous entity, giving again a new format to the so-called "Northeast Region" and including in the priority area the State of Espírito Santo and the Mucuri valley, in the State of Minas Gerais, among other municipalities.

Six years later, in a new response by the legislator, Complementary Law No. 125/2007 extinguished Adene and created Nova Sudene, once again changing the area to receive priority treatment, called by law the "Northeast Region."

Nova Sudene's area of activity is different from all others, as the Municipality of Governador Lindenberg only became part of the Regional Development Plan with Provisional Presidential Decree No. 2,156/2001, remaining in the Nova Sudene configuration, in addition to several new municipalities of the State of Minas Gerais that were incorporated.

It is important to clarify that all reports that grant benefits after the termination of Sudene were issued by their Inventories, that is, not only the reports prepared for the companies located in the south of the State of Espírito Santo, but also all those issued to beneficiary companies located in the Northeast Region, which followed a similar form and procedure and were promulgated by the same competent authority.

The Inventory was created by the Ministry of National Integration when Adene still existed. Therefore, Sudene and Adene never coexisted. It was the Inventory that issued all reports for grants for Adene. The agency itself has never even questioned the competence of Sudene's Inventory to issue reports, which were issued on the basis of the two provisional presidential decrees, in particular on article 1, paragraph 4, of Provisional Presidential Decree No. 2,199-14/2001, already transcribed above, and articles 1, 2, 3, I, and 11, paragraph 2, of Provisional Presidential Decree No. 2,156-5/2001, which are from exactly the same day.

The activity of interpretation presupposes differentiating prescriptive statements conveyed by laws from the concept of a legal norm. To interpret is nothing more than to extract or construct the content, meaning, and scope of legal norms based on the contact of the interpreter with the legal texts.

There can never be a consideration or interpretation of a legal rule decoupled from the other rules that are part of the legal system. In a certain sense, there cannot be any interpretation that is not systematic. It is positive law here and now, or considered at a given historical moment, taken fully into account, respecting its hierarchical structure of principles and rules.

A systematic analysis shows that Sudene, Adene, and Nova Sudene succeeded in time without overlapping functions, since in reality they had the same nature as an autonomous entity of the federal government.

Whether called an authority or agency, the primary purpose of these governmental entities has always been to promote the sustainable development of the Northeast Region. All of them fulfilled the constitutional design provided for in article 3, item III, to eradicate poverty and marginalization and reduce regional and social inequalities, as well as the provisions of articles 170, VII, 151, I, and 43 of the Federal Constitution.

It is important to note that the physical area of the nine states that make up the Northeast Region of Brazil was never confused with the legal design of the area covered by these entities, ever since Sudene was created. The

change in name of these entities is absolutely irrelevant. What has always been sought was "to study and propose guidelines for the development" of a special DNA, greater than those nine states of the federation.

Over time, at the initiative of the legislature, Sudene has grown or shrank in size in accordance with the need to protect human beings in the course of developing its action plan.

The Northeast Region development fund, of an accounting nature, created by article 3 of Provisional Presidential Decree No. 2,156/2001 and to be managed by Adene, with the purpose of securing funds for investments in the priority region, established that at least 3% of the funds obtained should be applied in the State of Espírito Santo without any indication of a restriction on geographic location, whether in the municipalities in the north or in the south.

It is impossible to contemplate a regional development agency without the existence of a source of financial resources to support it. One thing is tied to the other. It is in function of a development plan that a fund of resources is created.

In turn, article 2 of article 11 of Provisional Presidential Decree No. 2,146/2001 stated that "Adene's area of activity is defined in article 2 of this Provisional Presidential Decree," which included, without restriction, all the municipalities of the State of Espírito Santo.

With that being the case, how could article 1 of Provisional Presidential Decree No. 2,199/2001 be interpreted in such a way that only the municipalities located in the area of the extinct Sudene, namely those in the northern region of Espírito Santo, obtain the tax benefit of up to 75% of the income tax and additional non-refundable amounts, calculated over operating surplus?

The entities, regardless of their given name, only succeeded each other in time, with constant and normal mutations in the area considered as deserving of priority treatment, in the terms advocated by the Federal Constitution.

With Provisional Presidential Decree No. 2,146/2001, once again, the semantic content of the word Northeast Region was changed. And by logical imposition it was no longer possible to issue grants of incentives for an area (that of the extinct Sudene) that was in disharmony with the area considered, under the current legislation, as a priority and legitimate part of a regional development plan.

Therefore, it would be illegal not to issue grants of incentives establishing for tax benefits for companies located in the southern region of the State of Espírito Santo in order to prove compliance with the requirements established by law, since the activity of the Administration is bound.

The incentive modality treated here is the basis for the promotion of areas chosen by the legislator as lacking a development plan in order to combat social and regional imbalances, and this kind of benefit is only granted to companies that prove they meet predetermined conditions.

But that is not all. In addition to the above conditions, there is still a series of onerous conditions established to be respected by the companies after the concession, such as: (i) prohibition on distribution to partners of the value of the tax that is no longer collected due to reduction or exemption; and (ii) the need for the company to establish a capital reserve, which can only be used to absorb losses or to increase capital stock.

In addition, the benefits have a certain term of validity. These are, therefore, exemptions that impose requirements granted for a certain period of time.

Even if one were to insist on the allegation that the reports issued under Adene are invalid, they could no longer be subject to revocation or annulment years after their receipt by beneficiaries. This is because the STF's own Precedent 473 does not apply to the case in the manner intended by the adverse party, since, as seen, it has had legal consequences in the sphere of bona fide third parties who assumed bilateral obligations with the state, and these subjective rights must be respected.

Moreover, since it is a benefit that comes with requirements, revocation and annulment are forbidden by reason of preclusion of the possibility for the Administration to choose one or another interpretation, even if such behavior is the measure that seems to the Administration to be the most convenient and timely discretion.

On the other hand, even if it could be considered an error on the part of the Administration, that is, that the interpretation initially adopted was not the best or the most appropriate one, it is already well known that an error of law cannot serve as grounds for annulment of administrative acts (articles 145, 146, and 149 of the National Tax Code - CTN), which, in this case, are linked. Positive law is assumed to be known to the Administration.

One must insist, in the name of the great principle of legal certainty affirmed in article 2 of Law 9,784/99: even if the reports were rife with illegality, it would be forbidden for the Administration to cancel them, thereby imposing the duty to abide by them. Whoever cancels grants of incentives for benefits that also impose requirements three years after they were enjoyed may end up doing so at the end of the total period of enjoyment of the incentive, with retroactive imposition of interest, monetary correction, and fines. The legal certainty and good faith of the beneficiaries would be compromised. Under such conditions, no company would assume requirements for benefits and live with the element of surprise in the event of future cancellation.

The annulment of the grants of incentives also implies an offense against articles 178 and 179 of the CTN, given that it is an incentive (a) for a certain period of time and (b) granted under conditions that impose requirements.

The impossibility of invalidating the grants of incentives for conditional benefits and for a certain period ensures the very survival of this kind of incentive, thereby protecting, by way of indirect consequence, the public interest.