

Of Prescribability in the Environmental Administrative Process

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Abstract— It is undeniable that environmental protection is of increasing importance to society as a whole, given its vital importance for the survival of man on planet earth. In this way, the State adopted a rigid posture that reflected through governmental actions, due to the exercise of its legal function, elaborating laws and regulations that aim at the protection and conscious use of natural resources, as well as the mechanisms of reprimand to the violators. Thus, in spite of environmental law, the present work seeks to highlight and discuss the incidence of prescribed under the environmental administrative processes established from the practices of acts considered illegal the legal norms attached to the environment, reflected by reason of the processing time, intercurrent prescription, due to the eternalization of these processes, considering that this administrative position is unbearable for the administered, because, the same results in embargoes and interferences in the legal relations between the pairs - Administrators and Public Administration, since the administrative inertia unjustifiably harms the delay in the regular progress of the process.

Keywords— Environmental Law, Social Relationships, Prescriptibility.

I. INTRODUCTION

The objective of this study is to analyze the incidence of intercurrent prescription in the course of the environmental administrative procedure due to the extensive time taken to process its procedures, which often extend over a period of more than five (5) years, and thus, end up hampering their pedagogical and punitive function, as regards the imposition of penalties and pecuniary sanctions for the practice of conduct contrary to the environment, in addition to giving absolute legal uncertainty in the relations between the parties involved, where environmental damage ends up being succumbed by deadline.

It is essential to record that the Public Administration has control of all procedural procedures despite its optional acts, resulting from its exercise of police power derived from Law No. 6.938 / 81, which establishes the National Environmental Policy - PNMA, which was received by art. 225, of the Federal Constitution, where such administrative position is regulated by Decree No. 6,514 / 08, which provides for infractions, penalties and administrative sanctions in favor of the environment, where the latter, however, is destined to processes in the federal jurisdiction is also applied, by analogy the

demands reflected in the States, Federal District and Municipalities.

Thus, from an overall view, it is undeniable that administrative procedures, within the scope of the Public Administration must observe the legal term of process, under penalty of losing the right to promote the proper application of administrative penalty, which often ends in the application of fine due to the investigation of infraction practices against the environment. In this sense, the term is also dealt with by Law No. 9.873 / 99, which establishes the five-year prescriptive period for the exercise of punitive action by the Federal Public Administration, either Direct or Indirect, as of the date of practice of the act or, in in case of permanent or continuous infringement, of the day on which it ceased.

In order to do so, it is perfectly possible and due to the application of the intercurrent prescription in environmental administrative proceedings due to extensive processing, above all, because it is timid that the paralysis of the same does not operate, because of the taxpayer, that in turn, is subject to the timeliness of its acts, but rather by the inertia of the Public Administration regarding the practice of acts essential to the regular progress of the process.

II. OF ENVIRONMENTAL LAW

Initially, it should be clarified that Environmental Law is a public order norm, whose purpose is to promote the protection of the environment, through the exercise of its legal function, by elaborating laws and regulations aimed at the protection and conscious use of natural resources, as well as such as mechanisms for reprimanding offenders, through principles and coercive norms that regulate human activities that, directly or indirectly, may affect the health of the environment in its global dimension, aiming at its sustainability for present and future generations, under the terms of Art. 225, of the current Constitution,

"Art. 225. Everyone has the right to an ecologically balanced environment, a common use of the people and essential to a healthy quality of life, imposing on the Government and the community the duty to defend and preserve it for present and future generations . "

Thus Environmental Law, therefore, a set of norms and legal instruments established by the country's legislator whose foundation is the protection of the environment, against human behavior, whose main tool is coercive action by the Public Administration that has pillar, the provisions of the caput , of art. 37, of the Constitution Patria, in verbis:

Art. 37. The direct and indirect public administration of any of the Powers of the Union, of the States, of the Federal District and of the Municipalities shall obey the principles of legality, impersonality, morality, publicity and efficiency and also the following ...

In line with the constitutional conception referred to above, the alignment of Environmental Law with other branches of law, such as: criminal, tax and, above all, Administrative Law is observed, especially with the advent of Law 6.938 / 81, which provides for the application of penalties and administrative sanctions due to the occurrence of conducts and activities harmful to the environment. The correct exegesis of this law is indicated in the provisions of its art. 70, which defines what becomes an environmental infraction, let us see:

Art. 70 - It is considered an environmental administrative infraction any action or omission that violates the legal rules of use, enjoyment, promotion, protection and recovery of the environment.

Therefore, Environmental Law regulates any action or omission that violates the legal rules of use, enjoyment, protection and recovery of the environment, where once the infraction is established, this will be processed in an environmental administrative process, which will seek the promotion of punishment of the offender with the application of Law No. 9605/98, which deals with

environmental crimes, provides for harmful conduct against the environment and its sanctions, with a view to conscientizing society and punishing those who degrade it, without prejudice of the application of other penalties provided for in the legislation attached to Decree No. 6,514 / 08.

III. OF THE ENVIRONMENTAL ADMINISTRATIVE PROCESS - OF THE INCIDENCE OF INTERCHANGEABLE PRESCRIPTION

The environmental administrative process, like any administrative process, is a means by which the State, in the exercise of its police power, promotes the investigation of conduct understood as infringing on the environment as a result of the action or omission of the person or entity . Thus, the environmental administrative process, despite administrative legislation, will have as its basis the constitutional principles of legality, due process of law, legal certainty, motivation; proportionality and, with greater emphasis, the principle of reasonable length of the process, because it is inadmissible in the legal system the eternalization of administrative processes at any level of performance.

For this, the prescription, besides being a mechanism of legal security is a regulator of stability of social relations, either determining the initial term and also the deadline for its establishment and satisfaction of what is determined after regular administrative process, either or to avoid the unjustified suspension of the procedural movement.

In order to do so, the State's judicial protection in defense of the environment begins with the assessment of the alleged offender, with due observation of the principle of ample defense and contradiction, which eschew the principles of probation, motivation, reversibility and of the right represented, all based on art. 5º, LV of the Federal Constitution, which thus stipulates: "The litigants, in an administrative proceeding, and the accused in general are assured the contradictory and ample defense, with the means and resources inherent therein."

In this way, the environmental administrative process, besides being based on the police power of the Direct and indirect Public Administration, is also supported by the general principles of law, determined by art. 37, of the Constitution of the Nation, as previously mentioned, whose interpretation in the scope of Environmental Law plays a role of integration and harmonization of the legal system and stability of social relations, by means of normative acts focused, mainly, to the protection of the environment before the environmental infringements,

characterized not only by the occurrence of damage, but also, by non-observance of legal rules, that may or may not have harmful consequences for the environment.

Therefore, any conduct considered harmful to the environment derived from the practice of an unlawful act practiced by a natural or legal person, whether by action or omission, will be determined through an administrative process of its own, imposing a penalty in the manner determined in Decree No. 6,514 / 08 c / c Law No. 9,605 / 98, which can not be extended indefinitely in order to lose its purpose and cause significant instability in the relations between peers, thus giving rise to the possibility of intercurrent prescription due to the provisions of Law no. 9,873 / 99, with the additions of Law 11,941 / 09.

Thus, once the practice of an act harmful to the environment is verified, or, in the case of permanent or continuous infraction, when the illegal activity ceases, the initial frame of the administrative process is established, with the parameter, also, of the initial frame of the period of 05 (five) years for the Public Administration to promote the determination of unlawful conduct, under penalty of losing the right of action, as well as the possibility of imposing penalties and penalties, which is why the prescription in the pursuant to Decree No. 6,514 / 08 c / c Law No. 6.938 / 81.

With regard to Decree No. 6,514 / 08, which, among its provisions, establishes the federal administrative procedure for the determination of administrative infractions to the environment and the applicable sanctions, which is inaugurated by the drawing up of the notice of infraction by the enforcement agent, which shall contain the identification of the assessee, a clear and objective description of the environmental infractions found and the indication of the respective legal and regulatory devices infringed, as determined by arts. 96 and 97.

In this way, in the approach regarding the starting point of the counting of the term to determine environmental damage and its consequences, the comment of the eminent Cut Trennepohl, in work: *Infractions Against the Environment: fines, sanctions and administrative proceeding: comments to Decree No. 6,514, dated July 22, 2008, which reads as follows:*

"... Before deciding whether an illegal activity that has occurred for more than five years is still possible punishment should be checked whether the negative effects of it persist because of other anthropogenic action or not. In the event of an action or omission that prevents the adverse effects from ceasing, or that the environment returns to its original equilibrium, the five-year prescription for the determination and punishment is

removed, since it characterizes the continued negative effect. "

Therefore, once the environmental administrative process has been instituted, it is important to observe the five-year period for its determination and application of the applicable sanction, avoiding, for its consequence, the perpetuation of these processes, causing eminent and undeniable instability in the relations, besides violating the principle of due process of law, legal certainty and other principles inscribed in Article 37 of the Constitution. In this context, notwithstanding the exercise of the environmental police power conferred on all the organs that are members of SISNAMA, in the light of art. 6, of Law 6.938 / 81, it is necessary to observe the legal term, under penalty of loss of the right of action to investigate the practice of infractions against the environment and, consequently, the possibility of imposing sanctions. In the strict legality of the principle of legal certainty, it is impossible for the administrative process to be perpetuated, despite Law No. 9.873 / 99, which establishes the five-year prescriptive period for the punitive action of the Federal, State or Federal Public Administration. Indirect, counted from the date of practice of the act or, in case of permanent or continuous infraction, of the day in which it ceased.

It is therefore important to note that the perpetuation of administrative processes due to the deprivation of the Public Administration is eminently harmful to the legal system, since it necessarily implies the primary function of the protection of the environment by the State, where the Administration and its agents has the duty to act in the confirmation of the principles of efficiency and ethics, under penalty of violation of the law itself, configuring unlawfulness revealed by a flawed and invalid conduct. Therefore, under the terms of Law No. 9,783 / 99 and Decree No. 6,514, of 2008, it remains the understanding that intercurrent prescription has as its main purpose to curb the inertia of public agents - responsible for expressing the will of the State - in promote the necessary actions to boost the process, finalizing it in a reasonable time. This follows the provisions of art. 21, of Decree No. 6,514 / 08:

Art. 21.

§ 2º. The statute of limitations in the procedure for the determination of the notice of infringement paralyzed for more than three years, awaiting judgment or order, whose records shall be filed ex officio or at the request of the interested party, without prejudice to the determination of the functional liability resulting from the stoppage.

As can be seen, the incidence of intercurrent prescription is perfectly applicable in cases of

proceedings that have been carried out for more than 03 (three) years without the proper apuratorial movements pertinent to the infraction dealt with in the administrative process. The unjustified procedural inertia, for more than three years, is undoubtedly a determining factor for determining intercurrent prescription.

Finally, in spite of several doctrinal and jurisprudential currents, it is important to recognize that in light of the guiding principles of Public Administration - art. 37, of the CF / 88 - the incidence of intercurrent prescription in the administrative sphere, is fully applicable, whenever, due to its own defect, acts are not practiced that is mainly responsible after the administration promotes challenge or recourse, as a way of safeguarding legal certainty and the stability of relations related to due process of law.

IV. OF THE PRESCRIPTION OF EXECUTIVE PREDICTION IN THE ENVIRONMENTAL ADMINISTRATIVE PROCESS

The administrative protection of the environment develops the specific legislation, where, it is the right of the administration of a reasonable length of the processes and their respective procedures, which highlights the possibility of the incidence of intercurrent prescription because the said process is processed "Ad eterno", considering that it is unbearable for the administered this eternalization, which results in embargoes and interferences in the legal relations between the pairs - Administrators and Public Administration, since the inertia of the administrative one harms, eminently, the regular progress of the process.

Consistent, environmental damage is a generic and comprehensive damage that reaches the legal good that is close to it, which is the social community of its surroundings, thus affecting social, economic and political life, given the irreversibility of the evil occasioned.

Since the environment is a diffuse right, civil reparation assumes great breadth, with profound implications on the species of responsibility of the degrading / polluting agent that is objective, based on the simple risk or the simple fact of the harmful activity, regardless of its fault.

Thus, based on the rule of art. 21, Decree No. 6,514 / 08, it is impossible to perpetuate the proceedings instituted with the purpose of promoting compensation for environmental damages, notwithstanding, the legal hermeneutics of imprescriptibility, which attributes to the environment the same inherent right to life and its reflexes. In this sense, it is impossible to ignore the fact

that the regular procedural environment is closely linked to the institutes of estoppel, decadence and prescription, which are rules of public order, covering various biases of our legal system and governed by the principles of legality, security legal, motivation, isonomy, reasonable length of the process, ample defense, administrative efficiency among other principles that manage the functions and prerogatives of Public Administration.

Thus, much more than the police power of the public entity in the face of the administered, is the protection of the constitutional rights of social relations between peers - public and private / private, where the application of the prescription proves to be an effective instrument of activity control administrative, thus avoiding the preponderance of administrative deities in comparison with the efficiency of the public service.

Respectful opinions of others, it is observed, that the environmental administrative process is submitted, yes, the incidence of the institute of the prescription is punitive, which starts from the date of the practice of the infraction or the cessation of the permanent or continuous infraction, by the intercurrent prescription, which may occur while the administrative proceeding is continuing, unless it is unjustifiably left paralyzed, without any movement, for more than three years.

In order to do so, we maintain the position that the pre-eminent environmental administrative process is subject to the prescriptive period established in civil-administrative legislation, or else, rely on the quinquennial prescription of the CTN and other sparse laws such as Decree No. 20.910 / 32 as the Law Decree No. 6,514 / 08, inasmuch as intercurrent prescription is intended to restrain the inertia of public agents in promoting the acts necessary for the regular progress of the process, a fact that prompts the perpetuation of these processes and, consequently, the time limit foreseen by law exceeds the deadline, so it must be borne in mind that all are due to the correct filing of proceedings and their respective procedures until finalization, in a timely manner, that must be developed by the mantle of item LIV, 5 of the Charter, which prescribes that no one shall be deprived of liberty or property without due process of law.

In this context, therefore, the principle application of due process, whose extension reaches the incidence of intercurrent prescription in the sense that the Public Administration can not extrapolate its exercise of police power and perpetuate the processes under its responsibility, under penalty of violating the principle of legal certainty and isonomy, in the form of art. 1 of Law No. 9.873 / 99, which establishes:

Art. It prescribes in five years the punitive action of the Federal Public Administration, directly and indirectly, in the exercise of police power, aiming to establish violation of the legislation in force, counted from the date of practice of the act or, in case of permanent or continuous infraction, of the day where it has ceased.

§ 1 - The limitation period in the administrative procedure paralyzed for more than three years, pending judgment or order, whose records shall be filed ex officio or at the request of the interested party, without prejudice to the determination of the functional liability resulting from the stoppage, as the case may be.

In spite of the above legal norm, it should be emphasized that mere internal acts of simple procedural movement, without any usefulness to elucidate the facts, do not have the power to rule out intercurrent prescription, since such practices only serve to perpetuate processes, that environmental procedural rules have been violated, since the process is inherent in the task of concluding the investigation of the practice of conduct harmful to the environment perpetrated by the natural or juridical person. Failure to comply with the provisions of Law 9,873 / 98, as amended by Law No. 11,941 / 09 and Decree No. 6,514 / 08, is an absolute cause of the incidence of intercurrent prescription, especially since the unjustified suspension of the lawsuit for more than three years will cause the recognition of the intercurrent prescription and will demand the determination of functional responsibility.

Following the above position, comes the STF, with the following understanding: "the remedy for damages to the Public Treasury arising from a civil offense" is mandatory, at the time of judgment of the Extraordinary Appeal (RE) 669069. In this sense, one has that this binding norm reaches the administrative environmental proceedings instituted for the purpose of promoting the adequate reparation of environmental damage, being therefore susceptible to the limitation period the right and true duty-power to propose the public civil action to be handled by the legitimate ones.

In addition, it must be noted that the Brazilian legal system does not admit any imprescriptibility, except those that are clearly and expressly already regulated in the Constitution. In the present case, as reparations for environmental damage end in fines for the public purse, such condition is subject to the limitation period. Therefore, it is not for the infraconstitutional legislator or for the applicator of the norm to create the possibility of perpetuating the possibility of an environmental civil litigation being brought to the attention of the Judiciary at any time, even more when this inertia derives from

omission of the Public Power, which, as a principle, has the duty to act efficiently and promote the reasonable duration of proceedings.

Thus, with due respect to contrary positions, pertinent to non-prescribability in environmental administrative processes, it is necessary to conclude that the intercurrent prescription is recognized in the general repercussion 666 of the STF, which also reaches the issues and matters that deal with the determination of responsibilities civil and environmental issues.

In the same line of case-law updates regarding this issue, the STJ has already acknowledged the incidence of intercurrent prescription in environmental administrative proceedings paralyzed in a higher term and 03 (three) years - Law 9,783 / 99 c / c Law 9,784 / 99, in refusing to accept the Regime filed in REsp 1,401,371 / PE, maintained the TRF's understanding of the 5th Region, albeit due to the impossibility of reanalysis of evidence, due to the prescription of the administrative process paralyzed for more than 03 (three) years.

It is noteworthy that the aforementioned decision is aimed at inhibiting the inertia of public administration, which can not leave the taxpayer at the mercy of endless administrative processes, waiting for a decision that will directly influence the management of their businesses and their assets.

The High and Supreme Courts have already signaled for their understanding to restrain the inertia of the public administration regarding the practice of administrative procedures and procedures capable of promoting regular progress in the process, regardless of their respective legal nature, under penalty of offense to the principles provided for in art. 37, of the Federal Constitution, which guide the activities of the Public Administration as a whole, such as REsp. 1.115.078-RS - Rel. Min. Castro Meira, judged on 24.03.2010. In this respect, new judicial decisions on prescriptibility in administrative proceedings also seek to guarantee the principle of legal certainty, since the administered / offender can not remain for too long for the uncertainty of a conviction or not, since such a response will have a direct impact on their assets.

Thus, the environmental administrative process in all its follow-ups and procedures, because it is based on the principles of Public Administration can not perish because of the inertia of the Public Administration, despite its prerogative, especially when provoked by the offender, that to his turn, presents, in a timely manner, manifestation by means of challenge and appeal. In such situations, the application of intercurrent administrative prescription as a means of guaranteeing legal certainty and stability of social relations, regulating the initial and

final period, thus avoiding that the processes last longer than normal, as well as avoiding the standstill unjustified from the procedural iter, the maximum of which reflects the scope of Paragraph 1 of Law 9.73 / 99, which reads:

"... The statute of limitation in the administrative procedure suspended for more than three years, pending judgment or an order, shall be subject to a statute of limitation, the proceedings of which shall be filed ex officio or at the request of the interested party, without prejudice to the determination of functional liability arising from the stoppage, case."

In fact, since administrative intercurrent prescription has the function of avoiding the perpetuation of administrative procedures, especially in the application of administrative penalty and penalty, therefore, in the case of enforceable collection, the prescription is accompanied by the institute of decay, which are modalities of extinguishment of the tax credit, as foreseen in its art. 156, of the CTN, where the development of the process finds limitations in the provisions in arts. 173 and 174 of the same statute. These commands are fluent in procedural courses, especially regarding the application of fines related to infractions of environmental damages, which, can not be understood as imprescriptible, since the inertia of the Public Administration can not be perpetuated, under penalty loss of the right to demand the collection of its alleged non-tax credit, due to the analogous application of art. 1 of Decree No. 20.910 / 32.

In order to do so, the intercurrent prescription, under the light of the domestic legislation, emphasizes the efficiency of the public service, the officiality and morality and the security of the relations between the pairs, and thus the prescriptive rules, when they are intended to deal with liability for environmental damage, must also be seen through the eyes of prescribibilidade, according to the art. 108, of the CTN c / c 178, of the CCB, whose understanding is pacified by Eg. STJ, by refusing to grant the Regime filed in REsp 1,401,371 / PE, for which it maintained the understanding of the TRF of the 5th Region, even though it was impossible to reanalyse evidence, due to the limitation of the administrative process paralyzed by more than 03 (three) years, which is contrary to the rule of paragraph 1 of art. 1, of Law No. 9.873 / 99, which is why it is noted that administrative disregard, above all, entails the loss of the right to impose administrative penalties and penalties corresponding to acts and acts harmful to the environment.

The aforementioned decision, while inhibiting the inertia of the public administration, protects the manager / offender from the eternalization of environmental

administrative processes, in relation to the awaited decision that will directly influence the management of their businesses and their assets. In addition, it can not be denied that the non-observation of the application of the rule of § 1º, of art. 1 of Law No. 9.873 / 99, in the environmental administrative process, it is in total disrespect for the guiding principles of the Public Administration itself, which are imperative to its proper functioning, under penalty of invalidating its acts, rendering them illegal and even unconstitutional, since the inattention to the principles implies a clear offense to the primacy of the public function enshrined in art. 37, of the Brazilian Constitution.

Hodiernamente, have been faced with judicial decisions that take into account the incidence of intercurrent prescription, under the abovementioned rules, which aim to inhibit the inertia of the public administration, giving shelter to the principle of efficiency, foreseen in the Federal Constitution, which should guide the activities, since both the Public Administration and its agents have to act in accordance with the ethical precepts, under penalty of eminent affront to the law itself, thus constituting an unlawful, unmotivated and deviant act of its function, the which, finally, translates into nullity of the administrative act.

It is essential to emphasize that the positions of our Country Courts, which are in line with the most up-to-date doctrine regarding the incidence of intercurrent prescription in environmental administrative proceedings, are intended to guarantee the principle of legal certainty, since the taxpayer can not remain for too long in the uncertainty of imposition of penalties pecuniary penalties whose collections of alleged credit will directly impact their operations and planning, in addition to their work activity.

It should be noted, in due course, that it is the duty of the Public Administration to guarantee and act in accordance with the principles described in art. 37, of the Constitution of the Nation, which is why it is necessary to recognize in the legal world intercurrent prescription in the administrative sphere whenever, due to the deference of the administration, the acts in question are not practiced within a period of up to a maximum of 03 from the constitution of the fact, or from the challenge and / or administrative appeal.

Accordingly, it is important that, in reference to the limitation of the enforceable environmental claim, the term a quo is given for the non-payment of the penalty imposed on the offender by a final administrative final decision that ratifies the infraction notice and imposes the pecuniary sanction . It should be emphasized, as

appropriate, that the final decision should comply with the command Law No. 9.873 / 98, with wording given by Law 11,941 / 09 c / c Decree No. 6,514 / 08.

Therefore, once the voluntary payment has not been made in the scope of the Public Administration, the period of five years begins for the taking of measures to promote the collection of the debit constituted in the final administrative decision, being allowed the adoption of restrictive measures, among the the most important of which are the registration of the Defaulters Registry - CADIN (Law No. 10,522, of 2002) and the active debt.

Law No. 9.873 of 1998, with wording given by Law No. 11,941 of 2009, expressly provides for the incidence of the statute of limitations:

Art. 1º-A. Once a non-tax credit has been definitively established, after a regular administrative process has been completed, a five (5) year period of execution of the federal public administration regarding credit arising from the application of a fine for violation of the legislation in force.

It is essential to point out that the Superior Court of Justice recognizes as the initial term of the enforceable environmental claim the necessary definitive constitution of the credit in the administrative scope, so the theory of imprescriptibility falls by land, since the counting of the term for the collection of the amount due by title is insured of fine. To that end, STF's Summary 467 has the following document: "It prescribes in five years, from the end of the administrative process, the Public Administration's intention to promote the execution of the fine for environmental infraction."

According to the STJ, prescribibilidade is accepted and affects training, enforceability and procedural procedure, as evidenced by repeated decisions of the Superior Court in order to apply to the execution of fines imposed by regular environmental administrative proceedings the provisions of Decree No. 20.910 / 32 according to the principle of symmetry, as set out in the following judgments:

CIVIL AND ADMINISTRATIVE PROCEDURE - FINE CHARGES FOR THE STATE - PRESCRIPTION - RELATIONSHIP OF PUBLIC LAW - CREDIT OF ADMINISTRATIVE NATURE - INAPPLICABILITY OF THE CC AND OF THE CTN - DECREE 20.910 / 32 - PRINCIPLE OF THE SYMMETRY.

1. If the relationship that gave rise to the collection credit is based on Public Law, there is no application to the prescription contained in the Civil Code.

2. Since the requirement of the amounts collected by way of a fine is born in a tie of an administrative nature, and therefore does not represent the requirement of a tax

credit, the legal discipline of the CTN is removed from the treatment of the matter.

3. Incidence, in kind, of Decree 20.910 / 32, because the Public Administration, in the collection of its credits, must impose the same restriction applied to the administered with respect to the passive debts of that one. Application of the principle of equality, corollary of the principle of symmetry.

3. Special appeal inadmissible. [9]

ADMINISTRATIVE. FISCAL EXECUTION. ADMINISTRATIVE FINE. INFRINGEMENT TO THE LEGISLATION OF THE ENVIRONMENT. PRESCRIPTION. LEGISLATIVE SUCCESSION. Law 9,873 / 99. DEADLINE. OBSERVANCE. SPECIAL APPEAL SUBMITTED TO THE RITE OF ART. 543-C OF THE CPC AND TO RESOLUTION STJ No. 08/2008.

1. Ibama filed an indictment against the defendant, imposing a fine of R \$ 3,628.80 (three thousand, six hundred and twenty-eight reais and eighty cents), in violation of the rules of environmental protection. The infraction was committed in the year 2000 and, in that same year, precisely on October 18, 00, was the credit inscribed in Active Debt, and the execution was proposed on May 21, 2007.

2. The issue discussed in the case file is, in part, coincident with that contained in REsp 1.112.577 / SP, also from my report and already judged under the regime of art. 543-C of the CPC and STJ Resolution No. 08/2008. In this particular case, the fine was applied by Ibama, a federal entity for environmental control and control, and it is possible to discuss the incidence of Law 9,873, dated November 23, 1999, with the additions of Law 11,941, dated May 27, 2009 In the other case, the fine was derived from the environmental police power exercised by an entity linked to the State of São Paulo, in which it would not be pertinent to discuss these two federal laws.

3. The jurisprudence of this Court recommends that the period for the collection of the fine imposed by virtue of administrative infraction to the environment is five years, under the terms of Decree No. 20.910 / 32, applicable by isonomy for lack of specific rule to regulate this time limit.

4. Although it is settled that the prescriptive term of art. 1 of Decree 20.910 / 32 - and not those of the Civil Code - apply to relations governed by Public Law, the case of the case involves examination in light of the provisions contained in Law 9.873 of November 23, 1999, with the additions of Law 11.941, of May 27, 2009.

5. Law 9.873 / 99, in art. 1º, established a period of five years for the Federal Public Administration, directly or indirectly, in the exercise of Police Power, to investigate the violation of the legislation in force, a period that must be counted from the date of practice of the act or, in the case of permanent or continuous infringement, of the day on which the infraction has ceased.

6. That provision established, in fact, the time-limit for the lodging of the claim, and not for the judicial recovery of the defaulted claim. In fact, Law 11.941, of May 27, 2009, added art. 1º-A to Law 9.873 / 99, expressly providing for a period of five years for the collection of the credit arising from breach of current legislation, in addition to the five-year term provided for in art. 1 of this Law for the determination of the infraction and constitution of the respective credit.

7. Prior to Provisional Measure 1,708, dated June 30, 1998, later converted into Law 9.873 / 99, there was no decadential period for the exercise of police power by the Federal Public Administration. Thus, the applied penalty was subject only to the five-year prescriptive period, according to the jurisprudence of this Court, due to the analogous application of article 1 of Decree 20.910 / 32.

8. The infraction under examination was committed in the year 2000, when Law 9.873 / 99 was already in force, and art. 1, which sets a deadline for the Federal Public Administration to establish, in the exercise of police power, the violation of the legislation in force and constitute the credit arising from the fine imposed, which was done, since the credit was registered in Active Debt in October 18, 2000.

9. As of the definitive constitution of the credit, occurred in the same year of 2000, a further five years are calculated for its judicial collection. This period therefore matured in 2005, but execution was only proposed on May 21, 2007, when the prescription was already in effect. The contested judgment must therefore be upheld, albeit on different grounds.

10. Special appeal not provided. Judgment subject to art. 543-C of the CPC and to STJ Resolution No. 08/2008. [10].

On the other hand, it is important to note that Law No. 9.873 / 99, covers the hypotheses that interrupt the prescription, let us see:

Art. 2º-A. The statute of limitations of the enforcement action is interrupted:

I - by the order of the judge ordering the summons in tax execution;

II - by judicial protest;

III - by any judicial act that constitutes in default the debtor;

IV - by any unequivocal act, even if extrajudicial, that it imports in recognition of the debit by the debtor;

V - by any unequivocal act that it imports in express manifestation of attempt of conciliatory solution in the internal scope of the federal public administration.

It should be noted that in none of the cases mentioned above in the scope of the environmental administrative proceeding, intercurrent prescription will prevail, as Minister Castro Meira teaches us, who pronounced in the judgment of Resp 1.112.577: "the initial term of the prescription coincides with the moment of the occurrence of the right injury ". Thus, in the case of an administrative fine, the prescription of the collection action begins only with the expiration of the credit without payment, when the offender becomes defaulted. "Before that, and as long as the administrative process of imposition of the penalty does not end, there is no statutory time limit, because the credit is not yet definitively constituted and simply can not be charged," said the minister. Therefore, prescritebilidade is evident as regulator the effectiveness of the Public Administration before its own inertia and interest of the taxpayer.

V. CONCLUSION

In spite of all the foregoing regarding the prescriptibility of the environmental administrative process, it is concluded that intercurrent prescription is fully possible, due to the lack of public administration when it remains inert in not proceeding with practices of internal acts that truly promote regular process , since such an institute is supported by Law No. 9.783 / 99, which states: "... it prescribes in five years the punitive action of the Federal Public Administration, directly and indirectly, in the exercise of police power, aiming to establish infraction of legislation in force, counted from the date of practice of the act or, in the case of a permanent or continued violation, of the day on which it ceased. " Loss of the right to impose administrative penalties must be established in the light of Decree No. 6,514 / 08, which states: "... it prescribes in five years the action of the administration aiming at ascertaining the practice of infractions against the environment, counted from the date of the practice of the act, or, in the case of a permanent or continuous infraction, on the day on which it ceased ", it is not justified that the administrator be at the mercy of the conduct of public agents, since this represents a clear offense to the guiding principles of

administrative activity established in art. 37, of the Brazilian Constitution.

It should be emphasized in due course that the preponderant objective of the intercurrent prescription in the administrative procedure is to restrict the inertia of the public agents, who in charge of the process, are responsible for expressing the will of the State, and it is not acceptable that the regular, lasts for more than 03 (three) years, in an unjustified way, leaving, therefore, the one administered at the mercy of its impresteza ..

The occurrence of the intercurrent prescription in the administrative procedure entails the necessary determination of the functional responsibility of the dehydrating server, under the terms of Law no. 8.112 / 91, since the administrative proceeding follows the principle of officiality, and therefore "the initiation and of the administrative procedure is the responsibility of the Administration itself. Furthermore, it is reiterated that it is the duty of the Administration to complete the processes for verifying the conduct to be adopted, thus satisfying the interest of the collectivity, in terms of art. 225, of the Magna Carta.

In the final round, due to the fact that the environmental administrative process is governed by the norms of administrative law, with bias in other branches of law, such as criminal and tax, it has to be that intercurrent prescription is made viable and legally applied with objective of curbing the unjustified paralyzation of the process for more than three years will bring about, making it "ad eternal", a fact that violates the peculiar principles of Public Administration attached to art. 37, of the Constitution, even though the constitutionally guaranteed right to an ecologically balanced environment is taken into account (Article 225). This right in fact is imprescriptible, however, the administrative and prescriptable conduct, ensuring, of course, its submission to the incidence of intercurrent prescription as a legal, constitutional and legal rule.

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