

# New Prospects for the Legal Qualification of Tolls in Brazil

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*"El autor parte del contexto histórico para discutir el tema de la recolección de peajes en Brasil realizadas por las empresas concesionarias de vías en dicho país. Igualmente, complementando su estudio, se encarga de realizar la jurisprudencia de la materia."*

## Abstract

The scope of this paper covers a brief study of the legal classification of toll collection in Brazil, analyzing the manner in which the matter has been viewed up to the present and finalizing with my proposal of qualification. The reason for a study which covers a theme which has apparently been settled is its constant resurgence in the practice of Brazilian highway concessions, usually in a distorted fashion. Initially, the paper will cope with the beginning of concessions in Brazil and how the academic community views the matter, followed by an analysis of the Extraordinary Appeal N° 181,475-6/RS of the Federal Supreme Court, frequently used, erroneously, as a basis to classify the legal nature of a toll as a tax. An analysis of the jurisprudence resulting from these discussions is made based on the State of São Paulo, where the largest number of highway concessions in Brazil is located, as well as a verification of the place of toll structure in the judicial structure. Finally, we propose a form of legal classification which will depend on the essential characteristics governing the collection of tolls, in each instance.

## 1. Introduction: The "Resurgence" of an Old Discussion and its Practical Effects

The discussion about the legal classification of toll is not a new one; also, scholars have dealt incessantly with the question, when attempting to legally define the term. Some of their impressions are mentioned, from time to time, during our brief analysis. The courts have already judged this matter, declaring their opinions; however

the interpretation of these judgments by some scholars, ends up being slightly biased, by not taking into consideration the context or the specific circumstances in which the judgments were made and also, sometimes, it includes a large degree of an ideological content, with respect to toll charging<sup>1</sup>.

The main argument is the erroneous assertion that the Federal Supreme Court has consolidated its understanding about toll and its legal nature as a tax. The appeal most frequently invoked when this matter is discussed is Extraordinary Appeal No 181,475-6/RS in 1999<sup>2</sup>: it registered in its summary the legal classification of toll as a tax, but it refers exclusively to the question of the toll-stamp. It is well-known that the institution no longer exists in the national legal system, however it was unavoidably recognized – at that time – as a tax due to its own legal nature. Therefore, it is an interpretation that cannot be applied to present day situations, involving the collection of tolls by private entities, under a regulation of concessionaires of public services – as will be demonstrated below<sup>3</sup>.

In other words, the scope is not to define the legal nature of toll but to determine how the legal system and the laws qualify it nowadays, based on the characteristics that have been adopted for the specific service. After all, it is ineffective concluding that an institution is "A", based on doctrinal inferences when its characteristics lead it to be interpreted as being "B". *Id est*, there is no practical value in being attached to the classical definition that toll has always had the legal nature of a tax (by inferring it under an "innate" nature of this

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1 The social-economic function of toll is often overlooked in these discussions. Fipe & Lastran (2003, p. 20) prepared a study in which the tolls are considered as a mechanism which induces the efficient use of highways and serving, moreover, to reveal the cost of road transportation and "(...) to lead the user to a dimension the demand for highway transportation in order to maximize the net social benefit of this transportation". In other words, it works to boost the use of other means of transportation.

2 Supreme Federal Court. Second Panel. Rapporteur Justice Carlos Velloso. Judged on 4 May 1999. Published in Official Federal Journal on 25 June 1999.

3 Moreover, it must be considered that this case has not been decided by the Plenary of Supreme Federal Court but by the Second Panel. Thus, it is not possible to identify it as a fully understanding of the Supreme Court.

charge) if in practice (in politics, business and law) the characteristics adopted in its collection identify it as a fee. In this sense, the form by which it is collected has a crucial role in this distinction, since there are sufficient arguments to justify its classification in both ways, which permits a “double” legal qualification. Thus, we will only be able to define the legal qualification after the analysis of the characteristics adopted in its application.

Why then has this argument surfaced once again, over the last few years? To understand this “resurgence”, it is necessary to analyze the context of the highway concessions in Brazil – initiated in 1994 – as follows. In this paper, I will not discuss whether toll was a tax or a fee prior to the Brazilian Constitution of 1988: there was a considerable change in the doctrinal interpretations regarding its legal classification, due to the new Constitution and the subsequent concession of highway operation to private enterprises<sup>4</sup>. I will limit myself to a more practical approach, evaluated in conjunction with the institution of the toll-stamp and the aforementioned decision of the Second Panel from the Supreme Federal Court: this will be crucial to the misleading understandings that have been recently committed.

## 2. The Beginning of Highway Concessions in Brazil

The highway concession sector is relatively new in Brazil (slightly more than seventeen years in existence); nevertheless, scholars have concentrated particularly on this theme during this period, which resulted in an evolution and scientific maturity of the sector<sup>5</sup>. Discussion of the legal nature of tolls, however, predates this period.

It is true to say that the doctrine and jurisprudence have defined the constitutionality of the collection of tolls in Brazil. This “story” of almost forty years ago is well-illustrated by Wald & Gaensly (2009, p. 69) at the beginning of the operation of Anchieta-Imigrantes System by Desenvolvimento Rodoviário S/A – DERSA in São Paulo. Likewise, we can assert with reasonable certainty that tolls in Brazil were characterized as fees, even before the existence of concessions. This means that it is irrelevant whether the highway is operated by public or private sector – this fact will be further examined in the paper. Notwithstanding, the discussion grows with the development of highway concessions in Brazil – a particular occasion when new theories emerged to justify the toll classification as a tax or as a fee.

One can assert that highway concessions in Brazil have roots in the privatization trend initiated in the administration of the former president José Sarney, in the second half of 1980. Later, Fernando Collor de Mello continued the privatization policy (e. g., with the National Program for Privatization – PND, Federal Law No 8,031/1990) culminating in the creation of the Federal Highway Concessions Program – PROCROFE in 1993, during the administration of Itamar Franco, with the signature of the first highway concession agreement in Brazil (Concession Agreement for the Yellow Line (Linha Amarela S/A) in the Municipality of Rio de Janeiro – until now the only municipal concession in the sector) and also the signature of the Rio-Niterói Bridge Concession Agreement, the first federal highway concession.

Later on, with the continuity of the privatization policy by Fernando Henrique Cardoso, article 175<sup>6</sup> of

4 As an example, Baleeiro (1977, p. 218-21; 1998, p. 254-56) has analyzed tolls as an aspect of the theory of taxation – without ever considering the possibility of tolls being a fee.

5 It can be mentioned some examples of specific works – without, obviously, exhausting the large bibliography available in Brazil: ALMEIDA, Lycurgo do Rego Barros. A “privatização” de facilidades rodoviárias no Brasil. Brasília: GEIPOT, 1994; DUARTE, Fábio Marcelo Rezende; DUARTE, Haroldo Fernandes (in memoriam). Aspectos jurídicos das rodovias: tutela de uso comum, concessões rodoviárias, responsabilidade civil, e outros aspectos. Rio de Janeiro: Mauad, 1997; OLIVEIRA, Roberto Guena (coord.) Avaliação do equilíbrio econômico-financeiro dos contratos de concessão de rodovias. São Paulo: FIPE/USP, 2001; LIMA NETO, Oswaldo (coord.) Transporte no Brasil: história e reflexões. BRASILEIRO, Anísio et al. (autores). Empresa Brasileira de Planejamento de Transportes/GEIPOT; Recife: Ed. Universitária da UFPE, 2001; DUARTE, Fábio Marcelo de Rezende. Estudos e pareceres de direito rodoviário. Rio de Janeiro: Temas & Idéias, 2002; OLIVEIRA, Roberto Guena; MICHEL, Fernando Dutra; CYDIS, Helena Beatriz Bettella (coord.). A experiência brasileira de concessões de rodovias. São Paulo: FIPE/LASTRAN, [2003]; GARCIA, Flávio Amaral. Regulação jurídica das rodovias concedidas. Rio de Janeiro: Lumen Juris, 2004; SAVARIS, José Antonio. Pedágio: pressupostos jurídicos. Curitiba: Juruá, 2004; ANDRADE, Leticia Queiroz de (org.). Decisões e pareceres sobre pedágio. 2. ed. São Paulo: ABCR, 2005; ANDRADE, Leticia Queiroz de (org.). Rodovias: uso da faixa de domínio por concessionárias de serviços públicos: decisões e pareceres jurídicos. São Paulo: ABCR, 2005; MACHADO, Kal. Concessões de rodovias: mito e realidade. São Paulo: Prêmio, 2005; SENNA, Luiz Afonso dos Santos; MICHEL, Fernando Dutra. Rodovias autossustentadas: o desafio do século XXI. São Paulo: CLA, 2006; DALLARI, Adilson Abreu; BRANCO, Adriano Murgel. O financiamento de obras e de serviços públicos. São Paulo: Paz e Terra, 2006; DUARTE, Fábio Marcelo de Rezende. Concessão e administração de rodovias. Porto Alegre: Notadez, 2009; CARVALHO, André Castro (org.). Contratos de concessão de rodovias: artigos, decisões e pareceres jurídicos. São Paulo: MP, 2009; MELLO, Marco Aurélio et al. Concessão de rodovias: aspectos jurídicos e econômicos relevantes. São Paulo: Quartier Latin, 2010; HUMBERG, Mario Ernesto (org.). Pedágio: mitos e fatos. São Paulo: CLA, 2010. In addition, it should be noted that scientific production in Brazilian universities, relating to highway concessions- present in some dissertations for masters degrees and some doctoral theses elaborated during the period: DE CHIARA, Paulo Celso. Análise de viabilidade econômica, pela iniciativa privada, de investimentos em infra-estrutura e operação do serviço público de transportes rodoviários, sob o regime de concessão. Dissertação (Mestrado em Engenharia de Construção Civil) – Escola Politécnica, Universidade de São Paulo, São Paulo, 1996; LEE, Shu Han. Concessão de rodovias à iniciativa privada: critérios para limitação de tarifas em processos de licitação. Dissertação (Mestrado em Engenharia Civil) – Universidade Federal de Santa Catarina, Florianópolis, 1996; GONÇALVES, Luiz Augusto de Souza. A questão da legalidade da cobrança de pedágio na SC-401 dos moradores do norte da Ilha de Santa Catarina. Monografia (Graduação em Direito) – Centro de Ciências Jurídicas – CCJ, Universidade Federal de Santa Catarina, Florianópolis, 1999; SCHMITZ, Rutsnei. Uma contribuição metodológica para avaliação da tarifa de pedágio em rodovias. Tese (Doutorado em Engenharia de Produção) – Universidade Federal de Santa Catarina, Florianópolis, 2001; ARANTES JÚNIOR, Assis. Um método para avaliação de concessões de rodovias sob a ótica da iniciativa privada. Dissertação (Mestrado em Engenharia Civil) – Universidade Federal de Santa Catarina, Florianópolis, 2002; BARELLA, Rodrigo Maluf. Concessão de rodovias: uma análise crítica. Dissertação (Mestrado em Administração) – Escola de Administração de Empresas de São Paulo, Fundação Getúlio Vargas, São Paulo, 2003; SCHUMACHER, Luciana Maria. Manutenção e reposição do equilíbrio econômico-financeiro dos contratos de concessões de rodovias: avaliação das revisões e reajustes de tarifas no Brasil. Dissertação (Mestrado em Engenharia) – Escola Politécnica, Universidade de São Paulo, São Paulo, 2003; SOUZA JÚNIOR, Roberto Tadeu. O leilão de Demsetz como mecanismo regulador: o caso prático das concessões rodoviárias gaúchas. Monografia (Especialização em Regulação de Serviços Públicos) – Escola de Administração, Universidade Federal do Rio Grande do Sul, Porto Alegre, 2004; KARAM, Rejane. A concessão de rodovias paranaenses sob a ótica da regulação. Dissertação (Mestrado em Desenvolvimento Econômico) – Universidade Federal do Paraná, Curitiba, 2005; FERNÁNDEZ, Sandra Elizabeth Villegas. Parcerias Público-Privadas (PPP) no setor rodoviário: um estudo da concordância entre o objeto do contrato e a forma jurídica dos contratos no Brasil. Dissertação (Mestrado em Contabilidade e Atuária) – Faculdade de Economia, Administração e Contabilidade, Universidade de São Paulo, São Paulo, 2006; CITRON, Benjamin. Avaliação crítica do programa de concessões rodoviárias no Brasil: estudo do Lote 5 da Segunda Etapa do Programa Federal. Monografia (Graduação em Engenharia de Produção) – Escola Politécnica da Universidade de São Paulo, São Paulo, 2006; MELLO, Edson do Nascimento. Concessões rodoviárias estaduais: estudo de caso. Concessionária Litoral Norte S.A. Dissertação (Mestrado profissionalizante em Administração) – Faculdade de Economia e Finanças – IBMEC, Rio de Janeiro, 2007; CARDOSO, Adriana Bortolon Carvalho. Concessão rodoviária do Estado de São Paulo: a interação entre Agência Reguladora e concessionárias. Dissertação (Mestrado em Ciências Contábeis) – Fundação Instituto Capixaba de Pesquisas em Contabilidade, Economia e Finanças (FUCAPE), Vitória, 2007; DUARTE, Guilherme Rodrigues. Análise econômico-financeira de concessões rodoviárias: estudo de caso de uma concessionária. Monografia (Graduação em Engenharia de Produção) – Escola Politécnica da Universidade de São Paulo, São Paulo, 2008; RAMOS, Thiago Graça. Cálculo do valor do tempo para uma rodovia pedagiada utilizando modelos de escolha discreta. Dissertação (Mestrado em Engenharia de Produção) – Universidade Federal Fluminense, Niterói, 2008; SERMAN, Carlos. Análise dos aspectos críticos em processos de concessão de rodovias. Tese (Doutorado em Engenharia de Transportes) – Universidade Federal do Rio de Janeiro, Rio de Janeiro, 2008; FONTES, Augusto Cesar Sabóia Petit. PPPs: aspectos gerais e o caso da PPP do Projeto Paiva em Pernambuco. Monografia (Especialização em Gestão, Finanças e Políticas Públicas), Faculdade Boa Viagem, Recife, 2008; ROSA, Renato Xavier da Silveira. Concessão de exploração de rodovia: o caso do pedágio das marginais da Rodovia Presidente Castello Branco (SP-280).

the Federal Brazilian Constitution was regulated by Federal Laws nº 8,987/1995 and 9,074/1995 – this fact improved the concession of public services in Brazil. More specifically in the highway sector, some federal highway concessions were granted to States to be object of concession agreements to the private sector, which has resulted in programs in the State of Paraná and the State of Rio Grande do Sul. Besides this fact, there were concessions of four other federal highways to the private sector.

In 1996, Paraná government promoted six concession bids, which also involved federal highways whose administration had been granted to the State, based on the authorization of Law 9,277/1996); in 1997, there were concession bids for nine state highway stretches in the State of São Paulo, followed by a further three biddings later on; in 1998, the State of Rio Grande do Sul promoted eight highway concession stretches (polos) bids – among state and federal highways under the administration of this State – with one of the stretches (Santa Maria) not entering into operation. The responsibility for one of these stretches (Pelotas) was subsequently given back to the Federal Government; at present, due to the cancellation of the Delegation Covenant (signed in 1996) during the administration of Governor Yeda Crusius (2007-2010), the administration of almost all these federal highways in the State of Rio Grande do Sul may return to the Federal Government, with only one remaining under State control (the Brita Rodovias S/A concession). In the State of Rio de Janeiro, two state highway concessions were awarded but not as part of highway concession program, as was the case in other States.<sup>6</sup> Both the State of Espírito Santo and the State of Bahia have granted one state concession each. The Municipality of Rio de Janeiro has also granted the concession for the Yellow Line, the first one in the entire country<sup>6</sup>.

This period could be called the “First Stage” for highway concessions in Brazil. As a result, a number of legal questions regarding toll collection arose, particularly with regard to its legal nature: All the administration models for highway concessions considered toll as a fee, especially under the Federal Law 8,987/1995 – which establishes the fee policy of outsourced public services as a regulation of article 175º, III, of the Brazilian Federal Constitution.

Subsequently, there was a new movement – which we will call “The Second Stage”-for highway concessions in Brazil. The State of Pernambuco, in 2006, promoted a state Public-Private Partnership – PPP; likewise, the State of Minas Gerais promoted a highway PPP. In 2007, there was a federal public bidding by the Federal Government for seven, which was followed by the signature of the agreements in 2008. A little further on, in 2009, another

stretch of a federal highway (BR-116/324) was granted to the private sector in the State of Bahia. This same State, in 2010, offered a state highway concession to the market.

In São Paulo, the concession for the West Stretch of the Rodoanel (a state Ring Road linking several highways) was promoted in 2008 as well as another five state concessions in the same year. In 2010, there was a public bidding for the exploration of the Southern Stretch of Rodoanel, as well as public works by the concessionaire on the Eastern Stretch, whose signature of the contract is scheduled for the first semester of 2011.

In addition, it is expected that in the next few years there will be a “Third State” of federal and state concessions, particularly in the States of São Paulo and Minas Gerais. As it can be noticed, the highway concessions sector has grown in the last few years and this tendency should probably continue in Brazil. Not with standing, even though it may seem obvious that toll collection in public services concessions is a fee, highway concessionaires and other public entities that operate highways have been subjected to several opportunistic attempts of classifying toll as a tax – equally in the First Stage as in the more recent Second Stage.

### 3. Reinsertion of the Discussion in The Academic Community and the Overcoming of some theses

Various different interpretations have arisen regarding the problem in the operation of highways, with the expansion of the services. Some consider that toll is “an instrument of justice in the division of public expenditure” and it is a fee on any occasion – even if a law defines it as a tax. This is, for example, the understanding of Torres (1995, p. 88)<sup>7</sup>. Other scholars such as Harada (2000 and 2004) are diametrically opposed to this interpretation due to the “symbiosis” between the public and private sectors, which would lead to an affront to “the principles on which public law is based”. His position should be examined carefully because, some years later, Harada (2006) considered toll as tariff in a legal opinion – which was an answer to a query formulated by Concessionaire Rodovia Presidente Dutra S/A related to a service tax (ISS).

Some “intermediary” theses have been developed with the aim of conciliating the different arguments and positions of both sides. Authors such as Bandeira de Mello (2005, p. 11-17) support the theory that toll is a fee when it is the remuneration of a concessionaire. When the service is rendered by the public sector, nonetheless, it becomes a tax. Thus, in the name of the economic-financial balance of the contracts, the fee could always be used as an instrument to its re-balancing. If it were considered a tax this possibility would be clearly limited.

Tese de Laúrea (Bacharelado em Direito) – Faculdade de Direito, Universidade de São Paulo, São Paulo, 2008; DAL VESCO, Delci Grapegia. Impactos da alteração da gestão do Governo Estadual nos indicadores contábeis das concessionárias de rodovias no Estado do Paraná de 1996 a 2006: um estudo empírico. Dissertação (Mestrado em Contabilidade) – Universidade Federal do Paraná, Curitiba, 2008; CORDEIRO FILHO, Mário. Avaliação de empresas de concessões de rodovias no Brasil. Dissertação (Mestrado em Ciências Contábeis e Atuariais) – Pontifícia Universidade Católica de São Paulo, São Paulo, 2009; MÜLLER, Luiz Henrique. Regulação do equilíbrio econômico-financeiro das concessões de rodovias mediante Taxa Interna de Retorno Flutuante. Dissertação (Mestrado em Gestão Empresarial) – Escola Brasileira de Administração Pública e de Empresas, Fundação Getúlio Vargas, Rio de Janeiro, 2010; ANDRADE, Maria Elisabeth Moreira Carvalho. Contabilização dos contratos de concessões. Dissertação (Mestrado em Controladoria e Contabilidade) – Faculdade de Economia, Administração e Contabilidade de Ribeirão Preto, Universidade de São Paulo, Ribeirão Preto, 2010.

6 Part of this history can be found in Andrade (2005, p. 254-258).

7 See, as well, Duarte (2009, p. 77).

This opinion was elaborated in the seminal study of Cintra do Amaral (1999 and a further republishing in 2004, p. 21-33) who rejected the topographic criteria of classification considered by literature (e. g., Difini, 2008, p. 44): a toll is a tax because it is included in article 150º, V of the Federal Constitution, belonging to Section VI (Taxation and the Budget), Chapter I (National Taxation System)<sup>8</sup>. In his final arguments, he disagrees with Pinto Ferreira and believes that his opinion was based on regulations from the 1967 Federal Constitution (article 20º, II) which indeed considered toll a tax – later revoked by the Constitutional Amendment I of 1969. Lastly, in his conclusions, the professor registered the predominate understanding that “toll may be a tax or a fee depending on the circumstances. It is a tax when the highway is operated directly by the government and charged to the user. It is a fee when it is paid by the user directly to the concessionaire of a public service.” (Cintra do Amaral, 2004, p. 27-33). Likewise, a short while ago, Garcia (2004, p. 149-153) consolidated the prevailing opinion regarding this topic and, based on the systematic interpretation of the Constitution, concluded that toll can be either a tax or a fee, depending on the subject that institutes and charges it (public or private sector).

Furthermore, Professor Cintra do Amaral (2004, p. 30-33) discards the requirement of the so-called alternative path (a parallel no-charged road to the tolling highway) for justifying its collection in virtue of the misconception existing between the old concepts of liberty and faculty of choice. A fee could only be charged where the service has actually been rendered, differently from a tax, which could be charged on its potential use (article 145º, II of the Brazilian Taxation Code – Federal Law Nº 5,172/1966). About this subject, it is important to remember the content of Summary Nº 545 of the Federal Supreme Court which stated: “fees and taxes should not be confused because the former, different from the latter, are obligatory and their collection is dependent on prior authorization through the Budget related to the law that instituted them”. Justen Filho (2010, p. 746), under a fundamental rights approach, highlights the lack of relevance in the distinction between the faculty of choice and the obligation of the use of the public service, as mentioned in the Summary.

It is possible, however, to still use the in fine section of the Summary Nº 545 which institutes a condition for collecting taxes: a prior budgetary authorization. Due to the fact that taxes constitute public revenues and, in addition, they are subordinate to the budgetary principles of unity and universality, prior budgetary authorization is required in order to estimate the revenues and authorize the expenditure with these resources. This tendency was followed by the Fiscal Responsibility Act, which conceived great importance to the estimation of revenues (article 12º) and conditions for tax expenditure (article 14º). In the case of fees collected by a concessionaire,

these obligations, obviously, do not exist. If the public authority does not render the public service there is no need to mention any budgetary authorization, as the activity is granted to the private sector – and, thus, constitutes private rather than public revenues.

Schwind (2010, p. 50-51) summarizes this discussion and points out the majority understanding of the scholars: if the remuneration was through tax, one would not be dealing with a concession but rather with a service provision agreement. This happens because the tax would not allow the application of the economic-financial equation peculiar to concessions.

This helps to clarify part of this discussion (a toll, charged by a private entity, cannot be considered as a tax) but does not serve to define whether toll charged by a public entity is a tax or a fee, which will continue to depend on the acting of the Legislative or Executive Branch (in the event that a law or a normative act defining the characteristics be issued and, consequently, the regulation applicable to tolls will be defined based on these premises)<sup>9</sup>.

An argument that should be mentioned en passant is that the toll charged as a fee would supposedly represent a restriction to the right to come and go (free movement). Firstly, it should be verified that this basic right in the Federal Constitution has a double sense. The first is included in article 5th, XV, which guarantees free movement, in times of peace, throughout Brazilian territory, so that any person may enter, remain or leave with his possessions. The second, resulting from the first, is the tax exemption of article 150º, V, in the Federal Constitution, which vetoes the establishment of taxes which inhibit the movement of people or assets inside the territory – highlighting the possibility of collecting tolls. According to Machado (2002, p. 245), the inclusion of this caveat concerning tolls is principally, to reject arguments about the unconstitutionality of its collection.

In other words, the first hypothesis grants an administrative-political freedom, vetoing any interference by whosoever on the right of free personal locomotion – which could, in fact, be classified as the crime of kidnapping or private prison (illegal deprivation of liberty). This cannot be confused with the liberty to circulate<sup>1</sup>, which is related directly to the case of toll and its collection – and doable in the case of the second hypothesis. In this second instance, the tax exemption guarantees that the liberty recommended in article 5th, XV, is not hampered by the collection of taxes, thus safeguarding the liberty to come and go<sup>10</sup>. These two aspects can be observed in the excerpt of Torres (1995, p. 84) transcribed below:

*The exemption stated in article 150º, V, of the Federal Constitution, is based on the liberty of free movement which, in a Legal State, has priority and is absolute. All citizens in Brazil have the right to move from one municipality to another or from one state to another without needing permission by the judicial or police*

8 There are also some court decisions with this opinion: Extraordinary Appeal No 194,862/RS. Second Panel of the Federal Supreme Court. Rapporteur Justice Carlos Velloso. Judged on 25 June 1999. This served as the basis for the Extraordinary Appeal No. 181,475-6/RS above-mentioned, which has been taken as a precedent by some scholars to justify the toll as a tax.

9 This will be better discussed later in this paper.

10 With respect to tax exemption, see CARVALHO (2009).

*authorities and without the necessity of paying any tax (no highlights in the original excerpt).*

The liberty to come and go, obviously, is not absolute. One cannot, based on the right of locomotion, demand access to a region of national security near to an atomic energy plant<sup>11</sup>. Nor is it possible to invoke it to invade a property considered private or invade a public building whose access is limited to its respective employees. Or, even when a building is public, the access to certain sectors may be restricted or subject to certain restrictions (e. g., opening hours of a park or entrance fee to a museum). So, a legal rule<sup>12</sup> in the name of the common well-being (public interest), may limit the right to come and go in a few cases: v.g., defining a national security area prohibiting free access; considering that a certain area is private property and prohibiting the access of third parties (except in special instances defined by civil legislation); establishing the open hours of a public park or determining an admittance price to a public museum.

Particularly, in the case of a concession, there is a rule – the contract itself – establishing directives and conditions for traffic on the highways – which should be respected in the same way as the admission to parks outside official hours is barred or the payment for admission to a public museum is established. The invocation of the right to come and go in these cases, in my view, will sound like a misleading of the constitutional guarantee.

The same situation occurs in the collection of fees for traffic on the highways: article 175º, by stating that the government shall render public services, accepts the fee regulation in these conditions and nothing prevents the adoption of the tax regulation as well. It is a trade-off to be considered when the characteristics of toll collection in a case are defined: in the case of a tax, security and chargeability<sup>13</sup> of the tax (e. g., enabling the imposition of fines and fiscal prosecution) compared to the difficulty in adjusting the value (which should be done via law and obey, for example, some specific restrictive taxing principles). In the case of fees, the flexibility of increasing prices (it may be by act of the Executive Branch) and less chargeability in relation to the payer<sup>14</sup>.

Following these considerations, it should be emphasized that in addition to these discussions an important decision was taken by the Federal Supreme Court regarding tolls and their legal nature: the Extraordinary Appeal Nº 181,475-6/RS.

### 3.1. The Extraordinary Appeal Nº 181,475-6/RS and the Toll-Stamp

The Extraordinary Appeal Nº 181,475-6/RS (hereon referred to as EA 181,475) was taken from a collective writ of mandamus filed by the Union of Cargo Transportation

Companies in the State of Rio Grande do Sul – SETCERGS against the Superintendent of the National Highway Department – DNER (presently denominated National Department of Transportation Infrastructure – DNIT) in order to avoid the charge of the toll-stamp on federal highways – created by Federal Law Nº 7,712/1988 – under the argument that the tax bracket on which the tax was calculated was the same as that one from the Vehicle Tax – IPVA<sup>15</sup>. The EA 181,475 was not processed and judged by the Second Panel of the Federal Supreme Court but its summary afterwards was used as a basis for justifying the legal nature of toll as a tax:

*CONSTITUTIONAL. TAXATION. TOLL: Law 7,712 of 22 December 1988. I – Toll: legal nature: tax: Federal Constitution, art. 145º, II, art. 150º, V. II – Constitutional legitimacy of the toll created by Law 7,712 of 1988. III – EA not processed.*

**“Not with standing, even though it may seem obvious that toll collection in public services concessions is a fee, highway concessionaires and other public entities that operate highways have been subjected to several opportunistic attempts of classifying toll as a tax – equally in the First Stage as in the more recent Second Stage”.**

It is important to analyze the nature of the toll-stamp. The abovementioned Toll-Stamp Law (subsequently revoked by Federal Law Nº 8,075/1990) prescribed in article 2nd that “the contributor of the toll is the user of a federal highway under the jurisdiction of the National Highway Department-DNER”. This means that the first relevant information was that every user of a federal highway would be liable for payment for the period of one month, irrespective of the number of times he used the highway (as long as he used it at least once in a month). This was later defined in Federal Decree Nº 97,532 of 17 February 1989, article 3rd: “the fact that permits the tax liability for the payment of the toll is the effective utilization of the federal highway within the calendar month”. Hence the term “stamp” since it was necessary to prove the payment whenever there was an inspection on federal highways by federal authorities, by fixing the stamp to the vehicle – no matter whether the user had been on a highway only once or each day

11 See this distinction in SILVA (2004, p. 236-239). The author, in fact, conceives the freedom of locomotion as the possibility of coming, going and staying without the necessity of specific authorization and respecting the legal rules in favor of the public interest. The liberty of circulation, on the other hand, “(...) means the possibility of moving from one point to another by means of a public way or a way designated to public usage”. Later on, he defines “[t]he planning activity of the way by the public authority occurs in two manners: through the creation (or authorization for creating) of the road network necessary to exercise the right to circulation and through the regulation of its use.” (highlights as in the original excerpt)

12 The text of article 5th, XV, establishes that this liberty will be exercised “in the terms of law”.

13 Chargeability is the possibility of demanding that the administrators fulfill the obligation using, if necessary, indirect means of coercion such as fines. However, it is not possible to oblige the payment of taxes by means other than judicial. These concepts are laid out in BANDEIRA DE MELLO (2009, p. 413-414) and DI PIETRO (2010, p. 201).

14 I will cope with this subject and the trade-off further on.

15 It should be noted that the tax bracket for the calculation in no way was similar to the one of the IPVA – which is based on the value of the vehicle, while a toll-stamp is a fixed amount according to the number of axles of the vehicle. It is important to say that this fact was emphasized into the decision of the Extraordinary Appeal.

during thirty days.

Another point was that “the amount of tolls estimated to be collected should not exceed the amount necessary for maintaining the federal highways, considering the wear that the automobile could cause to them, as well as the adaptation of these highways in face of the safety requirements related to the volume of traffic” (text of the article 3rd of the Federal Law). The paragraph of article 3rd approved the values of the tolls which would be in the Budget Guidelines Law – LDO. Therefore, this could be characterized as an earmarked charge. Also, it should be noted that the toll-stamp was charged only for maintaining the highways and not to expand them or other related activities. Article 6th, in fact, stated the earmarking of the toll-stamp revenues to specific expenses - forbidding any circumvention:

*Art. 6th The amount collected can only be applied to cover expenses incurred in the execution of services included in article 3rd, included in the annual budget or in additional credits.*

*§ 1st: For the year 1989 and up to the total available, the amount will be applied in the following programs:*

- Maintenance 22%
- Restoration/improvements 50%
- Adapt capacity 20%
- System operation 8%

*§ 2nd: In any circumstances it is forbidden to use resources of the toll collection to pay personnel expenses.*

The destination of these resources was the National Treasury (budgetary principle of universality) and the resources classified as budgetary revenue (article 8th). Earmarked revenues, as per article 2nd, single paragraph, of the Federal Decree-Law N° 1,755/1979, were transferred and maintained on deposit in the Bank of Brazil. In practice, the destination of all resources to a single cash account, without creating a trust fund – as already existed, e.g., with the National Highway Trust Fund-FRN – caused operational difficulties in earmarking revenues from toll- stamp collection in the long term, despite the fact that this was not a prerequisite for existing an earmarking<sup>16</sup>.

One can see, from this fact, some of the important characteristics of the toll-stamp. Firstly, that it was a Law which compelled to payment those driving on any federal highway, the amount being established by law (LDO). Second, its revenue was considered budgetary and it had the National Treasury as final destination. Lastly, the revenue from toll-stamps was entirely earmarked for highway maintenance and could not be used, for example, to pay personnel expenses (article 6th, second paragraph).

Therefore, there is no doubt that the toll-stamp is a tax – and this was the decision of the Federal Supreme Court with reference to the EA mentioned herein. Despite the fact that at the time of judgment, there was conceptual confusion between toll and toll-stamp, it is worthy of remark that toll-stamp is truly a tax (with all the aforementioned characteristics of a tax). This has defined the application of its legal regulation: it was instituted by a Law, included as budget revenue from National Treasury and earmarked for highway maintenance.

The fact of being a budgetary revenue collected destined directly to the National Treasury and the existence of a earmarking are not exclusive traits of taxes (fees can also have these characteristics). Nonetheless, the practice in public finance shows that normally a tax has these kinds of characteristics while the resources from fees of the exploitation of public services tend to be used directly in the rendering of the public service and in other related activities through a state company, created solely for this purpose. Thus, a fee may serve to cover costs of personnel expenses involved in the rendering of the services in this state company; on the other hand, taxes have a stronger synallagma (mutuality) characteristic and commonly appear related to the specific activity by the means of the Law which created this tax. Notwithstanding, that it bears some relation to the activity, there are no legal constraints for using the tax revenue for this purpose (Carvalho, p. 151): it would be the same event as using its revenue for paying the personnel involved in rendering the service – if the prohibition mentioned above, of course, did not exist.

It is interesting to note the opinion of the Regional Federal Court (Fourth Region) in several decisions<sup>17</sup> mentioned by Savaris (2004, p. 94) in relation to this question. For this Court, toll would be a tax or a fee in accordance with the political option of the legislator. This is a very modern interpretation which is applicable nowadays – as will be discussed later. With respect to the toll-stamp, I believe that the option adopted by the legislator referred to a tax (as per the all highlighted characteristics defined herein).

In short, it was a right decision of the Federal Supreme Court with regard to the toll-stamp as the category tax – as there was no other way it could be qualified. What is not correct is the usage of this decision, by some scholars, to fundament the legal nature of toll as a tax, in this day and age, as something inherent to this type of charge. So, in the light of the questions analyzed above, it is important to define how toll is structured at present, in a totally different manner from the tax denominated “toll-stamp”.

### **3.2. Brief Report on the Jurisprudence Involved in the Discussions of the Highway Concessions of São Paulo**

Concurrently with the privatization period of the highway concessions, various discussions regarding the legal nature of toll appeared – particularly in the

<sup>16</sup> This detail does not concern this paper. For greater detail relating to earmarking revenues and the FRN, see Carvalho (2010).

<sup>17</sup> These are the decisions mentioned by the author: Appeal in a writ of mandamus No 91.04.14000-1/RS. Rapporteur Appeals Court Judge Teori Albino Zavascki. Second Panel. Judged on 6 August 1992. Published in Official Journal on 23 December 1992. Civil Appeal No. 97.04.174730/RS. Rapporteur Appeals Court Judge Vladimir Freitas. Judged on 27 May 1997. Published in Official Journal on 9 September 1997. Appel in a writ of mandamus No 92.04.065567/RS. Rapporteur Judge Paim Falcão. Judged on 2 September 1990. Published in Official Journal on 17 November 1993.

State of São Paulo whose tolls were being collected by the Highway Development Department S/A – DERSA and the São Paulo State Highway Department – DER/SP, which helped to define, at least jurisprudentially, its collection as a fee due to its characteristics adopted by the State regulation.

One of the first instances in which the question “toll: tax or fee” was treated specifically was a writ of mandamus filed by the Municipality of Diadema against the Secretary of Transport and the CEO of DERSA. The content of the summary is reproduced below:

*Writ of mandamus. Insurgency of the petitioner against the collection of toll at the entrance to the city of Diadema, for those driving on the Imigrantes Highway in São Paulo-Santos direction, under the allegation that it is a tax and therefore was included in item V of article 150° of the Federal Constitution. The present case is not a tax but a price or fee. Legal and constitutional collection. Also, the State Law No 2,481/1953 was repealed by posterior legislation - Decree-Law N° 5/1969 and State Law No 95/1972. There is no requirement for the toll booth being constructed 35 km distant from the zero mark of the Municipality of São Paulo. Legal texts are incompatible. Application of rule imbedded in article 2nd paragraph first of the Introduction of the Civil Code Law. Writ denied. Decision maintained. Appeal not judged in favor of the petitioner (Civil Appeal No. 059.881-5/4. Forth Chamber of Public Law January/99. Rapporteur Appeals Court Judge Eduardo Braga. Judged on 25 February 1999).*

As can be seen, the example involved two discussions: the so-called “Zero Mark” and the legal nature of toll which was a fee – as already decided. During the same year there was a pronouncement by the State Court of São Paulo in a case involving the DER and the concession for the Anchieta-Imigrantes Highway System together with the Anhanguera–Bandeirantes System<sup>18</sup>.

Some years later, there was the same complaint against the tolls of the first highway concessions in the State of São Paulo. The discussion was also extended to the “Zero Mark question”. In 1953, the State Law N° 2,481 was edited, whose article 1st, paragraph 8th, vetoed the institution of toll booths within a radius of less than thirty five kilometers, counted from Mark Zero in the Municipality of São Paulo – which is located in the Praça da Sé.

This Law was subsequently repealed by supervening rules that authorized the institution of toll booths on the Anchieta-Imigrantes System by DERSA within that radius established by the State Law N° 2,481 (Decree No 5/1969, modified by State Law N° 95/1972, and Decree N° 22,419/1984). This fact meant an implied repeal because the supervening text was incompatible with the previous one (as per the Law of Introduction to the Brazilian Laws – Decree-Law N° 4,657/1942, article 2nd, paragraph 1st.

This interpretation was adopted in 1999 on the decision

of the writ of mandamus mentioned above, petitioned by the Municipality of Diadema. Besides this, the decision has also defined that toll was a fee in that specific case<sup>19</sup>. Several years later, this understanding was consolidated in similar decisions involving Ayrton Senna Highway<sup>20</sup> and Castello Branco Highway<sup>21</sup> – and also, once again, the Anchieta-Imigrantes System<sup>22</sup> – where the implied repeal of the aforementioned Law as well as the legal nature of toll as fee were expressly established by the Court.

As can be noted above, highway concessions in the State of São Paulo were subjected to various initiatives that resulted in judicial disputes regarding the legal nature of toll, all of which contributed to a context of instability in the sector. The context of uncertainty was reduced by the standard of the decisions adopted by the Court of Justice of São Paulo, which, rightly, maintained a line of interpretation with relation to toll so as not to create further legal instability by conflicting decisions.

### 3.3.The Present Toll Charging Structure

With the end of the toll-stamp and the further development of the sector, highway concessions started to be structured economically based on the regulation applicable to fees, following the same principals either in the collection directly by public authorities or by private sector (concessionaires). It was a political (and legal) option afforded by the Constitution of 1988 and adopted afterwards with the extinction of the toll-stamp – probably to avoid continued legal discussions. The most common toll model at present in use is the collection through a concessionaire of public service. In São Paulo, v. g. , there is only one toll collected by public authorities – i. e., by the State Highway Department – DER. Ever since the first concession, in 1994, up to the end of 2010 (partial data) there are 53 concessionaires of public services operating in the sector, administering more than 15 thousand kilometers of paved highways - a sector which involves a turnover of almost forty billion dollars between investments, operating expenses, payments to the regulatory authorities, taxes and financial expenses.

The toll fee of a concessionaire does not only cover the cost of maintenance of the highways, as many erroneously believe. The fee is the result of the economic-financial engineering of the project finance of the concession. In the words of Câmara (2009, p. 74-65) it is the “regulatory clause from the agreement”, fixed as the result of the tender that won the bidding. Nevertheless, it is not unchangeable insofar as there is always a possibility of unilateral alteration on the part of the public authority responsible for the agreement – as pointed out by the author.

As a result of an economic option, the toll is not defined as marginal cost (the exact measured value for the rendering of the service), but it is calculated by means of other economic equations, including the amortization of investments made initially, and others to be made during the term of the concession agreement. This distinction is well underlined by Justen Filho (2010, p.

749-754) – and also analyzed in a specific study by Cintra do Amaral (2009, p. 25-27) which differentiates between the previous model of concessions by cost as opposed to the present one by price.

“In short, it was a right decision of the Federal Supreme Court with regard to the toll-stamp as the category tax – as there was no other way it could be qualified. What is not correct is the usage of this decision, by some scholars, to fundament the legal nature of toll as a tax, in this day and age, as something inherent to this type of charge”.

The formation of the fee price is a complex economic task, defined based on studies carried out by the grantor of the public service (public authority) – before bidding, if a minimum fee is determined – and by the bidders when offering their respective tenders. It involves not only the cost of maintaining the service but also the business cost of providing the public service of operating and conserving the highways, which obviously transcends the mere maintenance of the surface.

Another point highlighted by Moreira (2010, p. 323-324) is the political character on planning the fee structure. According to the author, “[t]he value to be established as a fee will be a photograph of the long term State directives – whether these will indicate expansion and development of infrastructure, revenue distribution or work generation, or based on other reasons of primary public interest”. In the vision of Moreira, a fee has this function of plotting and defining the desired objectives. Because of these aspects, “[a]s they are the expression of a determined public policy, the definition of a fee does not need to be static or identical in all concessionary projects”.

After the analysis of the characteristics hereinabove, it should be mentioned that public authorities can also charge a toll as a fee whenever the characteristics considered lead to its classification as one. DER/SP could be used as an example – entity that, before the Second Stage of Highway Concessions in the State of São Paulo, collected a toll fee from users who had driven on

highways under its administration. In a similar way, the example of the State of Rio Grande do Sul: the Governor authorized, through Decree N° 34,417/1992, the collection of a price on its state highways – based on a “Toll Unit” which varies in accordance with the category of the vehicle. It is important to note that article 3rd of the Decree N° 34,417/1992 does not require the updating of the value by law, rather by an exclusive act by public authority:

*Article 3rd: The toll, calculated in Toll Units, will be set, periodically, in tables approved by the Secretary of Transportation, based on proposals of the Autonomous Department of Highways – DAER/RS after hearing the Executive Council.*

It should be noted that there exists a Direct Action of Unconstitutionality N° 800-5/RS<sup>23</sup>, filed by the Brazilian Socialist Party – PSB, which intends to refute the validity of the abovementioned Decree due to a violation of the constitutional principles of legality and no taxation in the same year of the institution of a tax. In a preliminary injunction decision by the Plenary of the Federal Supreme Court it was registered in the summary that “[a]ll indicates that this case configured is merely a public price question, not subject to the principles invoked, and for this reason the thesis of unconstitutionality is not plausible. By means of the regulatory power of the Head of the Executive Branch (art 84º, VI, CF) there would be no obstacles to the institution of toll by decree, since there is no constitutional restriction in this matter”.

It should be emphasized that this decision (although not definitive) is from the Plenary of the Federal Supreme Court in an analysis of the Law (abstract control of constitutionality): so, even though one considered, equivocally, the EA 181,475 as a Supreme Court previous understanding that toll is legally classified as a tax, it should be noted that the decision in the EA was by the Second Panel in a specific case (concrete control of constitutionality). This serves as a counter argument to avoid the use of the EA 181,475 as final Court understanding of the legal nature of tolls.

This does not prevent a public authority from authorizing the collection of toll as a tax, as long as – as happened with toll-stamp – it is subjected to the principles of taxation and public finance specific to its collection. What cannot be affirmed is that toll has to obligatorily be collected through a tax when the charge is by the public authority – since at no time does the Federal Constitution indicate this obligation.

The article 150º, V, of Federal Constitution vetoes the utilization of a tax as a limitation to the movement of people or goods, apart from the collection of toll (when

18 Civil Appeal No 092.794-5/9-00. Forth Chamber of Public Law. Rapporteur Appeals Court Judge Eduardo Braga. Judged on 19 June 2000.

19 Both of the understandings were in the Civil Appeal No 059.881-5/4 abovementioned. This interpretation was repeated, regarding the Anchieta-Imigrantes System, in the Civil Appeal No 055.669-5/8-00. Fifth Chamber of Public Law. Rapporteur Appeals Court Judge William Marinho. Judged on 28 October 1999.

20 Civil Appeal No 538.547-5/2-00. Thirteenth Chamber of Public Law. Rapporteur Appeals Court Judge Borelli Thomaz. Judged on 12 December 2007.

21 Civil Appeal No. 288.671-5/0. Eighth Chamber of Public Law. Rapporteur Appeals Court Judge Paulo Dimas Mascaretti. Judged on 16 May 2007; Motion for Clarification No. 288.673-5/2-01. Eighth Chamber of Public Law. Rapporteur Appeals Court Judge Paulo Dimas Mascaretti. Judged on 15 August 2007; Civil Appeal No 382.317-5/2-00. First Chamber of Public Law. Rapporteur Appeals Court Judge Franklin Nogueira. Judged on 8 April 2008; Civil Appeal No 270.739-5/6-00. Eleventh Chamber of Public Law. Rapporteur Appeals Court Judge. Judged on 10 November 2008; Civil Appeal No 285.018-5/0-00. Sixth Chamber of Public Law. Rapporteur Appeals Court Judge Sidney Romano dos Reis. Judged on 27 March 2009.

22 Civil Appeal No 522.398-5/0-00. Sixth Chamber of Public Law. Rapporteur Appeals Court Judge Oliveira Santos. Judged on 12 March 2007.

23 Plenary. Rapporteur Justice Ilmar Galvão. Judged on 26 November 1992. Published in the Official Federal Journal on 18 December 1992.



collected as a tax) for the use of roads maintained by the public sector. It does not mention, however, that tolls will be collected exclusively under a tax regulation: this will be decided by the rule that authorizes their collection. If it is subordinated to a Law and considered as budget tax revenue, because of the service rendered, or put at the disposal of the citizens, it will be a tax. To the contrary, if the rule authorizes its institution and readjustment by exclusive act of the Executive Branch, it will be a public price (fee).

This is a consequence of article 175° of the Federal Constitution, which allows the public authority to render public services – leaving it up to the specific law to determine the fee policy for the service in question. Public authorities, when rendering a public service, may charge a tax or a fee and they will do so in accordance with the characteristics used for attaining its objectives – since the caput of the article 175° did not limit the rendering to any of the species of collection. By the means of the pertinent legislation, public authority has the option of following the rules of collection applied to public or private sector – which will be defined through the characteristics adopted whether they be those of a tax or of a fee<sup>24</sup>.

If it is considered as a tax, it can be charged even though the potential user does not make use of the highway (potential use of a public service). A State toll tax could be created, e. g., to be paid annually, applying to all traffic on all state roads not granted to the private sector and situated in its territory. Hence, in theory, if someone wants to drive between two municipalities in this State by a highway in 2011, he would have to prove the payment of the toll tax to the Treasury Department of the State – under the risk of being fined by the respective audit, if he disregards this rule.

On the other hand, a toll fee could also be instituted – which will be paid only by those who effectively use the highway. In this case, the charge will be by regulatory acts of the Executive Branch and the revenue could be used to cover the costs of the activity and other related (for example: payroll). One should also consider that a tax may be illegal if it does not respect the requisites of the National Taxation Code; a fee cannot be contested under these arguments because there are no pre-established legal requisites for this type of charge included in the National Taxation Code. Or one could extract the requisites for charging a fee from the Law Nº 8,987/1995 (in the rules regarding the fee policy) – nevertheless, it should be highlighted that the requisites refer to services granted to the private sector. Thus, in this case the fee would not necessarily need to have a

synallagma linkage but at least be reasonable (article 6th, paragraph 1st, Law Nº 8,987/1995)

Moreover, the principle of a reasonable fee could be extended also to public services rendered directly by public authority, since – as affirmed by Bandeira de Mello (2009, p. 673)<sup>26</sup> – if such a service is defined as being relevant to the society, it would not make sense if it weighed too heavily on the beneficiaries of the service, which justifies, v. g., subsidies or social fees.

#### 4. Legal Qualification of Tolls as a Tax or as a Fee

With this new fee structure, a new concept of toll could be consolidated: it can be either a tax or a fee depending on the politics chosen – which is oriented by the analysis of the legal system itself. In this way, the studies which analyze only its legal classification – i. e. whether a toll is always a tax or is always a fee because of some immanent characteristics of it – decreased to give space for a conception related to its legal qualification.

As stated by Di Pietro (2010, p. 59), “[p]ublic authority can be subjected to the legal regime of the Law applied to the public sector or that applied to the private sector. The option between one and the other is normally chosen by the Constitution or the Law.” In this manner, toll can take on a profile of a tax or of a fee in the light of the legal regime adopted by law, which will depend, evidently, on the politics defined by the Parliament (or the Legislative Branch) and later by the public authority. Action on the part of the public authority can follow either public or private law, as neither the Federal Constitution nor any Law determined an obligatory regime to be followed in the case of toll collection. The characteristics adopted for its collection will determine whether it is a tax or a fee, which in turn will depend on the analysis of the specific case in question (a posteriori analysis). There lies the difficulty of conceptualizing toll as a tax or as a fee as something a priori, considering that the definition of its legal qualification depends on how, in practice, it will be collected (and how the specific laws and rules will define it).

In Brazil, the legal regime most commonly adopted is the one used for fees, either on the highways operated by public authorities or those by the private sector. This does not mean that the possibility that toll is a tax is excluded: this will depend, obviously, on the content of the law which authorizes its collection – as shown in the above paragraph. In Brazil, the Courts have been following this line of thought over the years: this makes that the dominant court understanding reflects this policy adopted by State<sup>27</sup>.

24 See item 4 infra.

25 This understanding is not unanimous among scholars because some of them see the synallagma as essential for the collection of a toll – even as a fee. See, v. g., Savaris (2004, p. 99 nt. 246): “The possibility of collecting toll through fee is limited to the hypothesis that it is destined to amortize construction and maintenance costs of the highway used, because it is in this hypothesis that can be found the synallagma character of the price. If the toll is charged to promote sustainable development in the defense of the environment or in the combat of traffic congestion, there is no longer the possibility of it being collected through a public price.”

26 “If the State gives such importance to the activity to which the classification was awarded, considering it important to all components of society, it would be a folly if the members of this society, to whom the benefit is destined, were excessively burdened or, worse still, marginalized.”

27 Regional Federal Court (Fourth Region). Appeal in a writ of mandamus – 69655. No: 200004011430400. UF: PR. Third Chamber. Rapporteur Judge Francisco Donizete Gomes. Judged on 26 November 2002. Published in Official Federal Journal on 4 December 2002. “ADMINISTRATIVE. WRIT. TOLL TARIFF OR TAX PLUS BURIED IN THE VALUE DESTINED TO COVER THE COST OF THE DUPLICATION OF THE HIGHWAY. LEGITIMACY 1. Toll is not characterized as a tax whether in the taxation mode, tax or contribution for betterments. It is a fee, it has the nature of a contractual rendering and aims at remunerating a public service rendered by a concessionaire, including, in the value, a certain margin of profit 2. The inclusion of an addition in the value of the toll for covering the cost of duplicating the highways is legal since it, in the light of the ever growing volume of traffic on our highways, can be included as highway conservation and maintenance.”; Court of Appeals of the State of São Paulo. Civil Appeal No 285.018-5/0-00. Sixth Chamber of Public Law. Rapporteur Appeals Court Judge Sidney Reis. Judged on 23 March 2009. “Writ of mandamus – Invalidity of administrative rule – Desire to transit

“If it is considered as a tax, it can be charged even though the potential user does not make use of the highway (potential use of a public service). A State toll tax could be created, e. g., to be paid annually, applying to all traffic on all state roads not granted to the private sector and situated in its territory”.

Savaris (2004, p. 99) also analyzed the evolution of jurisprudence and doctrine on the matter, summarizing it as follows – although in a more restrictive way<sup>28</sup>:

*Once recognized that toll can assume a fiscal profile, it should be noted that the possibility of taxing the use of roads, maintained by public authorities, does not impede that the charging for the utilization be through the use of a fee if the toll is linked to the construction and maintenance of the highways and especially when the operation of the highway is made under the form of concession – as there is an offer to private individuals of special facilities related to a public asset whose use is not obligatory. (highlights not in original)*

Despite the author’s conclusion that toll can be used either as a tax or as a fee, the use of the later regime is restricted to some hypotheses – which, in the end, leads to a conclusion as to the legal nature of a toll. The use of one form or the other is governed by the purpose of the toll, defining its nature as a tax or a fee.

In spite of this orientation being reasonable, I follow – as already shown – the hypothesis of the application of both legal regimes. Since the legal system does not define which should be followed in the case of toll, it is up to the policy board to promote the collection, defining its basic characteristics – which will lead to the classification a posteriori of the legal regime as a tax or as a fee, in compliance with the principles of public finances, for the fulfillment of policies outlined by the public authority. Considering that the Legislative Branch defines what will be a public service within constitutional limitations (Bandeira de Mello, p. 685-686), will also do so regarding the regime applicable to its cost: taxation or not taxation (fee).

Both of the regimes will have advantages and disadvantages – constituting the trade off mentioned previously which, in summary, involves the question of flexibility and guarantees offered. As defined by Schwind (2010):

*On one hand, there is a fee regime, which is more flexible but offers fewer formal guarantees to the*

*users – since there can be an alteration of values, at any moment, without the necessity of a law. On the other hand, there is a legal regime of taxes, which is less flexible but offers the user guarantees that do not exist in the fee regime.*

The Federal Constitution, as already affirmed, in no moment makes conditions for charging of toll to the tax mode: it only mentions that there cannot be a tax which limits the movement of people and goods, with the exception of toll. So, toll does not fit in with limitation of the power to tax when so regarded. Savaris (2004, p. 94-95) shows the judgment of the Court of Appeals of Rio Grande do Sul in the Motion for Clarification No 598.391.423 in which three tax species for toll were examined: toll-tax (collected without any counterpart by the State to the user), toll-tax and toll-fee.

### **Conclusion: My Proposal for Legal Qualification**

In the light of these considerations, how should toll be legally qualified? As observed herein, there are positions that sustain both the classification as tax or as a fee, with each one applied to different situations. Some argue that it will always be a tax, others that it will be a tax or a fee depending on who is rendering the service and there are also those who consider that it will always be a fee – and there are other positions adopted.


Following a jurisprudential criteria, by the analysis of cases followed in this paper, I am able to affirm that toll is still being considered as a fee. Despite the lack of a specific judgment by the Federal Supreme Court as to the merit (as the EA 181,475 was specifically addressed to the case of the toll-stamp and cannot be used as a precedent for toll in its present format) it is possible to affirm that the preliminary injunction in the Direct Action of Unconstitutionality No 800-5/RS has defined, up to now, the legal qualification of toll as a fee even when charged by a public authority (in casu, the Autonomous Highway Department of Rio Grande do Sul – DAER).

As a consequence, toll nowadays is a fee whether it is charged by the public authority or by a private highway concessionaire. However, I would add that nothing could create obstacles to an alternative legal regime for the collection of tolls, qualifying them as taxes in the case of direct collection by the government. In the event that there is a specific law authorizing its collection, fixing the tax bracket and the destiny of the resources, this will be sufficient to characterize it as a tax. I emphasize that this would not be an unfounded decision without criteria, bordering on arbitrariness, rather it would be dependent on the characteristics adopted by the collection regulation.

So, there is no pre-defined legal qualification covering the figure of toll in Brazil. The legal regime adopted by the Legislative Branch or the government (by means of the respective power of regulation as in the edition of a decree on the theme) for the collection will serve

on the sides of the Castello Branco Highway without payment of a toll – Appeal granted – (...) As to the merit, one does not see the violation of the law – Illegality in the collection of toll inexistent, as it is not a tax but rather a fee – Provision of the article 150, V of the Federal Constitution (...).”

28 See note 25 supra.

to qualify toll for each specific case, which should be analyzed doctrinally or, if it is the case, by the Courts in a case. Toll will be or a tax or a fee in accordance with the classification inherent to the legal regime adopted. In the case of concessions and permissions for public services, the regime is defined by the Federal Constitution as being the one of fees – with no doubts to affirm that toll, in this case, is qualified as a fee 

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