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ABUSE OF THE TRUST AS A SOURCE OF PAYMENT OR GUARANTEE AGAINST FEDERAL PARTICIPATIONS. CASE OF THE STATE OF COLIMA

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Summary. The purpose of this paper is to analyze the legal figure of the trust as a means of assigning federal participations as a source of payment and guarantee of credits of the federal entities. The particular case of the State of Colima and the particularities of its trust agreement for the allocation of federal participations will be analyzed, in order to be able to determine, in addition to its incompatibility to achieve the allocation of federal participations through such legal figure, the abuses that this implies, such as the lack of respect to the rights of hearing and defense of the State of Colima, in the execution of such federal participations, through procedures that do not guarantee the essential formalities of the procedure. The incompatibility of the federal entities to legislate in relation to the feasibility of using the trust as a mechanism for the allocation of federal participations as a source of payment and guarantee of the credits assumed by the federal entities will be studied, since the trust is a matter of reserved legislative adaptation for the Congress of the Union. The method used in this work is the inductive-deductive method with a qualitative approach, using documentary research instruments, through the qualitative analysis of legislation, jurisprudence and doctrine related to the subject matter of this work.

Key words: Federal participations, trust fund, public debt, Colima

ABUSO DE LA FIGURA DEL FIDEICOMISO COMO FUENTE DE PAGO O GARANTÍA CON CARGO A PARTICIPACIONES FEDERALES. CASO DEL ESTADO DE COLIMA

Resumen. El objeto del presente trabajo es analizar la figura jurídica del fideicomiso como medio de afectación de las participaciones federales como fuente de pago y garantía de créditos de las entidades federativas. Se analizará el caso particular del estado de Colima y de las particularidades respectivas a su contrato de fideicomiso de afectación de participaciones federales, para estar en aptitud de determinar, además de su incompatibilidad para lograr la afectación de participaciones federales a través de dicha figura jurídica, los abusos que ello implica como la falta de respeto a los derechos de audiencia y defensa del estado de Colima, en la ejecución de dichas participaciones federales, mediante procedimientos que no le

garantizan las formalidades esenciales del procedimiento. Se estudiará la incompatibilidad de las entidades federativas de legislar en relación a la factibilidad de utilizar al fideicomiso, como mecanismo de afectación de las participaciones federales como fuente de pago y garantía de los créditos asumidos por las entidades federativas, por ser el fideicomiso una materia de reservada adecuación legislativa para el Congreso de la Unión. El método utilizado en este trabajo es el inductivo-deductivo con enfoque cualitativo, utilizándose como instrumentos de investigación los documentales, a través del análisis cualitativo de la legislación, jurisprudencia y doctrina relacionada con la materia del presente trabajo.

Palabras clave: Participaciones federales, fideicomiso, deuda pública, Colima

Introduction

The purpose of this paper is to analyze the legal figure as a mechanism for the assignment of federal participations as a source of payment and guarantee of the federal entities, analyzing particular issues of the state of Colima, in order to see if such legal figure is compatible for such purpose.

On the other hand, the particular vicissitudes of the State of Colima will be analyzed in order to determine the way in which its trust for payment of obligations and allocation of federal participations is constituted, an analysis that implies establishing the abuses involved in using this allocation mechanism for federal resources.

In the particular case of the State of Colima, in 2002 a trust was conceived as a means of assigning federal participations to serve as a source of payment and guarantee for credit obligations contracted by the State with the authorization of the Local Congress; however, it is considered pertinent to analyze the corresponding legal figure, given the importance of the affected resources (federal participations) which have a component of public resources and therefore emphasis must be placed on their protection in order not to affect the interests of the Nation.

So far, it is pertinent and appropriate to analyze the figure of the trust as a means to guarantee the debt of the federal entities, charged to the federal participations, since according to the legal nature of the same, they are of an unseizable nature and only by exception, they can be subject to affectation, under the limits and budgets established by the law itself that contemplates the federal participations (Ley de Coordinación Fiscal).

However, it is necessary to analyze the particular case of the State of Colima, and thereby prove that the legal figure of the trust has been used in an inadequate manner, in violation of the law, thus affecting the interests of the governed by being involved in them, public resources inherent to the contributions and income from natural resources such as oil and mining, which are the property and domain of the Nation.

The justification for this study is updated as it is pertinent because, according to the public information of the State of Colima (www.col.gob.mx), it is known that as of September 2021, seventy-five percent of the present and future federal participations have been assigned to the guarantee trust created to guarantee the payment of the loans that the government of the State of Colima has contracted.

In addition to the above, the justification and relevance of the work is accredited, given that, in recent times, the figure of the trust has been questioned, since it has been considered necessary to analyze the figures by means of which the management of public

finances in an austere manner is prevented, reason why in Mexico it has been questioned and even the current administration of President López Obrador (2020), has extinguished several trusts.

Therefore, it is appropriate to analyze the use of the legal figure of the trust as a means to affect federal participations as a guarantee, circumscribing the study to the case of the State of Colima, in order to make the study more delimited.

Problem statement

It is considered necessary to analyze the use of the figure of the trust, in the particular case of the State of Colima, since it is considered that the figure of the trust has been abused, with the purpose of committing present and future public resources for the satisfaction of debts, charged to federal participations, as a means to guarantee said source of debt.

The problem addressed implies not only the excessive use of the figure of the trust as a method to affect the federal participations, to serve as a payment guarantee for the loans contracted by the federal entities and municipalities, which has occurred in the particular case of the State of Colima, since seventy-five percent of the present and future federal participations are committed by means of a trust, the abuse lies in the fact that an inadequate legal figure has been used for the purpose of materializing the affectation of the federal allocations, which aggravates even more the abuse against public resources.

Research objectives

1.- To analyze the historical and current evolution of the State of Colima, in relation to the allocation of federal participations through the figure of the trust.

2.- Demonstrate that the legal figure of the trust is incompatible to affect federal participations as a means of guaranteeing public debt.

3.- Analyze that, regardless of the fact that the local law contemplates the trust as a mechanism for the allocation of federal participations as a source of payment or guarantee of loans, the figure in question is unfeasible.

Theoretical Framework

Historical background, in the state of Colima, of the Trust as a means of assigning federal participations as a means of guaranteeing public debt

In July 2002, the Government of the State of Colima, represented by its then Governor, Fernando Moreno Peña, entered into a trust agreement F/2112337, irrevocable, for administration and source of payment, with a banking institution, which, from the date of substitution, as of September 29, 2021, 75% of the total federal participations received by the State of Colima, as part of the Fiscal Coordination Pact, are "affected" through the trust.

Based on the trust agreement in question, the Trustor (Government of the State of Colima) contributes in property several goods and rights, among them the federal participations, present and future, in the percentages stipulated in the agreement, in favor of the Trustee (credit institution), for the purpose of delivering in payment to the creditors of the State Government, who have registered their credit in the files of the trustee, being

the trustee in the first place, and the remainder of such resources shall be delivered to the Government of the State of Colima, acting in a duality, as Trustee in the second place.

In the particular case of the State of Colima, in relation to the trust agreement and its amendments, for the constitution of the trust for the allocation of federal participations, the Government of the State of Colima irrevocably assigned the rights over 75% seventy-five percent of the present and future federal participations, and the federal participations at the rate of 75% were annotated as the trust patrimony, being said assignment over those already received or those to be received in the future during the term of the trust.

For the purposes of this work, it is clear that the trust patrimony is constituted through the transfer to the trust institution of the rights that the State Government has over the present and future participations, at the rate of 75%. According to what has been stated in this work, it will be demonstrated that the transfer of such rights in favor of a private party such as the trustee, is not compatible, according to the provisions of the Fiscal Coordination Law, nor to the objects and purposes of the legal figure of the trust, since it has been constituted with a very personal right (public resources) of which the private parties do not have the quality or *ius imperio* to be able to be holders of the same, for this reason, it will be demonstrated that the figure of the trust has been abused for the purpose of affecting the finances of the state and this translates into the fact that to date 75% seventy-five percent of the total federal participations received are affected and transferred to the aforementioned trust, which is detrimental to the people of Colima.

Analysis of federal participations

Federal participations are contemplated in the Fiscal Coordination Law and are defined as the set of contributions to which the States and Municipalities are entitled to receive as part of the National Fiscal Coordination System, in this sense, federal participations can be defined as the freely available federal resources to which the States and Municipalities are entitled to receive as part of the fiscal coordination pact, (Tépac Marcial, 2011).

Based on Article 2 of the Fiscal Coordination Law, federal participations are mainly comprised of federal taxes from federal tax revenues, understood as all resources received by the Federation from federal taxes, mining rights and a portion of oil revenues from the Mexican Petroleum Fund.

In accordance with the above article and based on Cárdenas (2008), it is stated that federal participations, coming from federal participatory revenues, are intended to establish the amounts by means that the Federal government transmits to state governments through federal participations and contributions, and are composed of the total tax revenues not agreed upon in the entities, plus oil extraction rights and mining rights.

In line with the foregoing, it is undoubtedly held that, in accordance with the content of the federal participations, made up of taxes and duties on natural resources from oil extraction and mining, it is clear that the component in question has related implications in the sphere of the governed, according to articles 31 and 27 of the Political Constitution of the United Mexican States, the first of these articles refers to the obligation of Mexicans to contribute in an equitable and proportional manner to public spending, and the second provision refers to the fact that natural, mining or oil resources are property of the Nation, over which direct control is exercised.

In this sense, having a component of public resources, federal participations are protected by Article 134 of the Political Constitution of the United Mexican States, in

accordance with the principles of efficiency, effectiveness, economy, transparency and honesty to meet the objectives for which they are intended.

By virtue of the above and in view of the essential component of the federal participations, of public resources, coming from the contributions received from the Mexican citizens themselves, who in compliance with their constitutional obligations of article 31, deliver to the Nation the contributions established by law, as well as those from the use of natural resources, which, according to article 27 of the Constitution, are original goods of the Nation.

In line with the above, the Congress of the Union, with respect to the nature of the federal participations, established the general rule that the federal participations were not subject to affectation, being this congruent with the component of the same that implies public resources of a sensitive nature, since they come from the Nation, in its people (contributions) and territory (natural resources) components.

Article 9 of the Fiscal Coordination Law contemplates the characteristics of the federal participations, which state that federal participations are not subject to seizure, cannot be used for specific purposes and are not subject to withholding. The article in question makes an exception, stating that federal participations may only be used as a guarantee and source of payment, with the authorization of the Local Congresses and registered in the corresponding Registry of the Ministry of Finance, in favor of the Federation, credit institutions operating in Mexican territory, as well as individuals and legal entities of Mexican nationality.

From the foregoing legal considerations, it is stated that the federal participations are:

a.- These are the public resources to which the states are entitled to receive as part of the Fiscal Coordination System;

b.- They are constituted with 20% of the federal tax collection, which constitutes the collection of federal taxes (with the exceptions of Article 2 of the Fiscal Coordination Law), as well as the collection of mining rights and the corresponding oil revenues; therefore, in accordance with Article 134 of the Constitution, their component must be regulated in accordance with the principles of efficiency, effectiveness, economy, transparency and honesty to meet the objectives for which they are intended.

c.- Due to their nature, federal participations are not subject to seizure and may only be subject to appropriation to guarantee loans, provided they have been approved by local legislation and registered in the Debt Registry of the Ministry of Finance.

In accordance with the aforementioned characteristics, the "assignment" of federal participations as a guarantee of payment of credits, through the legal figure of the trust, is incompatible; however, in order to unravel the above, it is considered necessary to carry out the legal analysis, as applicable, of the legal figure of the trust, from which the incompatibility of the same will be concluded, for the purposes of article 9 of the Fiscal Coordination Law.

Analysis of the legal concept of trusts, in relation to the assignment of federal participations as collateral for loans

The legal concept of trust can be defined as the legal act by means of which a person called settlor transfers the ownership of property or specific rights to another person called trustee, who is obliged to exercise it for the benefit of the person designated in the contract as trustee or to transfer it to the latter. (Claudia Jaimez, 2010).

According to Rodríguez-Azuero (2007), the essential elements of the trust are the following:

a) Personal elements, constituted by the persons involved in the trust, such as 1.- The settlor, who through the separation of such person from his rights and the transfer made in favor of the trustee; 2.- The trustee, the person who, by virtue of the transfer, acquires the ownership or legal title of the assets contributed by the settlor. According to the Mexican legal framework, only those persons permitted by law, such as credit institutions (article 385 of the General Law of Credit Instruments and Operations), may have this character; 3.

From the personal element referred to above, and as far as the subject matter of this paper is concerned, the transfer of title or ownership made by the settlor to the trustee, with respect to the trust assets, stands out.

b) The trust is constituted by a set of assets and/or rights that constitute an independent and autonomous unit, affected to a determined purpose, any asset may be the object of the trust, unless they are of a non-transferable or very personal nature of the settlor. With the trust an independent patrimony is constituted, but for the same, it is necessary that the settlor gives up the ownership of the same and that the trustee becomes the trustee.

From the essential element in question, the fact of the independence of the patrimony is highlighted, which is materialized by the fact that, between the settlor and the trustee, a real transfer or alienation of the assets subject of the trust takes place. It should be noted that non-transferable or very personal assets of the settlor cannot be the object of a trust.

In the Mexican legislation, the figure of the trust is contemplated in Section One of Chapter V of the General Law of Credit Instruments and Operations (LGTOC), which in the articles that are of interest to the subject under discussion, states the following:

Article 381.- By virtue of the trust, the settlor transfers to a fiduciary institution the ownership or title to one or more assets or rights, as the case may be, to be destined to lawful and determined purposes, entrusting the realization of such purposes to the fiduciary institution itself.

Article 384.- Only the persons with the capacity to transfer the property or the ownership of the assets or rights object of the trust, as the case may be, as well as the judicial or administrative authorities competent to do so, may be settlors.

Article 386.- All kinds of property and rights may be the object of the trust, except those which, in accordance with the law, are strictly personal to their owner.

The assets given in trust shall be considered as assigned to the purpose for which they are destined and, consequently, only the rights and actions related to such purpose may be exercised with respect to them, except for those expressly reserved by the settlor, those deriving for him/her from the trust itself or those legally acquired with respect to such assets, prior to the constitution of the trust, by the trustee or by third parties. The fiduciary institution must record such property or rights in the accounts and keep them separate from its unrestricted assets.

The trust constituted in fraud of third parties, may at any time be attacked for nullity by the interested parties.

From the provisions transcribed above, the elements indicated at the beginning of this subtitle can be deduced, related to the essential elements that, according to the doctrine, are necessary for the creation of the trust, as well as the restrictions for the creation of the trust, from which the following is highlighted.

Article 381 of the LGTOC establishes the definition of trust under Mexican law. From the definition in question, it is clear that there must be a real transfer, i.e., alienation of the assets or rights of the settlor in favor of the trustee; On the other hand, from Article 384 of the LGTOC, it is emphasized that, with respect to the personal element "settlor", it is required to have the power to transfer the ownership or title of assets, which is consistent with Article 381 of the referred norm, in the sense that, in order for a trust to exist, it is necessary the transfer or alienation of assets or rights made by the settlor in favor of the trustee; Finally, in relation to article 386, it is established that, as to the patrimonial element of the trust, and for the purposes of the present work, the strictly personal property of the owner cannot be part of the trust, that is to say, those that according to their nature cannot be subject to alienation.

Now, with regard to the local regulations of the State of Colima, it is referred that both the Public Debt Law of the State of Colima, in force until December 29, 2015, and the Public Debt Law of the State of Colima and its municipalities, both in their relative articles 12 and 9, respectively, establish the power of the executive branch to have powers to subscribe trusts as instruments for the collection and/or distribution of the total federal participations, susceptible of being affected as a source of payment or guarantee of obligations.

Now, it should be noted that the provisions in question, by which the trust is contemplated as a source or mechanism for the allocation of federal participations to serve as a source of payment or guarantee of the debt contracted in the state of Colima, were introduced to the legislation with the amendment published in the Official Gazette "EL Estado de Colima" dated September 26, 2009. Notwithstanding the foregoing, it should be noted that the trust F/2112337 by which the federal participations are affected, was created in July 2002, that is, seven years before the local legislation contemplated such legal figure as a mechanism of allocation to serve as a source of payment or guarantee of credits contracted by the State.

With respect to the foregoing, it is noted that although the local law of Colima contemplates the figure of the trust as a mechanism of affectation as a source of payment or guarantee of obligations of the state of Colima or its municipalities, it must be said that this has implications and cannot modify the text of the General Law of Credit Instruments and Operations, since it is the latter the one that regulates such mercantile act and establishes its requirements and limitations, given that, in accordance with Article 73 section X, it is the exclusive competence of the Congress of the Union to legislate in matters of commerce, including in such act the mercantile operation regulated by the General Law of Credit Instruments and Operations, such as the Trust.

Therefore, it is unnecessary and unimportant that the Local Congress of Colima has adapted its public debt laws to establish the trust as a mechanism to serve as a source of payment and guarantee of the obligations contracted by the state of Colima and its municipalities, since such issue does not modify or legitimize the prohibitions that the same legal figure of the trust establishes, such as the fact that, for the constitution of trusts, the alienation of assets or rights is necessary in a forced manner, as well as the prohibition

in the sense that only assets susceptible of alienation and which are not personal of the trustor can be the object of a trust, being that, for the reasons stated herein, it is clear that the present and future federal participations are inalienable and are of a very personal nature of the federal entities and the municipalities.

One of the objectives of this work is to prove that the trust is incompatible, regardless of whether the local provisions in this matter contemplate the mechanism of affectation in question, a premise that will be demonstrated in the progress of this work.

Method

Through the inductive-deductive method applied to the theoretical framework indicated above, the hypothesis can be demonstrated.

Qualitative approach and non-experimental design.

Instruments, review of legislation, legal framework and bibliographic references.

Through the inductive-deductive method, we will analyze the common aspects of the legal figures addressed herein, such as federal participations, trusts and the same. In other words, from the analysis of the general nature of these legal institutions, the objects and hypotheses of the research can be deduced.

Results

In trust F/2112337, the Government of the State of Colima, in its capacity as trustor, contributed to the trust the irrevocable assignment of 75% of the federal participations. In the purposes of the trust, it is established that the trustee is responsible for exercising the rights over the federal participations held in trust in accordance with the provisions of the contract; it was also agreed that the trustee, directly and without the intervention of the Government of the State of Colima, will receive from the Treasury of the Federation the percentage of the federal participations subject to the trust.

Now then, in the referred contract in the clause related to the constitution of the trust patrimony, in the first place, the State Government contributes in property a certain amount in cash, for the constitution of the trust, and on the other hand, it is also established that the trust is constituted with the irrevocable assignment in trust of the present and future federal contributions, which constitutes the percentage of federal participations in trust.

It has been demonstrated that, in the trust contract regarding the constitution of the trust, in relation to the federal participations, the parties that intervene in the contract, use the term "affectation", instead of the appropriate term, "to transfer in property", which in accordance with the applicable legislation (article 381 of the LGTOC), is the appropriate term and which, in addition, is used for the contribution of the amount in cash that is delivered as part of the trust patrimony.

Now, the following question arises Is the term "affectation" adequate for the constitution of the trust, in relation to the federal participations of the Government of the State of Colima? the answer is no, given that up to what has already been stated, it can be concluded that, for the constitution of the trust, it is necessary the transfer of the property

or ownership of rights and obligations, (articles 381 and 384 of the LGTOC), without the existence of a trust without the transfer or alienation of the trustor's property in favor of the trustee and for the purposes of the trust.

In accordance with Article 9 of the Fiscal Coordination Law, it is established that federal participations are unseizable and cannot be used for specific purposes; they can only be used as a guarantee or source of payment of obligations, with the approval of the local legislatures and registered in the debt registry contemplated in the Financial Discipline Law of the Federal Entities and Municipalities.

In line with the foregoing, since there is a prohibition of attachment or affectation, it is clear that, in application of the legal principle "A maiori ad minus", "A minore ad maius", which establishes that he who can do more can do less, and that if the less is prohibited, the more is prohibited, which means that if the attachment or affectation of federal participations is prohibited, it is even more prohibited, this means that if the seizure or assignment of federal participations is prohibited, it is even more so the alienation of federal participations is prohibited, since, as stated in previous paragraphs, for the constitution of any type of trust, the transfer or alienation of assets or rights is necessary, which is why the alienation of federal participations, whether present or future, is also prohibited.

In this sense, it is not feasible to consider that the creation of a trust implies a mere encumbrance or creation of a lien or security interest, since security interests are distinguished by granting the creditor the right of preference over the affected assets, while trusts created for the purpose of guaranteeing debts do not have these characteristics, in the sense of a right of preference, but rather the asset is subtracted from the assets of the debtor and the owner or holder thereof is the trustee.

In this regard, it is convenient to refer to the jurisprudence 1^a/J 12/2007 of the First Chamber of the Supreme Court of Justice of the Nation, in which the high court of the country establishes that the trust entity is the only holder of the rights, actions and obligations related to the trust assets, and therefore it is the only one entitled to go before judicial or jurisdictional instances, in order to exercise, defend and enforce the rights related to the trust assets.

On the other hand, the Second Collegiate Court in Civil Matters of the Seventh Circuit in the issuance of Thesis VII. 2^o. C.73C (10th.), resolves that according to the jurisprudence referred to in the previous point, in which it is established that the ownership of the trust patrimony corresponds to the trustee when the property of the trust has been transferred in its favor, the foregoing regardless of whether they are public assets or assets belonging to official legal entities that have been the subject of the trust, this by virtue, concludes the Collegiate Court, because in its consideration the ownership and title of the assets subject of the trust is transferred in favor of the trustee.

In addition to the legal impossibility of using the legal figure of the trust to contribute the federal participations to guarantee or serve as a source of payment of credits, it is considered that the true effect of the use of the trust as a mechanism for the allocation of the federal participations is crystallized by the fact that the borrower, trustor of the federal participations, is left in clear defenselessness when a creditor requests payment from the federal participations, according to clause eight of the trust agreement F/2112337, the payment is made without further procedure and without the state government being able to oppose or assert grounds for which the payments would be improper, leaving the creditor in a state of defenselessness, being that the Supreme Court of Justice of the Nation has established the need that, in the process of execution of the

guarantee of the federal participations, the guarantee of hearing and defense must be respected. Regarding this particular issue, the Plenary of the highest court of the country, in resolving constitutional controversy 43/2005 regarding, among other issues, the respect for the rights of hearing and defense of public entities in the execution of guarantees charged to federal participations, states that, regardless of the fact that official legal entities, such as federal entities or municipalities, cannot be holders of individual guarantees (today human rights according to the constitutional reform on human rights of 2011), it is not an impediment that they can fail to comply with articles 14 and of the Political Constitution of the United Mexican States, nor that they must fail to observe the rule of law, nor that they can be allowed to arbitrarily comply with articles 14 and 14 of the Political Constitution of the United Mexican States, this does not prevent them from failing to comply with Articles 14 and 14 of the Political Constitution of the United Mexican States, nor does it prevent them from failing to observe the rule of law, nor does it prevent them from allowing arbitrariness to exist. In view of the foregoing, they conclude that it is necessary that the procedures for the execution of federal participations as a method of guarantee or source of payment must guarantee the essential formalities of the procedure, that is, that the public entity that is intended to be affected by such execution be given an adequate hearing and defense.

It should be noted that our highest court of the country has established the need to respect the rights of hearing and defense of the public entities, in order to safeguard the rule of law, regardless of the fact that, as already mentioned, there is a legal impediment to use the figure of the trust as a mechanism to affect the federal participations, since these are a personal property of the federal entities and the municipalities and contain a burden of public resources, which must be safeguarded in accordance with the principles of article 134 of the Constitution, it is stated that, in addition to this, the figure of the trust crystallizes an affectation to the rights of hearing and defense of the entity, in this case Colima, for the following reasons.

According to the trust agreement F/2112337 and its amendment agreements, in its clause "*EIGHTH. OF THE PAYMENT PROCEDURES*" states that the trustees will first submit their payment request to the trustee and the trustee will make the payment within the times established in the trust itself, highlighting that, in order to carry out the payment in question, not even, in accordance with the terms of the trust agreement, is it necessary to notify, much less to give the trustee intervention for, hearing and defense through the offering of evidence to the entity, in order to respect the rule of law and the rights of hearing and defense established in the trust, it is not even necessary to notify the trustee, much less to give the trustee a hearing and defense through the offering of evidence to the entity, in order to respect the rule of law and the rights of hearing and defense established in the Political Constitution of the United Mexican States.

In this regard, it is considered that, regardless of the fact that, in conventional procedures, such as the execution of trusts, the parties may freely agree, it is necessary to emphasize that the Supreme Court of Justice of the Nation, in resolving the amparo in review 795/2019 issued the thesis 1^a XLVIII/2020 (10^a) in which it states that, although it is allowed that the parties agree on conventional execution procedures, such as in the case of trusts for guarantee purposes, the referred procedures must respect the essential formalities of the procedure, meaning that, before the execution is carried out, a procedure is established in which at least the executed party is guaranteed the essential formalities of the procedure, meaning that, before the execution is carried out, a procedure is established in which, at least, the executed party is guaranteed that the execution will be carried out, the referred procedures must respect the essential formalities of the procedure,

meaning that, before the execution is carried out, a procedure must be established in which at least the executed party is guaranteed the faculty to be notified of the execution procedure, the possibility of contradiction and the offering of evidence in defense, the possibility of pleading, as well as the issuance of a resolution that resolves the issues raised by the parties. However, as it has been indicated and as the trust for the State of Colima is constituted, for the execution of the federal participations as guarantee or source of payment, it is not necessary to comply with the essential formalities of the procedure indicated above, since, as indicated above, the mere instruction of the trustee creditor is sufficient for the trustee to proceed with the withholding and corresponding delivery of the resources from the federal participations.

In this regard, and according to the jurisprudence of the Plenary of the Supreme Court of Justice of the Nation P./J. 47/95, under registry number 200234 essential formalities of the procedure must be understood to mean that, in a procedure followed in the form of a trial, and even more so in those in which privative acts established in article 14 of the Constitution are being ventilated, the parties must be guaranteed at least the following procedural rights: 1.- The notification of the initiation of the proceeding and its consequences; 2.- Opportunity to offer and present evidence for the defense; 3.- The opportunity to plead; and 4.- A resolution that settles the controversy.

In this sense, it is worth highlighting what Márquez, J. F. (2000) comments, this type of trust implies certain risks for the trustor, due to the possibility of abuses by the trustee, meaning that the simple possibility that the trustee may dispose of the trust assets at his own discretion constitutes a real court, since, as has been mentioned in the particular case of the state of Colima, not even the essential formalities of the procedure are respected.

Discussion and conclusions

First, federal participations, by their nature, are non-transferable and non-seizable, given that they have a component of public resources from the collection of taxes and royalties from the exploitation of natural resources that are the property of the Nation.

It is shown that Article 9 of the Fiscal Coordination Law establishes an exception, only a possibility of assigning federal participations, so that they may serve as a source of payment and guarantee for the agreed obligations, but this in no way implies that the state or the municipalities may transfer this right to third parties, since, as stated above, federal participations as an inherent right of the states and municipalities because they belong to the Fiscal Coordination Pact, are non-transferable.

In accordance with the law that regulates trusts (Ley General de Títulos y Operaciones de Crédito), the incorporation of trusts requires the alienation of assets or rights, and only assets and rights susceptible of alienation and that are not of a personal nature of the trustor may be alienated to the trust.

It is made clear that the fact that the Congress of the State of Colima has adapted its legislation on public debt to contemplate the trust as a mechanism of affectation to serve as a source of payment and guarantee for obligations, this cannot imply an exception to the law that regulates the trust, since it is not within the competence of local legislatures to legislate on these matters, given that commerce and everything inherent to it is a reserved and exclusive matter of legislation to the Congress of the Union.

It is evidenced that, by itself, the use of the trust for the purposes of source of payment, by itself is a violation of the norms that regulate the legal figure of the trust, which in itself constitutes an abuse of such figure, the affectation is aggravated, in the particular case of the State of Colima, the affectation is aggravated by the fact that, in the procedure of execution of the federal participations, the essential formalities of the procedure are not respected, leaving the State of Colima in a state of defenselessness.

It is noted that the foregoing does not mean that the federal entities, such as the State of Colima, cannot assign as a source of payment or guarantee the federal participations, but that the trust is not compatible as an assignment mechanism for such purposes, and in any case, the assignment would have to be made through the Ministry of Finance and Public Credit itself, through a procedure in which the essential formalities of the procedure are guaranteed to the parties.

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