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THE ILLEGAL COLLECTION OF FINANCIAL COMPENSATION FOR THE EXPLOITATION OF MINERAL RESOURCES – CFEM AND THE INCOMPETENCE OF THE NATIONAL MINING AGENCY (ANM)

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Abstract: The present work aims to expose the constitutional and infraconstitutional legal basis that culminates in the incompetence of the DNPM - National Department of Mineral Production, extinct on 12/26/2017 and of the ANM - National Mining Agency to collect the Financial Compensation for Exploitation of Mineral Resources, provided for in § 1 of article 20 of the Federal Constitution and instituted by Law 7990/89. The expository analysis of the infraconstitutional legislation that disciplines the matter, and the arguments presented indicate the existence of a true legal imbroglio, transforming it into total legal uncertainty for the Brazilian mineral sector, which calls for the reflection of the need to make the infraconstitutional legislative fabric compatible or the alteration of paragraph 1 of article 20 of the Federal Constitution, with adjustments in ordinary legislation so that there is support and a solid basis for the adoption of the collection and collection model by the ANM.

Keywords: Financial Compensation for Exploitation of Mineral Resources. National Department of Mineral Production. National Mining Agency. Direct Public Administration. Indirect Public Administration.

INTRODUCTION

The Financial Compensation for the Exploration of Mineral Resources, CFEM, was instituted in the Brazilian legal system within the scope of the Federal Constitution and it is a tax levy or tax levied on the exploration of mineral substances, directly affecting the national mining sector.

Since then, that is, since its constitutional provision, the infraconstitutional legislator has not been able to clearly seek the legal paths necessary to validate this exaction or encumbrance on Brazilian mining activities to provide legal certainty to the sector.

During all these years, what the ordinary legislator did was to trample the constitutional device, transferring the right to collect the entire CFEM to an entity of the indirect administration, transforming the Supreme Republican Charter into a dead letter.

CFEM's constitutional provision in the constitution cannot be linked to the competence provided for in article 23, XI of the Federal Constitution, given that the exclusive competence in the aforementioned device refers to registering, monitoring and supervising concessions of research and exploitation rights water and mineral resources in their territories.

The unconstitutionality remains even after the extinction of the DNPM Autarchy (National Department of Mineral Production) [1]and the creation of the National Mining Agency (ANM), through Law 13,575/2017 [2](Conversion of MP 791/2017).

There is a unique need to shed light where the public administration seeks to keep in the dark, disrespecting the most elementary principles of law, perpetuating the unconstitutionality and the affront to the rights of the Brazilian mining industries.

This work will expose the legislative confusion regarding the collection of CFEM, presenting a situation in which in the same legal diploma there is a double determination regarding the collection of the tax levy.

When evaluating the entire legal and constitutional legal framework, that is, from its constitutional provision that instituted it within the scope of ordinary legislation, nothing was actually accomplished during these almost 35 years that could bring legal security to the miners and, on the contrary,

1. NOTE: Created on 08.03.1934 through Decree 23.979 of 08.03.1934, linked to the Ministry of Agriculture. Available at < https://legis.senado.leg.br/norma/445864/publicacao/15697366 > Accessed on 06.08.2023. The DNPM was a body of the Direct Public Administration, belonging to the Ministry of Mines and Energy. With Law 8.876/94, it was transformed into Autarchy.
2. Available at < http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/lei/l13575.htm > Accessed on 06.08.2023.

from 2010 to 2022 alone, R$ 44.6 billion were collected without respecting the constitutional and infraconstitutional financial rules.[3]

The Judiciary must be provoked, so that it actually evaluates and recognizes the affront to the Federal Constitution and the infraconstitutional laws and inhibits the maintenance of the way in which the CFEM is being collected, considering that there is no legal entity constitutionally legitimized to promote the CFEM charge.

There are numerous vices in the way in which the CFEM charge is being imposed, which go beyond the affront to the principles and postulates of administrative and financial law, leading to its unconstitutionality.

There is not enough clarity and legal certainty to pacify the understanding that the ANM has the competence and legitimacy to collect the entirety of the CFEM, as the legislation made its format dubious.

LEGISLATIVE EVOLUTION OF CFEM

The Federal Constitution, in its text before Constitutional Amendment 102 of 09/26/2019 [4], paragraph 1 of article 20, had the following dictation:

> " Article 20: The following are assets of the Union:
>
> [...]
>
> 1 - Under the terms of the law, the States, the Federal District and the Municipalities, as well as the bodies of the direct administration of the Union, are assured of participation in the result of the exploration of oil or natural gas, of water resources for the purpose of generating energy. electricity and other mineral resources in the respective territory, continental shelf, territorial sea or exclusive economic zone, or financial compensation for such exploration. (gn).

It must be noted that the constituent clearly indicated which entities are entitled to receive the resources from profit sharing or financial compensation for the exploitation of resources by exploitation and, as for the Federal Government, it obtains the right to participate in the CFEM collection, for through its Direct Administration body.

With EC 102/2019, paragraph 1 of article 20 now reads as follows:

> § 1 The Union, the States, the Federal District and the Municipalities are assured, under the terms of the law, the participation in the result of the exploitation of oil or natural gas, water resources for the purpose of generating electricity and other mineral resources in the respective territory, continental shelf, territorial sea or exclusive economic zone, or financial compensation for such exploitation. (gn).

At first, it could be concluded that the 1988 Constituent Assembly, which had the objective of compensating for the loss of tax collection by the Federal Union, due to the extinction of the former IUM - Single Tax on Minerals, provided for the possibility of entities state politicians (States, Federal District, Municipalities and direct administration bodies of the Federal Union, participation or financial compensation for the exploitation of mineral resources.

The original text of paragraph 1 of article 20 provided that the CFEM was assured to the direct administration body of the Union, and by EC 102/2019, the expression "direct administration body of the Union" was excluded to keep only the expression "Unity".

The issue that will be exposed in this work is independent of this change, promoted by EC 102/2019, considering that the Union may have its share in the collection, through its direct administration bodies.

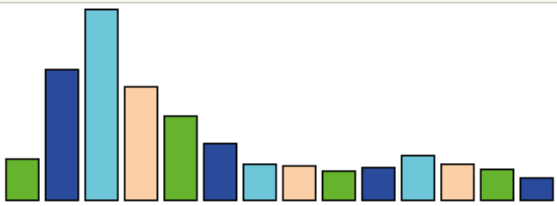
3. Available at < https://sistemas.anm.gov.br/arrecadacao/extra/ARRECADACAO/EXTRA/acessoexterno/associacao/Relatorios/arrecadacao_cfem.aspx > Accessed on 05/29/2023

4. Available at < https://www.planalto.gov.br/ccivil_03/constituicao/emendas/emc/emc102.htm > Accessed on 06.08.2023.

CFEM COLLECTION

Updated Daily

Year/Month	Total
2023 2023(Open)	2.134.623.686,73
2022	7.018.100.957,13
2021	10.288.935.761,49
2020	6.080.696.753,38
2019	4.504.238.668,90
2018	3.036.143.592,41
2017	1.838.568.021,45
2016	1.797.879.226,75
2015	1.519.721.771,84
2014	1.711.318.234,76
2013	2.376.174.750,78
2012	1.834.958.234,73
2011	1.561.680.727,11
2010	1.083.427.367,36



Note: To view collections by state, click on the total for the year.

Table 1

Source: National Mining Agency

SUMMARY TABLE - COMPETENCE TO COLLECT

ACTIVE SUBJECTS	ENTITY/BODY	LEGAL SUBSTANTIATION	PARTICIPATION IN THE SHARES	RATIONALE	OBSERVATION
state	States	Article 20, §1, of the Federal Constitution; Article 2, §2, III of Law 8001/90; Article 8 of Law 7990/89	23%	Law 8001/90 and Law 7; 990/89	
Federal District	Federal District		23%		
Municipalities	Municipalities		65%		
Body of the Direct Public Administration of the Federal Union	**Ministry of Mines and Energy**		12%		
	DNPM	**Article 2, § 2, III of Law 8001/90;**	**NONE**		**Receives, by transfer, part of the share of the Federal Union**

Law 7.990/89 [5] was enacted, which instituted not the profit-sharing rule, but the financial compensation provided for in paragraph 1 of article 20 of the Republican Charter in the following terms:

> Article 1 The use of water resources, for the purpose of generating electricity and mineral resources, by any of the regimes provided for by law, will give rise to financial compensation to the States, Federal District and Municipalities, to be calculated, distributed and applied in the manner established in this Law.

The way of encumbering mineral exploration, through financial compensation and not through participation in the result, had the premise of facilitating the collection, since the complexity of determining the result (economic or financial), and the method to determine the calculation basis for participation, would require complex procedures (including accounting) for verification and inspection, and could make it unfeasible, because participation in the result would bring legal questions, as it could result in resembling the imposition as an exaction of a tax nature, of the direct kind, that is, on profit (result).

The infraconstitutional legislation opted for financial compensation, allowing the incidence of the encumbrance in a linear way through rates, in general, on the net revenue of mining companies, a simpler and more practical model to collect.

Article 8 of Law 7.990/89 still maintains the constitutional basis of § 1 of Article 20 of the Federal Constitution, by providing that it is the direct administration body that will directly receive CFEM resources, along with other federative entities:

> Article 8 The payment of the financial compensation provided for in this Law, including the compensation for the exploration of oil, oil shale and natural gas will be made, on a monthly basis, directly to the States, the Federal District, the Municipalities and the bodies of the Direct Administration of the Union, until the last business day of the second month following the taxable event, duly corrected by the variation of the National Treasury Bond (BTN), or another monetary correction parameter that may replace it, with the application of funds in debt payment being prohibited and in the permanent staff. (gn)

It must be noted that the above provision maintains the constitutional provision contained in paragraph 1 of article 20, in the sense that the payment of the CFEM must be made directly to the States, the Federal District, the Municipalities and the bodies of the Direct Administration of the Union.

directly pay the CFEM to the entities indicated in the device, but this is not what is happening, given that the ANM collects and subsequently transfers the resources, contrary to the CF and ordinary legislation.

If the miner must directly pay the CFEM to the federative entities, it does not justify that the DNPM and subsequently the ANM fully collect the CFEM.

It is important to point out that in the creation or transformation of the DNPM into an Autarchy, through Law 8876/1994, in its article 3, IX, it indicated its competence to issue norms and exercise supervision over the collection of financial compensation for the exploitation of mineral resources, of referred to in § 1 of Article 20 of the Federal Constitution, clearly demonstrating that it did not have the competence to collect.

This statement justifies and justifies that in the same legal diploma of its creation in Autarchy, the DNPM, had CFEM as a source of revenue, but coming from the Ministry of Mines and Energy.[6]

5. Available at < https://www.planalto.gov.br/ccivil_03/leis/l7990.htm > Accessed on 06.08.2023.

6. Article 5 The following are the revenue of the Autarchy:

Likewise, the source of revenue for the ANM was maintained, in accordance with the wording of item X of article 19 of Law 13,575/2017, indicating that CFEM is the source of funds for the ANM, and that it must come from the Ministry of Mines and Energy.[7]

Still in the same legal diploma, contrary to item X of article 19 of Law 13.575/2017, letter "a" of item XII of article 2, provides that the ANM is responsible for regulating, inspecting, collecting, constituting and collecting the credits arising from the CFEM.

Now, if CFEM's resources must come from the Ministry of Mines and Energy to the ANM, how can the latter collect and constitute all its collection? Thus, by the logic foreseen in the norm, the CFEM is collected by the ANM, which transfers it to the States, Municipalities and Federal District and to the Ministry of Mines and Energy, which then returns to the ANM the share of the Federal Union, even because it is the Ministry of Mines and Energy that have legitimacy to participate in the proceeds collected in the light of article 8 of Law 7.990/89.

The legislative uproar is amplified when we come across the wording of article 26 of Decree 1/1991, which determines that the CFEM must be collected by the taxpayers of the tax *directly* from the beneficiaries, in an account with Banco do Brasil.[8]

Item I of paragraph 2 of article 2 of Law 8001/90 provides that 7% of the CFEM product must be distributed to the mining regulatory agency, that is, the ANM.[9]

If the ANM must receive the CFEM quota through the Ministry of Mines and Energy, there is no legal logic for the entire CFEM to be collected by it.

Item X of article 19 of Law 13.575/2017, contradicts all legislation which observes paragraph 1 of article 20 of the Federal Constitution, that is, the ANM does not have legitimacy or competence to collect the CFEM, since it must receive only part of the its product (7%) transferred from the Ministry of Mines and Energy.

The compliance by the miners with the imposition of collection by the ANM comes from the fact that the latter, in a coercive manner, and without legal basis, constitutes the entirety of the credit, fully inscribes the value as being from its exclusive source of revenue as its Active Debt and proposes tax enforcement action, seeking to expropriate assets from those who do not pay the CFEM in full.

As for the CFEM rates, these are those provided for in the Annex to Law 8001 of 13/03/1990, which is up to 3.5%, depending on the mineral substance.

[...]

Single paragraph. The share of the financial compensation for the exploitation of mineral resources due to the Union, referred to in § 1 of Article 20 of the Federal Constitution and Article 8 of Law Number: 7990, of December 28, 1989, regulated by Decree No. 1, of January 11, 1991, is destined to the Ministry of Mines and Energy, which will pass it on in full to the DNPM, subject to the provisions of item III of § 2 of Article 2 of Law Number: 8001 of March 13, 1990.

7. Article 19 - The ANM's revenues are:

[...]

X - the amount collected as CFEM, to be passed on to ANM, through the Ministry of Mines and Energy, as established in item III of § 2 of Article 2 of Law Number: 8001 of March 13, 1990.

8. Article 26 - The payment of the financial compensation provided for in this decree, including the royalties owed by Itaipu Binacional to Brazil, will be made monthly, directly to the beneficiaries, upon deposit in specific accounts held by them at Banco do Brasil SA, until the last business day of the second month following the taxable event. – Available at < http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0001.htm > Accessed on 06/08/2023.

9. § 2 - The distribution of the financial compensation referred to in the caput of this article will be made according to the following percentages and criteria:

I - I - 7% (seven percent) for the regulatory entity of the mining sector. Available at < https://www.planalto.gov.br/ccivil_03/leis/l8001.htm > Accessed on 06.08.2023.

ANNEX

(Included by Law Number: 13540 of 2017)

TAXES FOR FINANCIAL COMPENSATION FOR THE EXPLORATION OF MINERAL RESOURCES (CFEM)

a) Aliquots of mineral substances:

ALIQUOT	MINERAL SUBSTANCE
(VETOED)	(VETOED)
1% (one percent)	Rocks, sand, gravel, gravel and other mineral substances when intended for immediate use in civil construction, ornamental stones; mineral and thermal waters
1,5 (one integer and five tenths percent)	Gold
2% (two percent)	Diamond and other mineral substances
3% (three percent)	Bauxite, manganese, niobium and rock salt
3,5 (three integers and five tenths percent)	Iron, subject to letters b and c of this Annex

b) Decree of the President of the Republic, to be published within ninety days from the enactment of this law, will establish criteria so that the regulatory authority of the mining sector, upon duly justified demand, can exceptionally reduce the CFEM rate of iron from 3.5% (three and five tenths percent) to up to 2% (two percent), with the aim of not jeopardizing the economic viability of deposits with low performance and profitability due to the iron content, scale of production of taxes and the number of employees

c) The decision and the technical opinion of the regulatory entity of the mining sector regarding the reduction of the CFEM rate, referred to in letter b of this Annex, will be published on its official website on the internet, and the reduction will only take effect sixty days from disclosure.

On 03/13/1990, Law 8001 was enacted, defining the participation of each CFEM State Creditor in the product of its collection, in addition to defining their percentages (rates) of incidence, in the following terms (wording before modification by the Law 13.540/2017).

Article 2: For the purpose of calculating the financial compensation referred to in Article 6 of Law Number: 7,990, of December 28, 1989, net sales are understood to be total sales revenues, excluding taxes levied on the sale of the mineral product, transport expenses and insurance costs.

§ 1 The percentage of compensation, according to the classes of mineral substances, will be:

I – aluminum ore, manganese, rock salt and potassium: 3% (three percent);

II – iron, fertilizer, coal and other mineral substances: 2% (two percent), subject to the provisions of item IV of this article;

III – precious stones, colored stones that can be cut, carbonated and noble metals: 0.2% (two tenths of a percent);

IV – gold: 1% (one percent), when extracted by mining companies, and 0.2% (two tenths of a percent) in other cases of extraction. (Wording provided by Law Number: 12,087 of 2009)

§ 2 The distribution of the financial compensation referred to in the caput of this article will be made as follows:

I – 23% (twenty-three percent) for the States and the Federal District;

II – 65% (sixty-five percent) for the Municipalities;

II-A. 2% (two percent) for the National Fund for Scientific and Technological Development - FNDCT, instituted by Decree-Law Number: 719, of July 31, 1969, and reestablished by Law Number: scientific and technological development of the mineral sector; (Included by Law Number:

9,993, of 7.24.2000) (Regulation)

> III - 10% (ten percent) for the Ministry of Mines and Energy, to be fully transferred to the National Department of Mineral Production - DNPM, which will allocate 2% (two percent) of this share to mineral protection in mining regions, through the Brazilian Institute of Environment and Renewable Natural Resources – Ibama. (Wording provided by Law Number: 9,993, of 7.24.2000). (gn).

It is clear and uncontroversial that the tax burden created by § 1 of article 20 of the Federal Constitution and instituted by Law 7990/1989, provided for the possibility of only State Entities, as creditors, collecting CFEM percentage of the net revenue of holders of rights to exploit mineral resources.

This is not a question of royalties mistakenly spread in some doctrines, given that CFEM is a contribution from miners to State Entities with the aim of compensating for environmental results or their impacts on mineral exploration in their territories. Therefore, it cannot be understood that it is payment (public price) for the withdrawal or exploitation of Federal Union assets.

It is enough to look at the breakdown of the CFEM collection product and see that the Federal Union, through the Ministry of Mines and Energy, had a tiny quota of 12% (twelve percent) (which it still has – 1.8% in the new wording of the article 2 of Law 8001/1990), with the largest participants in the division of these resources being the States, Municipalities and the Federal District.

The Federal Constitution of 1988 deals with the environment in a specific chapter: article 225, caput. "Article 225 expresses whose right it is and who has the duty to preserve it." Everyone has the right to an ecologically balanced environment, an asset for common use by the people and essential to the quality of life, imposing on the public authorities and the community the duty to defend and preserve it for present and future generations."

Those who exploit natural resources are obliged to recover the degraded environment. The mineral resource is a non-renewable good, it is degrading.

CFEM aims to repair the imminent costs and risks of the extractive industry. The funding from CFEM is for the construction of roads, ports, airports, hospitals, schools, public safety, due to the occurrence of a large movement of machines and men, with the purpose of offering minimum conditions for mineral exploration to be carried out.

In this sense, there is no way to understand that the CFEM is charged due to the appropriation of Union property, the provision of article 99, III of the Civil Code being inapplicable.

The issue of exploration of a mineral asset (belonging to the Union, as owner of the subsoil (Article 20, IX of the CF), is resolved in the authorization or concession provided for in the Mining Code, therefore, a phase prior to the effective exploration, in which charged the respective fees and emoluments to the National Mining Agency and met numerous requirements and requirements.

The work of Enríquez (2007) carried out visits to the 15 largest mining base municipalities in Brazil and sought to verify their use of mineral income. According to the study, large producers are heavily dependent on revenue (40%) and jobs (47%) provided by mining activities. CFEM in these municipalities corresponds, on average, to 16% of municipal revenues, with greater dependence on those in the North and Northeast regions.

These numbers reflect the vulnerable situations that several municipalities are experiencing, and underestimate the serious situations of others, which suffer from the imminent depletion of their deposits.

Despite the fact that the law specifies

the destination of the CFEM, there are no instruments capable of verifying the application of the financial resources arising from the Compensation. Thus, the study above found that in only two cases there is a formally regulated plan on the use of CFEM. In the others, the revenue from this collection is used in several areas, and are often diluted in the city hall's cash. It is important to point out that there is a social demand (mainly from environmentalists) and from the producing companies, who perceive a bad application of the CFEM, for a regulation of the use.[10]

All State-Creditor-Entities, that is, the State, the Federal District, the Municipality and the Ministry of Mines and Energy (through the Federal Union) were inert in their legislating functions regarding the exercise of the constitutional right to collect the CFEM relative to each quota that would be due to him; in addition, they were left in the same lethargic situation with regard to supervising the aforementioned collection by the miners.

The legislator sought to partially resolve this issue by defining the public body that would be competent to only supervise the collection, being elected by the norm the DNPM - National Department of Mineral Production, which transformed into an Autarchy by Law 8.876/1994 (02/05/1994) received the aforementioned jurisdiction in item IX of article 3, *in verbis:*

> Article 3: The DNPM autarchy will have the purpose of promoting planning and promoting the exploration and use of mineral resources, and supervising geological, mineral and mineral technology research, as well as ensuring, controlling and supervising the exercise of mining activities throughout the national territory, in the form of the Mining Code, the Mineral Waters Code, the respective regulations and the legislation that complements them, being incumbent upon, in particular:
>
> [...]
>
> IX – to issue norms and exercise supervision over the collection of financial compensation for the exploitation of mineral resources, referred to in § 1 of Article 20 of the Federal Constitution. (gn)

It is clearly noted that at no time did the infraconstitutional legislator contradict the constitutional provision of granting the predecessor of the ANM the competence to collect and promote financial, administrative and public finance procedures to appropriate the CFEM.

It is notorious and does not require further study that the DNPM, only from the above rule, became competent to supervise the CFEM collection, even because, in relation to the Federal Union quota, the competence to collect was of the Ministry of Mines and Energy (item III, § 2, Article 2, Law 8001/1990 in the wording prior to Law 13540/2017 and § 1 of article 20 of the Federal Constitution.), as it is repeated, the DNPM being a Federal Autarchy, it is not a body of the Direct Public Administration, provided for in the Constitutional Charter, even after EC 102/2019

It is also concluded, without the slightest hermeneutical effort, that at least the share of the Union, relative to the Ministry of Mines and Energy (body of the direct administration of the Federal Union) was a body with legal competence to supervise the collection of CFEM.

Likewise, with the extinction of the DNPM and the creation of the ANM, the latter began to regulate, supervise, collect, create and charge the credits arising from the CFEM, pursuant to letter "a', item XII of article 2 of the Law 13,575/2017.

10. Enríquez, MA Curse or gift? The dilemmas of sustainable development from a mining base. Doctoral thesis, Universidade de Brasilia, 2007

LEGAL NATURE OF CFEM

After a long doctrinal and jurisprudential clash, the Federal Supreme Court, in an appropriation of Minister Sepúlveda Pertence in Judgment rendered in Extraordinary Appeal 228.800-5-DF, defined the non-tax legal nature of the tax assessment in the following terms:

> ***ABSTRACT: Assets of the Union: (mineral resources and water potential of electric energy): participation of federal entities in the product or financial compensation for its exploitation (CF, Article 20, and § 1): legal nature: constitutionality of the governing legislation (L. 7990/89, articles 1 and 6 and L. 8001/90).***
>
> *1. The fact that it is a compulsory pecuniary benefit established by law does not necessarily make a tax on profit sharing or financial compensation provided for in Article 20, § 1, CF, which constitute equity income.*
>
> *2. Obligation instituted in L. 7.990/89, under the title of "financial compensation for the exploitation of mineral resources" (CFEM) does not correspond to the respective constitutional model, which would not, as such, include its impact on the company's revenue; nevertheless, it is constitutional, as it conforms to the alternative of "participation in the exploitation product" of the aforementioned mineral resources, also provided for in Article 20, § 1, of the Constitution.*[11]

The Federal Supreme Court put an end to the discussion that existed, in the sense that the CFEM had a tax legal nature, therefore, it was defined that the contribution is not derived revenue, but equity, that is, original.

In this area, as a development, a new discussion was opened, now with greater force in the doctrinal scope, generating two strong currents in the sense that the CFEM would be "public price" or simply "non-tax revenue".

Thus, copious jurisprudence has decided that the CFEM is not a matter of "public price", but derived from a legal relationship of a non-tax nature with discipline in administrative law.

In this sense, the following edges stand out:

> **TRF-4 - APPEAL/REVIEW REQUIRED APPELREEX 5618 PR 2007.70.00.005618-0 (TRF-4) Publication date: 09/01/2008**
>
> **Menu: MINERARY LAW. FINANCIAL COMPENSATION FOR THE EXPLORATION OF MINERAL RESOURCES. LEGAL NATURE. PRESCRIPTION. ICMS DEDUCTION.** - The collection of Financial Compensation for the Exploitation of Mineral Resources (CFEM) is foreseen in Article 20, § 1, of the CRFB, constituting the Union's equity revenue. It is not, therefore, a public price - contractual consideration for the provision of a public service. - In the case **of a non-tax legal relationship based on Administrative Law,** the five-year statute of limitations provided for in Article 1 of Law Number: 20,910/32. - For the purpose of deducting ICMS from the CFEM calculation base, in accordance with the governing legislation, the company's debt to the State Treasury must be determined in accordance with what appears in its accounting-tax bookkeeping books, not credits arising from previous operations may be entered into the account, insofar as the taxation excluded is that which concerns exclusively the commercialization of the mineral product, transport expenses and insurance costs (Article 2 of Law n.º 8.001 /90
>
> **SUMMARY**
>
> **ADMINISTRATIVE AND CIVIL PROCEDURAL. FINANCIAL COMPENSATION FOR THE EXPLORATION OF MINERAL RESOURCES - CFEM. FIVE-YEAR PRESCRIPTION TERM. CALCULATION CRITERIA. ICMS. INCIDENCE. LAWS 7.990/89, 8.001/90 AND DECREE 01/1991. NORMATIVE INSTRUCTION**

11. Available at < https://jurisprudencia.stf.jus.br/pages/search/sjur101401/false > Accessed on 06.08.2023.

Number: 06/2000-DNPM. ILLEGALITY.

Process 200334000435950/DF Process at Origin: 200334000435950 – TRF 1st. Region.

NORMATIVE Number: 06/2000-DNPM. ILLEGALITY.

I – In the case of credit from the Public Power, the collection of debts related to the Financial Compensation for the Exploitation of Mineral Resources – CFEM, is subject, by symmetry, to the general rule provided for in Article 1 of Decree no. 20,910/32, according to which the period for the collection of any passive debts of the Public Power is 05 (five) years, also applicable **to credits of a non-tax nature,** as in this case.

TRF-3 - CIVIL APPEAL AC 7118 SP 2004.61.05.007118-5 (TRF-3) Publication date: 05/27/2010

Subject: CONSTITUTIONAL LAW. ADMINISTRATIVE LAW. CIVIL PROCEDURAL LAW. ARGUMENT OF NULLITY OF THE REMOVED JUDGMENT. FINANCIAL COMPENSATION FOR MINERAL EXPLORATION - CFEM. FEDERAL CONSTITUTION, ARTICLE 20, § 1, LAWS 7,990/89 AND 8,001/90. NON-TAX LEGAL NATURE. NORMATIVE INSTRUCTION Number: 06/2000 DO DNPM. LEGITIMACY. JUDGMENT KEPT. 1. There is no mention of nullity of the sentence when the magistrate assessed and judged the claim made in court, it being common ground that the judge, when basing the decision, is not obliged to express an opinion on all the points raised by the parties, provided that resolves the dispute in a motivated and sufficient manner. 2. The constituent legislator, when dealing with the organization of the Brazilian state, defines, in article 20 of the Federal Constitution, which are the assets of the Union and, among others, lists the mineral resources, including those in the subsoil, also allowing individuals to the research and exploitation of such resources through concession or authorization (Article 176), ensuring, under the terms of the law, the participation of state entities in the result of the exploration of such resources (payment of royalties), or financial compensation for this exploration (Article 20, § 1). 3. Thus, in the exact diction of the Constitutional Text, mineral resources are property of the Union and their exploitation by the individual must be subject to the requirements of the regulatory law that establishes, among others, the provision of financial compensation for such exploitation, not if it is inferred from this, that it is a tax whatever its modality and, even less, that any obligation for said compensation resides in the Union. In fact, the financial compensation under discussion is an effective income to be earned by state entities, including the Union itself, for providing the individual with the commercial exploitation of a natural resource from an exhaustible source, in return for the economic benefit arising from the exploitation, given that Law Number: 7,990/89, just regulates.

This way, it is verified that the CFEM is not a question of original revenue, but of equity, in the case of a legal relationship of a non-tax nature based on Administrative Law.

Once this necessary legislative and jurisprudential exposition has been made, the grounds for the nullity of the collection and collection acts, first carried out by the former DNPM, in the period from 05/02/1994 and from 12/26/2017 by the National Mining Agency (ANM).

LEGAL GROUNDS FOR THE ILLEGITIMACY OF THE EXTENDED DNPM TO CHARGE AND COLLECT CFEM

It is well known that in the Rule of Law, the Public Administration must obey the law in all its manifestations. Even in the so-called discretionary activities, the public administrator is subject to legal prescriptions regarding competence, purpose and form,

only moving freely within the narrow range of convenience and administrative opportunity.

The administrative power granted to the public authority has certain limits and a legal form of use. It is not carte blanche for arbitration, violence, persecution or government favoritism. Any act of authority, to be irreproachable, must comply with the law, with the morals of the institution and with the public interest. Without these requirements, the administrative act is exposed to nullity.[12]

Now, the lack of competence vitiates the act and, due to the legal deficiency, makes it null, that is, it was not even born in the legal world and produced effects.

Therefore, there is a need to assess the issue of competence and legitimacy of the DN in promoting the collection of CFEM installments, while it existed as an Autarchy, disregarding the previous period.

One cannot get the mistaken understanding that the simple fact that the charge charged does not have a tax legal nature does not translate into legitimacy and/or competence for collection.

The legal core of the issue of illegitimacy comes from the DNPM's lack of legal competence and not because of the legal nature of the collection charge.

Competence comes from the law and article 37, *caput,* of the Federal Constitution, which provides for the principles of public administration, gives prestige to legality, as a basic condition of our country's right.

There are plenty of legal and constitutional arguments that did not even delegate competence to the DNPM to register CFEM debts as Active Debt (which are not even its own), and to promote collection procedures.

The DNPM, during all the years of its existence, foresaw the possibility of inscribing the CFEM debt in its Active Debt, and the act of inscribing the CFEM debt, in addition to Active Debts, translating a true usurpation of rights belonging to other Federal Entities, contravened the basic and elementary rules of administrative law.

However, administrative acts, in order to be valid, are subject to the requirements of *competence, purpose, form, reason* and *object.*

HELY LOPES MEIRELLES teaches [13]that competence is the first condition for the validity of an administrative act. The renowned administrator teaches that " *no act – discretionary or binding – can be validly performed without the agent having the legal power to practice it.*

Competence results from the law and is delimited by it.

It is worth quoting CAIO TÁCITO [14]who warns on the subject that "it is not competent who wants to, but who can, according to the rule of law".

In this vein and in the other grounds set out below, it translates that the administrative act of enrollment in the Active Debt as an exclusive credit of the then DNPM, in addition to the procedures for promoting the collection lawsuit lacked legal competence, which could not even be presumed.

The administrative power of the then DNPM must and must be governed by positive law, the law must confer to the DNPM, for the practice of the act, the necessary competence for the administrative procedures that it must take in relation to eventual CFEM debts.

The Federal Constitution, prior to Constitutional Amendment 102/2019, assured the States, Federal District, Municipalities, as well as bodies of the Direct Administration of the Federal Union, the participation in the result of the exploration of mineral resources or compensation for this exploration.

It is necessary to retranscribe the wording

12. MEIRELLES, Hely Lopes. Brazilian Administrative Law. 32nd Edition. Malheiros Publisher. 2006. P. 110.

13. MEIRELLES, Hely Lopes. Brazilian Administrative Law. 32nd Edition. Malheiros Publisher. 2006. Pgs. 150/151

14. TACTIUS, Gaius. The Abuse of Administrative Power in Brazil. River. 1959. p. 27.

of article 20, paragraph 1 of the Federal Constitution, before EC 102/2019:

> "Article 20.....
>
> [...]
>
> *§ 1 - Under the terms of the law, the States, the Federal District and the Municipalities,* as well as the bodies of the direct administration of the Union, are assured a participation in the result of the exploitation of oil or natural gas, of water resources for the purpose of generating electricity and other mineral resources in the respective territory, continental shelf, territorial sea or exclusive economic zone, or financial compensation for such exploitation. (gn).

By simply reading the constitutional provision, one can verify which were the federative state entities that were assured of financial compensation for the exploitation of mineral resources.

The DNPM, from the moment it acquired the status of a Federal Autarchy by virtue of Law 8.876/1994, ceased to be a body of direct public administration and consequently could not even participate in the distribution of the CFEM collection, which depended on the transfer by the Ministry of Mines and Energy, in accordance with the provisions of Law 8001/1990 (in the wording prior to Law 13540/2017 and 13575/2017): *i n verbis:*

> Article 2....
>
> ***§ 2 The distribution of the financial compensation referred to in the caput of this article will be made as follows:***
>
> I - 23% (twenty-three percent) for the States and the Federal District;
>
> II - 65% (sixty-five percent) for the Municipalities;
>
> II-A. 2% (two percent) for the National Fund for Scientific and Technological Development - FNDCT, established by Decree-Law Number: 719, of July 31, 1969, and reestablished by Law Number: 8,172, of January 18, 1991, destined scientific and technological development of the mineral sector; (Included by Law Number: 9,993, of 7.24.2000) (Regulation).
>
> III - 10% (ten percent) for the Ministry of Mines and Energy, to be fully transferred to the National Department of Mineral Production - DNPM, which will allocate 2% (two percent) of this share to mineral protection in mining regions, through the Brazilian Institute of Environment and Renewable Natural Resources – Ibama. (Wording provided by Law Number: 9,993, of 7.24.2000). (gn).

It is clearly verified that the States and the Federal District were assured the percentage of 23%, the Municipalities 65% and the Ministry of Mines and Energy 10%.

The legitimate creditors of CFEM, based on the aforementioned legal diploma, were, therefore, only these legal entities, and the DNPM, pursuant to item IX of article 3 of Law 8.876/1994, was exclusively responsible for overseeing the collection and issuing norms, in *verbis:*

> "Article 3: The DNPM autarchy will have the purpose of promoting planning and promoting the exploration and use of mineral resources, and supervising geological, mineral and mineral technology research, as well as ensuring, controlling and supervising the exercise of mining activities throughout the national territory, in the form of the Mining Code, the Mineral Waters Code, the respective regulations and the legislation that complements them, being responsible, in particular:
>
> (...)
>
> IX - to issue norms and exercise supervision over the collection of financial compensation for the exploitation of mineral resources, referred to in § 1 of Article 20 of the Federal Constitution;" (emphasis added).

The question about at what time or in what

legal diploma the legislator legitimized or granted the competence of the then DNPM to collect, register the tax credit only in its name and promote the tax enforcement action, has no answer, at any time.

Thus, it appears that the legislator delimited the range of competence of the then DNPM in relation to the CFEM, and it was not found in the text, and for this reason it was not up to include, add, imply, presume, that it has others and in particular that of register any debts in the Active Debt (even because the credits were not yours) and promote a collection lawsuit.

Therefore, we are faced with a clear and uncontroversial text that does not require any hermeneutic study effort for us to understand that the then DNPM was exclusively responsible for "downloading norms and supervising the CFEM collection" and, at no time, charging it, much less registering all the credit as being its Overdue Debt and file an executive action even though it is not even one of the creditors provided for in Law 8.001/90 (article 2, paragraph 2, in the wording before Laws 13540/2017 and 13575/2017).

In fact, the then DNPM carried out various collection procedures and promoted tax foreclosures by submitting Active Debt registrations for tax credits that were not due or legitimate.

CFEM is non-tax revenue from the creditors provided for in paragraph 1 of article 20 of the Federal Constitution and paragraph 2 of article 2 of Law 8001/1990 (in the wording prior to Laws 13540 and 13575/2017), and only these may effectively charge the CFEM (after providing the necessary laws) and it is also evident that only these may, if applicable, register these credits in the Active Debt of their financial controls and promote the judicial action of execution.

It becomes unnecessary to expose any in-depth study to ratify the common understanding that CFEM is non-tax revenue, in accordance with the provisions of paragraph 2 of article 39 of Law 4.320/1964, and these can obviously be entered as Active Debt as provides for paragraph 4 of the same device of the aforementioned legal diploma, but only by the state entities provided for in § 1 of Article 20 of the Federal Constitution.

However, the registration of the debt in the Active Debt can only be carried out by the legitimate creditor of the non-tax revenue, *in casu,* the Ministry of Mines and Energy, through the Attorney General's Office of the National Treasury (the share that was incumbent on it and is currently incumbent on it) the State, through its State Treasury Attorney, the Federal District through its Federal District Treasury Attorney and the Municipality, through its Municipal Treasury Attorney and only in relation to its quotas.

Law 7.990/89 and Law 8001/1990 (in their wording prior to Laws 13.540/2017 and 13.575/2017) at no time even provided for the Federal Union to, whether through a Direct or Indirect Administration body, delegate competence to register all of CFEM's debt as its Public Debt and more, to promote the filing of an executive action on the share of the other state entities.

These issues are relevant and their implications in the legal world require the appreciation of the Judiciary, so that other, unfounded mechanisms or subterfuges are adopted to create competence via interpretation that affronts the Brazilian Republican Charter.

Only the creditor entities (States, Municipalities, direct administration body of the Federal Union) have and had the legitimacy and legal and constitutional competence to inscribe their credits in the Active Debt (within the limit of their share-shares) and promote the collection of any outstanding debts.

Even if it were admitted that the DNPM

acted by delegation, this also depended on the law and could not be presumed. Supervising the collection does not have the same meaning as collecting and registering all the debt of the active debt and Autarchy that does not even participate in the product of the CFEM collection.

The DNPM could not, due to lack of competence, inscribe the entirety of CFEM as its Active Debt, and having promoted the filing of numerous CFEM collection actions, it could, in theory, raise the amounts it understands to be owed and forward to the aforementioned creditors the corresponding documents for them to initiate the administrative collection procedure and, if applicable, the enrollment in the Active Debt and its judicial collection.

As in the issue of prescription, it is not a simple and fragile thesis, but rather a matter of observing the legal norm and in particular § 1 of article 20 of the Federal Constitution and the governing laws, including Law 7990/89, 8001/90 and 8876/1994, while the DNPM existed.

Where the legislator did not foresee or write it, it is not appropriate to expand or extend the interpretation. The competence is provided by law, and it is clear that the administrative power of the Autarchy and of all Public Power is bound.

As explained, the *bound* or *regulated power* is that which Positive Law - the law - confers on the Public Administration for the practice of an act within its competence, determining the elements and requirements necessary for its formalization.[15]

The DNPM, it must be repeated, was not and never was the competent body to collect, much less to have inscribed the entire debt in the Active Debt, as it was not a matter of its revenue or credit, as it was not even contemplated in its public budget in its entirety. of the provisions of paragraph 4 of article 39 of Law 4,320/1964.

The rule contained in article 53 "caput" of Law 4.320/1964, which provides that the assessment of revenue is an act of competent distribution, which verifies the origin of the tax credit and the person who is the debtor and registers the debt this one.

Any miners who owed CFEM were not those of the then DNPM, as they could at most be debtors of the Federal Union due to the share of the Ministry of Mines and Energy, the State and the Municipality, but never the extinct DNPM Autarchy.

In any trail that can be followed, one is faced with the illegality and unconstitutionality of the acts committed by the then DNPM. And this is confirmed in the scope of financial law (absence of budget law); administrative (competence); constitutional and civil.

The DNPM, at the most, must receive, by transfer, the Union share due to the Ministry of Mines and Energy (which indeed has constitutional and legal competence to claim its credit within the limit of its share of the proceeds from the collection) and thus, when seeking to register the entire debt, as being the entire amount belonging to it, violates the Federal Constitution, as it was not a body of the Direct Public Administration of the Federal Union and more, there are share-shares that belong to other state entities.

There were undue registrations of Active Debt in the case of the entire national territory as DNPM credits, given that its collection was affected, illegally and unconstitutionally. In addition, it must be repeated, only the federal government's share must be charged for it alone.

It reiterates the need for a more attentive reading of the CFEM legislation, at the time of the existence of the DNPM Autarchy, especially in item III of article 2 of Law 8.001/90, through which it shows that 10% of the CFEM collection is destined to the Ministry of Mines and Energy and this would transfer to the

15. MEIRELLES, Hely Lopes. Brazilian Administrative Law. 32nd. Ed., Malheiros Editores. São Paulo. 2006.

then DNPM the aforementioned quota, thus, at the federal level, the legitimate creditor of the exaction is not the DNPM.

We found that there is a need for greater hermeneutical effort to interpret the governing norms, especially the Federal Constitution.

The principle of strict legality is a duty of observance at all levels of public administration, which is why, its non-observance vitiates the act and the Judiciary is competent to inhibit this legal anomaly.

It is not possible to allow the direct affront of the Federal Constitution and more, illegitimately charge tax exaction without any legal provision.

Law 8.876/1994 that created the Federal Autarchy, *in casu,* the former DNPM, at no time had granted or granted it competence to receive what it is not even entitled to.

Moreover, if the less informed interpreter or with no legal nature extends the competence understanding that to supervise is also to promote its administrative and judicial collection, there will be frontal unconstitutionality for right affront to § 1 of article 20 of the Federal Constitution.

In this sense, it is legally impossible, even with regard to the Ministry of Mines Energy, for the DNPM to have registered the entirety of the debt in the Active Debt and promote the judicial execution action.

There are still remnants of obedience to the most elementary rules of law in the treasury scope.

And in this sense, it is necessary to transcribe part of PGFN/NFLDP note No. 360/98, cited and transcribed from PGFN/NFLDP Opinion Number 327/2003, of February 28, 2003, duly approved by Mr. Attorney General of the National Treasury, on the same date (strangely later modified, if there was a change in the governing rule) *in verbis*:

> 5. It is accepted as true the assertion that the debts related to the autarchy itself, in its institutional duties, can be collected by it. Inopportune is any form of interpretation in the sense of extending such collection to any credits of the Union, the competent federal body for the calculation and collection is the Attorney General of the National Treasury, as provided in the transcript above, corroborated by § 4 of article 2, of the Law 6.830/80.
>
> 6. As can be seen from the legislation on the matter under focus, it is incumbent upon the DNPM "to issue rules and exercise supervision over the collection of financial compensation for the exploitation of mineral resources, dealt with in § 1º Article 20 of the Federal Constitution, as provided in the item IX of article 3 of Law 8.876/94. It can be seen, therefore, that issuing rules and exercising oversight over collection is not the same as being able to register and collect the amount eventually registered and overdue debt
>
> 7. At this point, it seems much more appropriate to understand that it is incumbent upon the DNPM, if and when irregularities or non-payment of financial compensation to the Ministry of Mines and Energy are found, to formalize communication to that body, with the suggestion of sending any debt to the Public Prosecutor's Office. General of the National Treasury, to regulate the registration in Active Debts of the Union.
>
> 8. In view of the above, it is concluded that the Attorney General's Office of the National Treasury is competent to collect financial compensation for the exploitation of mineral resources related to the share due to the Union "[16]

It is not too much to expose the rules contained in Law 6.830/1980, which deals with the judicial collection of the active debt of the Public Treasury, highlighting the following provisions of the law:

16. Annex

> Article 2: It constitutes Active Debt of the Public Treasury that defined as taxable or non-taxable in Law Number: 4,320, of March 17, 1964, with subsequent amendments, which establishes general rules of financial law for the preparation and control of the Union's budgets and balance sheets, States, Municipalities and the Federal District.
>
> ***§ 1*** - Any amount whose collection is attributed by law to the entities referred to in article 1, will be considered Active Debt of the Public Treasury.
>
> ***§ 2 - The Active Debt of the Public Treasury, comprising tax and non-tax debt, includes monetary restatement, interest and fine for late payment and other charges provided for by law or contract.***
>
> ***§ 3*** - The registration, which constitutes the act of administrative control of legality, will be made by the competent body to determine the liquidity and certainty of the credit and will suspend the prescription, for all legal effects, for 180 days, or until the distribution tax foreclosure, if it occurs before the end of that period.

Another affront, that is, disrespect for Law 6830/1980, article 2, §§ 1 and 3.

As explained elsewhere, registration in Active Debts an administrative act and this must be carried out by a legally competent agent, and § 3 of article 2 of Law 6830/1980 reinforces this strong commandment.

The credit related to CFEM, charged by the executive action was not a non-tax credit of the DNPM (Autarchy). And if not, he could not have registered the Active Debt as his.

In this sense, not even the part of the Federal Government, which refers to its quota share, could be filed in the name of the DNPM.

Article 8 of Law 7990/1989 is clear when it provides that the CFEM must be collected directly from the aforementioned creditor political entities (the device is still in force even after the enactment of Laws 13540/2017 and 13575/2017), in verbis *:*

> Article 8 The payment of the financial compensation provided for in this Law, including the compensation for the exploration of oil, oil shale and natural gas will be made, on a monthly basis, directly to the States, the Federal District, the Municipalities and the bodies of the Direct Administration of the Union, until the last business day of the second month following the taxable event, duly corrected by the variation of the National Treasury Bond (BTN), or another monetary correction parameter that may replace it, prohibited the investment of resources in debt payment and in the permanent staff. (Wording given by Law Number: 8.001, of 3.13.1990) (gn)

It is evident that the registration in the active debt is an act of administrative control of legality, and the DNPM did not have the competence and legitimacy to have registered non-tax credits that did not belong to them and did not even have a legal provision, much less constitutional, because as provided in the device above (Article 8 of Law 7990/1989), only those entities can exercise the right to charge CFEM.

And the DNPM, through its Federal Prosecutor's Office, obtained the confiscation of miners' assets, used all mechanisms, even flawed ones, to force the collection of CFEM in its favor.

Paragraph 3 of article 2 of Law 6830/1980, has uncontroversial wording, inhibiting any other thesis, in the sense that the Active Debt of the Union (in *casu* the share belonging to the Ministry of Mines and Energy), will be calculated and registered at the National Treasury Attorney's Office.

The Judiciary has initiated the understanding so far exposed, as can be seen in the decision rendered by the Honorable Member. Judge of the 3rd. Court of the Federal Court of Goiás, in the records of Process 2007.35.00.007990-6, which, when assessing the issue of the competence and legitimacy of the DNPM in charging the CFEM of some

mining companies in that State, manifested itself in the reasoning of its decision:

> *"Now, article 8 of Law 7.990/1989 is clear in providing that the payment of financial compensation must be made directly to the States, the Federal District, the Municipalities and the bodies of the Direct Administration of the Union:*
>
> (...)
>
> *It is, in casu, revenue originating from the States, Federal District and Municipalities (Article 20, paragraph 1, CF), although the mineral resources are assets of the Union (Article 20, IX, Federal Constitution).*
>
> *This was the understanding of the Federal Supreme Court when judging the Writ of Mandamus n. 24.312-1, when it decided that the Federal Court of Auditors was not responsible for overseeing the resources provided for in article 20, paragraph 1 of the CF, as it did not fit the hypothesis of article 71, item VI, of the CF.*
>
> (...)
>
> *In the case of revenue originating in the States, Federal District and Municipalities (Article 20, paragraph 1, CF), I believe that it is totally irrelevant for the DNPM to charge and collect what does not belong to it, even more so without express legal provision for so much.*
>
> *Articles 3 and 4 of Law 8.876/94, contrary to what the defendant maintains, at no time attribute to the DNPM the competence to charge the CFEM belonging to the States, Federal District and Municipalities pursuant to article 20, paragraph 1 of CF.*
>
> (...)
>
> *In my understanding, this "financial participation" constitutes a non-tax credit of a patrimonial nature, therefore, civil, destined by law to the States and the Federal District (23%), to the Municipalities (65%), to the Fund for Scientific and Technological Development – FNDCT (2%) and the Ministry of Mines and Energy (10%).*
>
> *In fact, the competence of the DNPM is to "set rules and supervise the collection of financial compensation (article 3, item IX, of Law 8.876/1994).*
>
> *Downloading standards and supervising is one thing. Another very different thing is charging.*
>
> *Obviously, within the scope of inspection is the duty to establish the non-tax credit, all within the scope of an administrative proceeding, the result of which will be what is understood by "administrative res judicata", consolidates whether due to the inertia of the debtor in oppose or challenge the amounts then raised by the inspection, or due to the impropriety of any administrative appeals then offered.*
>
> *In this line of reasoning, once the administrative process of inspection and consolidation of the amounts owed under CFEM is concluded, the same (the process) must be sent to the Attorney General's Office of the National Treasury so that it is first registered in overdue debt and then, if case, a tax foreclosure must be proposed pursuant to Law 6.830/80.*
>
> *It also becomes obvious, due to the principle of sharing powers, a corollary of the federative principle, the PFM will only be able to enroll in overdue debt and then execute credits from the FNDCT (2%) and the Ministry of Mines and Energy (10%).*
>
> *Consequently, the credits that constitute revenue originating from the CFEM to the States, Federal District and Municipalities, must be registered and later executed by these respective federative entities.*
>
> *I dare to maintain that the DNPM has no competence to collect anything, only to inspect and then refer the administrative process to the rightful holders, that is, to the holders of the original revenues.*

In casu, I recognize and declare the competence of the DNPM to inspect the CFEM amounts legally allocated to those entitled to these funds, but it will not be able to charge anything from anyone.

The most that the DNPM can do, in my opinion, is, once the credit has been consolidated and the amounts defined, forward the process to the holder with the power to register as an overdue debt and with legitimacy for execution.

In the current model of legislation, I understand that the Appellants are subject to the full supervision of the DNPM, but this does not have the competence to charge them.

(...)

Well, this request proceeds, because the DNPM cannot collect anything, only inspect.

(...)

In view of the foregoing, I JUDGE the requests made in the complaint and grant the pleaded security, whereby I recognize and declare the right of the Petitioners not to submit to any collection of the Financial Compensation for the Exploration of Mineral Resources - CFEM by the DNPM of the 6th. Region.

(...)

I also emphasize that the DNPM cannot make any collection due to legal absence to do so, a situation that obliges it to send the respective administrative processes, to the federative entities that hold the credits and the competences for registration in active debt and subsequent execution, if applicable.

(...)

Goiânia, 09/12/2007.

Carlos Humberto de Souza

FEDERAL JUDGE.

This was a decision that shed light on the illegalities, unconstitutionalities and arbitrariness committed by the then DNPM, but which unfortunately did not produce the expected results.

It is clear, therefore, that the issue cannot be treated as a simple thesis of interpretation of legal norms, but the clear finding that the DNPM did not have legislative competence to charge the CFEM, and also because it was not the legitimate creditor of this exaction, prevented from registering it in the Active Debt and proposing any legal or non-judicial collection procedure.

The amounts eventually raised during inspection by the DNPM must be forwarded separately to each of the federative entities so that, if they have their legal norms of regency and regulation, they can institute the competent administrative process and, if effectively such amounts have an administrative decision that has become final and unappealable, they could, because they are competent, register in their Active Debt and promote tax enforcement actions. Because they have constitutional and legal competence.

The act of having the then DNPM entitled CFEM's total creditor violated the most elementary principles and institutes of Financial Law.

The mentioned exaction for the then DNPM does not translate into public revenue, as it does not have the constituent elements in its formation. The share that is owed to the Ministry of Mines and Energy is transferred by the latter to the DNPM and cannot even be registered as an Active Debt.

It is necessary to highlight Public Revenues that have at their core understanding that they are inflows with the characteristic of definitiveness, that is, inflows of financial resources that do not have a correspondence in liabilities.

In the words of ALIOMAR BALEEIRO, it is the entrance that, being part of the public

heritage without any reservations, conditions or corresponding liabilities, adds its importance, as a new and positive element.[17]

Public revenue, therefore, is the definitive entry of goods and values into the public coffers, that is, without pre-established exit condition.

The DNPM could only register CFEM credits if they were its public revenue and, from the moment it must share the collected amount, these resources cannot be classified as public revenue,

There is no legal and accounting mechanism for registering financial value arising from the transfer of a direct public administration body (Ministry of Mines and Energy).

However, it cannot be understood that it is Originating or Derived Revenue for the DNPM, since in theory it would be Derived Revenue to the Legal Entities provided for in § 1 of article 20 of CF/88.

In order to demonstrate the flagrant illegality, unconstitutionality and arbitrariness on the part of the DNPM and with that to be buried with a shovel of lime, it is enough to verify in the diction of Law 8.876/1994 that Established the DNPM as an Autarchy, in its article 5, which are your revenues or public revenues:

> Article 5: The following are the revenue of the Autarchy:
>
> I - appropriations allocated in the General Budget of the Union, special credits, transfers and transfers, which are conferred;
>
> II - proceeds from credit operations carried out in Brazil and abroad;
>
> III - emoluments, fines, contributions provided for in mining legislation, sale of publications, resources from inspection and inspection services or from lectures and courses given and various revenues established by law, regulation or contract;
>
> IV - resources from agreements, agreements or contracts entered into with entities, organizations or companies, public or private, national or international;
>
> V - donations, legacies, subventions and other resources allocated to it;
>
> VI - funds arising from the sale of mineral goods seized as a result of clandestine, illegal or irregular activities, taken to public auction.
>
> Single paragraph. The share of the financial compensation for the exploitation of mineral resources due to the Union, referred to in § 1 of Article 20 of the Federal Constitution and Article 8 of Law Number: 7990, of December 28, 1989, regulated by Decree no. 1, of January 11, 1991, is destined to the Ministry of Mines and Energy, which will transfer it in full to the DNPM, subject to the provisions of item III of § 2 of Article 2 of Law Number: 8,001, of March 13, 1990.

No indication of CFEM as DNPM revenue and in the sole paragraph of article 5 of Law 8.876/1994, mention was made of the exaction only to indicate that the quota due to the Federal Government would be allocated to the Ministry of Mines and Energy which will be transferred in full to the DNPM.

In this sense, there is no way to maintain the understanding that the DNPM could register the CFEM debt as its credit or income in active debt and consequently promote the collection lawsuit.

It is reiterated that the Federal Union's share of the CFEM must only be registered by it as an Active Debt and the National Treasury Attorney's Office propose legal actions for its collection.

In this regard:

> STJ - SPECIAL APPEAL: 1132468 RS 2009/0062374-6 (STJ)
>
> Publication date: 12/18/2009

17. BALEEIRO, Aliomar – An introduction to finance sciences – 16th. Ed. Rio de Janeiro, 2006. p. 12

Summary: CIVIL PROCEEDINGS - ASSIGNMENT OF RURAL CREDIT - VIOLATION OF ARTICLE 535 OF THE CPC - NON-EXISTENCE - NFLDP REQUIREMENT - SUMMARY 7/STJ - MP 2.196-3/2000 - PRESUMPTION OF CONSTITUTIONALITY - FISCAL ENFORCEMENT - OWNERSHIP OF THE CREDIT - NON-TAXABLE ACTIVE DEBT - REGISTRATION - POSSIBILITY - LEGITIMACY OF THE NATIONAL TREASURY FOR COLLECTION IN ACTIVE DEBT OF UNION CREDITS. 1. There is no violation of Article 535 of the CPC when the party does not even file a motion for clarification so that the court of origin fills a gap in the jurisdictional provision. 2. Unfeasible analysis of a thesis that requires resolving the factual-evidential matter of the file. Incidence of Precedent 7/STJ. 3. Although the STJ can declare the unconstitutionality of a normative act through its competent body, a provisional measure validated by EC 32/2001 is presumed to be constitutional. 4. Collection via tax foreclosure of any credits securitized by the Public Treasury may be applicable. STJ precedents. 5. It is incumbent upon the National Treasury to legally represent the Union in the collection of credits securitized by the Union, pursuant to Article 12, V, of LC 73/1993 with Article 23 of Law 11,457/2007. 6. Application for the benefit of legal gratuity granted under the terms of Law 1,060/50. 7. Special appeal known in part and in that part not provided.

It would be the same, for example, for a Municipality to propose a tax enforcement action against a taxpayer who is in default of paying ICMS (a tax of exclusive competence of the State), just because the State must transfer part of its collection to the mentioned Municipality.

This unconstitutional legal situation violated paragraph 1 of article 20 of the Federal Constitution, article 2, paragraph 3 of Law 6.830/80, article 2, paragraph 2 of Law 8.001/90, article 3, IX of Law 8.876/94, article 2, § 2, item III of Law 8001/90, (all in the wording prior to Laws 13540/2017 and 13575/2017).

The Explanatory Table below clearly elucidates how the CFEM must be collected and charged (according to the Law and the Federal Constitution), even now by the National Mining Agency (ANM) (simply replacing the DNPM by the ANM in the statement:

Finally, one cannot distance himself from the rules contained in the article of Decree 1/991 that regulated the CFEM (in force) whose wording is as follows:

> Article 26. The payment of the financial compensation provided for in this decree, including the royalties owed by Itaipu Binacional to Brazil, will be made monthly, directly to the beneficiaries, through deposits in specific accounts held by them at Banco do Brasil SA, until the last business day of the second month following the taxable event.

THE ILLEGITIMITY OF THE NATIONAL MINING AGENCY (ANM) TO CONSTITUTE CFEM TAX CREDIT

Even after the creation of the National Mining Agency (ANM), through Law 13575/2017, the unconstitutionality and illegalities remain, now for a new Autarchy, even though it has been granted the competence to collect and constitute the CFEM tax credit.

The changes that Law 8001/1990 and 7990/89 underwent through Laws 13540/2017 and 13575/2017 are analyzed.

Law 8001/1990 in the wording given by Law 13.540/2017 (Conversion of MP 789/2017), as provided in article 2:

> "Article 2nd: The rates of the Financial Compensation for the Exploitation of Mineral Resources (CFEM) will be those contained in the Annex of this Law, subject to the limit of 4% (four percent), and will

apply to:

[...]

§ 2 The distribution of the financial compensation referred to in the caput of this article will be made according to the following percentages and criteria:

I - 7% (seven percent) for the regulatory entity of the mining sector;

II - 1% (one percent) for the National Scientific and Technological Development Fund (FNDCT), established by Decree-Law Number: 719, of July 31, 1969, and reestablished by Law Number: 8,172, of January 18, 1991, intended for the scientific and technological development of the mineral sector;

II-A (revoked);

III - 1.8% (one and eight tenths percent) for the Mineral Technology Center (Cetem), linked to the Ministry of Science, Technology, Innovations and Communications, created by Law Number: 7677, of October 21, 1988, for carrying out research, studies and projects for the treatment, processing and industrialization of mineral goods;

IV - 0.2% (two tenths percent) for the Brazilian Institute of the Environment and Renewable Natural Resources (Ibama), for environmental protection activities in regions impacted by mining;

V - 15% (fifteen percent) for the Federal District and the states where production takes place;

VI - 60% (sixty percent) for the Federal District and the Municipalities where the production takes place;

VII - 15% (fifteen percent) for the Federal District and Municipalities, when affected by mining activity and production does not occur in their territories, in the following situations:

a) cut by the infrastructure used for the rail or pipeline transport of mineral substances;

b) affected by port operations and loading and unloading of mineral substances;

c) where the waste dumps, tailings dams and facilities for processing mineral substances are located, as well as other facilities provided for in the economic use plan; It is

d) (VETOED).

§ 3 In the non-existence of the hypotheses provided for in item VII of § 2 of this article, or while the Decree of the President of the Republic has not been edited, the respective portion will be destined to the Federal District and to the States where production takes place.

§ 4 (VETOED).

§ 5 The decree referred to in § 4 of this article will also establish criteria for allocating a fraction of the portion referred to in item VII of § 2 of this article to compensate for the loss of CFEM collection by Municipalities seriously affected by this Law.

§ 6 Of the installments dealt with in items V and VI of § 2 of this article, at least 20% (twenty percent) of each of these installments will be allocated, preferably, to activities related to economic diversification, sustainable mineral development and scientific and technological development.

Competence This attribution or pseudo-competence passed under Law 13.575/2017 to now be of the National Mining Agency, as provided for in article 2, XII, "a".

It is noted that the infraconstitutional legislator once again went against the constitutional provision of granting the National Mining Agency (ANM) the competence to regulate, supervise, collect, constitute and collect the credits arising from the CFEM, the same unconstitutionality committed by the legislation in force at the time of the deceased DNPM.

The ANM's constitutional incompetence and illegitimacy is uncontroversial, as Law 8001/90, in the wording given by Law 13,575/2017, is clearly and unequivocally unconstitutional, as it was in the original wording.

The extinct DNPM, from the moment it acquired the condition of Federal Autarchy by force of the then Law 8.876/1994, ceased to be a body of direct public administration and consequently could not even participate in the distribution of the CFEM collection, which depended on the transfer by of the Ministry of Mines and Energy, in accordance with the wording of the then revoked article 2 of Law 8,001/1990.

Likewise, with Law 13575/2017, which provides in its article 1:

> Article 1st: The National Mining Agency (ANM) is created, part of the indirect federal Public Administration, subject to the special autarchic regime and linked to the Ministry of Mines and Energy. (gn)

The legitimate creditors of CFEM remain, therefore, only those provided for in paragraph 1 of article 20 of the Federal Constitution, with EC 102/2019 and the ANM, which may at most regulate and supervise the exaction (article 2, XII, "a" of Law 8001/90 in the wording of Law 13575/2017).

The same vices are committed that were committed while the DNPM Autarchy existed.

At no time did the constituent grant competence or legitimacy to a body of the Indirect Public Administration, nor to the DNPM and much less now to the ANM, to collect, establish and charge CFEM credits.

The National Mining Agency (ANM) cannot constitute credit that it is not legitimate or a creditor, like the late DNPM.

Article 19, X, of Law 8.001/90 (as amended by Law 13.575/2017), provides as follows:

> Article 19: The ANM revenues are:
>
> [...]
>
> X - the amount collected as CFEM, to be passed on to ANM, through the Ministry of Mines and Energy, as established in item III of § 2 of Article 2 of Law Number: 8001 of March 13, 1990.

And what does the mentioned item III of § 2 of article 2 say.

> III - 1.8% (one and eight tenths percent) for the Mineral Technology Center (Cetem), linked to the Ministry of Science, Technology, Innovations and Communications, created by Law Number: 7677, of October 21, 1988, for carrying out research, studies and projects for the treatment, processing and industrialization of mineral goods;

Of course, only the aforementioned amount can be charged by the Ministry of Mines and Energy and subsequently passed on to ANM.

Thus, the other CFEM quotas or amounts, in addition to not being part of ANM's revenue, cannot be collected, and their credits constituted as they do not belong to it.

In order to seek the legitimacy that the ordinary legislator seeks, it would be necessary to issue a Constitutional Amendment providing that a body of Indirect Public Administration could be one of the creditor bodies of CFEM.

The indication of a resolution or alternative resolution can be tested as a way of resolving the entire legislative uproar, that is, to amend § 1 of article 20 of the Federal Constitution, indicating that only the Federal Union would have competence to impose the CFEM and this is the obligation to pass on to the Municipalities, States and Federal District, in accordance with the provisions of the Complementary Law.

The ANM, like its then predecessor DNPM, repeats itself, is not the competent body to collect, constitute, and even less to register all the debt in the Active Debt, since it is not a question of its revenue or credit,

since it cannot even be included in its public budget pursuant to paragraph 4 of article 39 of Law 4.320/1964 and article 19, X, of Law 13.570/2017.

It must also be highlighted that article 2º-F of Law 8001/90 (included by Law 13540/2017), provides unconstitutionally that it is the sole responsibility of the Union, through the regulatory entity of the mining sector, to regulate, *collect, inspect, charge and distribute the CFEM.*

Article 2, XII, "a" of Law 13575/2017 grants competence that is also unconstitutional, as it provides:

> Article 2nd The ANM, in the exercise of its powers, will observe and implement the guidelines and guidelines established in Decree-Law Number: 227, of February 28, 1967 (Mining Code), in related legislation and in the policies established by the Ministry of Mines and Energy, and will have the purpose of promoting the management of the Union's mineral resources, as well as the regulation and inspection of activities for the use of mineral resources in the Country, being responsible for:
>
> [...]
>
> II - regulate, supervise, collect, set up and charge the credits arising from:
>
> a) Financial Compensation for the Exploitation of Mineral Resources (CFEM), dealt with in Law Number: 7990, of December 28, 1989".

It is noted that the mentioned device goes beyond simply collecting, charging and distributing, it creates the competence to "constitute".

The constitution of the tax credit is a private and exclusive act of its legal creditor, in the case of those foreseen in § 1 of article 20 of the Federal Constitution.

The device violates article 20, paragraph 1 of the Federal Constitution and article 26 of Decree 1/1991 (regulation of Law 7.990/89), which provides as follows:

> Article 26. The payment of the financial compensation provided for in this decree, including the royalties owed by Itaipu Binacional to Brazil, will be made monthly, directly to the beneficiaries, through deposits in specific accounts held by them at Banco do Brasil SA, until the last business day of the second month following the taxable event.

FINAL CONSIDERATIONS

It appears that the extinct DNPM did not have the competence or legitimacy to charge the CFEM, not only because of the absence of a legal rule for this purpose, but especially because it is not one of the creditor entities provided for in article 20, paragraph 1 of the Federal Constitution.

As a result, all DNPM collections were undue, which is why miners have the undisputed right to repeat such amounts and, if there are legal actions for collection, these must be extinguished due to illegitimacy.

Likewise, with regard to the National Mining Agency (ANM), which, although it has an ordinary law providing for competence to charge, ended up being unconstitutionally granted the constitution of the CFEM credit, a direct affront to § 1 of article 20 of the Federal Constitution.

The constitution of credit is the prerogative of an active subject of a tax charge, tax or not, and both (DNPM and ANM) were never active subjects of CFEM, which is why the legal relationship between the miner and the aforementioned Municipalities will never take place.

Both municipalities had as a source of revenue the amount that must be passed on by the Ministry of Mines and Energy.

There is an urgent need to resolve all the legal issues set out in this work, because in addition to not respecting the collection rules provided for in law and contradicted in

others and even in the same law, there are no inspection mechanisms for the application of the resources in which federative entities have been receiving as CFEM.

The imposition of tax charges or encumbrances on any economic activity, in the case of mining, must be fully integrated with all governing legislation, and in the case of non-tax revenues, with observance of the principles and rules of financial law, administrative and especially constitutional.

Alongside the ANM claiming and proving that the resources that are directed or retained are insufficient to be able to exercise its attributions, it does not enable it to commit the vices pointed out in this work, and the legislator must not only find ways to resolve material needs and financial aspects of this important and necessary regulatory agency, but to resolve all the stir and vices contained in the operationalization of CFEM collection.

In this sense, so that the resolution of violations and constitutional violations can be started correctly, the enactment of a Constitutional Amendment, with an improvement in the wording of article 20, paragraph 1, can validate the infraconstitutional legislative fabric with minor adjustments to the wording.

The importance of the Brazilian mineral sector, in which it is responsible for providing inputs in the almost absolute majority of all goods needed by society, requires better treatment by the legislative power.

Judicial decisions in which they may be entered with the understanding that the CFEM collection is vitiated, will make the situation of the ANM even more difficult, as it will not be able to repeat the collected amount, since it will be passed on to the other federative entities.

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