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Contents

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EDITORIAL

MANUEL LIZARDI ALBARRÁN, NATIONAL AWARD IN LAW

It gives us great pleasure to share with all the clients and friends of the firm an event that has filled us with joy and pride: the awarding of the National Award in Law, granted by the Mexican Bar Association (Barra Mexicana Colegio de Abogados), to Don Manuel Lizardi Albarrán, for his exemplary professional life and service to Mexican society in the teaching and training of lawyers. Don Manuel Lizardi, a person whose wisdom and learning entire generations of lawyers have been able to attest to, has been a consultant to Von Wobeser y Sierra, S.C. since 1986.

The National Award in Law was created by the Mexican Bar Association in order to honor the legal profession in all its branches, including advocacy and the study and teaching of law. The distinction is granted annually to just one person, not for a single work, but for an entire professional career, taking into consideration services to Mexican society in the areas of the creation, expansion, exercise, investigation, teaching, and dissemination of the law and the legal profession.

Don Manuel Lizardi Albarrán was born in the city of Celaya, Guanajuato, on January 8, 1913. His parents were Fernando Lizardi Santana, Constitutional Representative and First Secretary of the Constitutional Convention, and Teresa Albarrán Espinosa.

He studied law from 1936 to 1940 at the Law School of the National Autonomous University of Mexico. On July 14, 1945, he took his professional exam, defending the thesis *Essay on the Legal Nature of the Trust*, which was approved unanimously and earned him an honorary mention.

Don Manuel was a pioneer in Mexico in the area of the trust, and that is where he has made his most important contributions to the law. Perhaps more than anyone, he promoted the instrument as a tool for resolving, with great certainty, problems that were challenging the development of the country in the areas of tourism, labor, foreign investment, real estate investment, business, pensions, guarantees, and successions, among others.

In 1968, Don Manuel was appointed Legal Director of the National Bank of Mexico (Banco Nacional de México). From 1968 to 1982 he acted there

as Secretary of the Board of Directors, and from 1982 to 1986 he acted as advisor to insurance companies and brokerage firms previously linked to that bank, and whose assets were not subject to the nationalization decree.

Don Manuel has trained great lawyers, not only in the practice of law but also as a professor. For more than forty-six years, he guided students through his class "Introduction to Commercial Law" in the Escuela Libre de Derecho, and they admired him enormously.

His dedication to and unwavering and strict observance of the ethical rules involved in the exercise of the profession would be less important if those of us who have had the honor of being his work companions, students, or friends did not apply his lessons in our practice.

Don Manuel never attempts to provide us with definitive truths; he works to develop our legal reasoning in order to find, together, solutions to the problems set forth—that is how sound judgment is forged. Don Manuel, always sharp in his observations and with well-intentioned irony, likes to stimulate us. It never fails that after hearing his comments we feel compelled to turn to our books in order to satiate a thirst for knowledge that is motivated by him and his guidance.

Don Manuel Lizardi is a man of deep sentiments. His loves, which are many, occupy the principal places in his life: his faith, his family, his country, his friends, his work, his school, and his students. In particular, his close family is a faithful reflection of the qualities he himself holds: joy, unity, sincerity, solidarity, strength, and moderation.

Working with him is enjoyable and creative. All of us who work in Von Wobeser y Sierra, S.C. feel fortunate and proud to learn every day with a great lawyer and person such as Don Manuel Lizardi.

At this time, Don Manuel Lizardi is finishing and about to send to press his book *La Ley General de Sociedades Mercantiles comentada* (*The General Law of Business Organizations, with Commentary*), which contains serious and profound studies of each article of said law, studies done with the quality and legal competence that only someone of his stature could achieve in legal research.

Those of us who have had the enormous pleasure of knowing him, and cherishing him, know that there are persons and moments in life that are not forgotten, that do not leave us, that stay with us. Long live Don Manuel!

Sincerely,
Claus von Wobeser

CORPORATE

ANALYSIS

ARTICLE 15 OF THE GENERAL LAW OF BUSINESS CORPORATIONS

The Article

> In cases of exclusion or removal of a partner/shareholder, except in variable capital corporations, the company may retain the portion of the capital and profits of said partner/shareholder until the operations pending at the time of the exclusion or removal are concluded, and at that time liquidate the equity corresponding to that partner/shareholder.

Comments

This article states a right of the company and a liability of the partners/shareholders that are removed or excluded from the company, and in turn a protection for the creditors of the company, for the company itself, and for the partners/shareholders that remain in the company. The text of the article is general and thus applicable to all types of companies, with the exception of variable capital companies, but with the tendency to be applied primarily in the case of companies in which the partners/shareholders are only liable for up to the amount of their contributions to the company.

The existence of this article has an obvious explanation. It is a natural and legal principle that every person who forms part of a company is indirectly responsible, through his/her/its contribution, for the obligations of the company. But the departure of a partner/shareholder by either exclusion or removal implies in principle the triggering of such partner/shareholder's right to receive his/her/its equity; and the necessary consequence of receiving his/her/its equity is the reduction of the solvency of the company, which will have to meet the corporate obligations—including those contracted prior to the departure of the excluded or removed partners/shareholders—with the equity of the other partners/shareholders that remain in the company.

This would clearly be unfair and therefore fully justifies this article, allowing the company to retain the portion of the capital and the profits—to be added to the reserve fund—of the excluded or removed partners/shareholders until the operations pending at the time of the exclusion or removal are concluded. The final part of the article is

incomplete because it says: "[…] and at that time liquidate the equity corresponding to that partner/shareholder," when it should say: "liquidate *and pay* the equity corresponding to that partner/shareholder." The reason it is incomplete is that *liquidate* in this case only means 'to determine the amount of money owed.'

There appears to be an aspect that the lawmaker did not consider, but that cannot be ignored, which is that the exclusion or removal of a partner/shareholder is a reduction of the capital stock "made by reimbursement to the partners/shareholders" and that, in addition, requires the amendment of the company bylaws. Therefore, article 9 of the General Law of Business Corporations (Ley General de Sociedades Mercantiles, LGSM or the Law) applies, which obligates the company to publish the capital reduction three times, in intervals of ten days, in the official gazette of the state (or the Federal District) where the company has its domicile, and grant the creditors of the company the right of opposition for up to five days after the last publication.

This article is located within the general section of the Law and it is thus presumed that it applies to all types of companies. But it seems to us that the article would be difficult to apply in relation to the exclusion of shareholders of a stock corporation (*sociedad anónima*). Of course, in the cases of the general partnership, the limited liability partnership and the limited liability company, sections I, II, III, IV, and V of article 50 of the LGSM apply, which can result in the rescission of the partnership agreement with respect to any particular partners and therefore his/her/its exclusion. With regard to removal, we believe that this cannot result from a simple desire or wish of the shareholders, but the removal would be valid for shareholders who have voted against resolutions of the general extraordinary shareholders meeting that would cause them harm, for example, applying by analogy sections I, IV, V, VI, and VII of article 182 of the Law.

The Law does not establish the causes of exclusion of shareholders in a stock corporation (*sociedad anónima*), but perhaps the exclusion could be attempted and successfully applied in the case of criminal or civil actions against the company by a group of shareholders. The Law establishes the right of removal in article 206, which is applicable to shareholders who have voted against resolutions adopted by the general shareholders meeting on a change of purpose or nationality of the company or its transformation (LGSM, Article 182, Sections IV, V, and VI).

It is not at all clear why this article 15 makes an exception in the case of variable capital corporations. The general principle is that every partner/shareholder is liable with his/her/its contributions for the obligations contracted by the company while he/she/it was partner. The reasons for the exception may be the following: (i) in variable capital companies all third parties and possible creditors are warned that the capital of the company may be decreased by partial or total withdrawal of the contributions, and (ii) in the stock corporation (*sociedad anónima*), the limited liability company (*sociedad de responsabilidad limitada*), and the limited liability stock partnership (*comandita por acciones*) there is a minimum capital not subject to withdrawal. Finally, the Law is not clear, but it is our opinion that the exception should only be applicable to the variable portion of the capital, and not to the fixed minimum capital not subject to withdrawal.

TAX
ANALYSIS

TAX REFORM 2008

In January 2008, the Mexican tax framework changed significantly, primarily as the result of the introduction of two new taxes and other important reforms to the regulation of existing taxes.

The purpose of this article is to explain in general terms the principal characteristics of this new tax regime, for which we will first discuss the Single Rate Business Tax and the Tax on Cash Deposits and then comment on the primary changes introduced to the Income Tax Law and the Federal Tax Code.

1. SINGLE RATE BUSINESS TAX

1.1. General

On June 20, 2007, the Federal Executive presented to the Congress of the Union a bill for the Single Rate Business Contribution Law (Ley de Contribución Empresarial a Tasa Única). During the legislative process, the Chamber of Deputies changed relevant aspects of the bill, as well as its title, to Single Rate Business Tax Law (Ley del Impuesto Empresarial a Tasa Única, IETU). Finally, with the approval of the Federal Executive, the IETU was published in the *Official Federal Gazette* on October 1, 2007, and entered into force generally on January 1, 2008.

This law creates a new tax that is characterized basically by the following changes:

a. It substitutes the Asset Tax (Impuesto al Activo, IMPAC), and therefore the IMPAC law is being repealed as of fiscal year 2008. As was the IMPAC, the IETU is a complementary tax to the Income Tax (Impuesto Sobre la Renta, ISR) and, in fact, the law provides for the crediting of the ISR to the IETU;

b. It taxes at a fixed rate the taxable profits resulting from business activities, under a cash flow scheme;

c. To determine the taxable base, it provides for limited deductions to the accruable income, but in order to adjust its determination to that of the ISR, it also provides for the application of direct credits against the IETU;

d. Its payment is calculated by fiscal year, and it is paid by a declaration that must be filed within the same time period as the ISR;

e. To define most of its concepts, the IETU Law refers to the concepts of the ISR Law and the Value Added Tax (IVA) Law, there being a correlation between these laws.

1.2. Persons Subject to the Tax and Activities Taxed by It

Individuals and entities residing in Mexican territory, as well as residents abroad with a permanent establishment in the country, are obliged to pay the IETU for the income they obtain, regardless of where it is generated, as a result of the following activities:[1]

a. Alienation of goods;

b. Provision of independent services;

c. Granting of the temporary use or enjoyment of goods.

Residents abroad with a permanent establishment in the country must pay the IETU for income attributable to this establishment resulting from the previously mentioned activities.

However, the Law exempts the following persons from the application of the IETU: (i) the Federal Government, the states and the Federal District, municipalities, autonomous constitutional bodies and State-owned entities; (ii) those not subject to the ISR in certain cases; (iii) authorized données; (iv) individuals and entities with income obtained from farming, livestock, forestry, or fishing, for the income that is exempt under the LISR; (v) entities whose shareholders are pension and retirement funds residing abroad; and (vi) individuals that, on an irregular basis, engage in acts that are taxed by the IETU.

1.3. Rate

The rate to be applied for the IETU is 17.5% on the taxable profit (taxed income minus authorized deductions).

[1] The tax credit will be determined by applying the factor equivalent to the IETU rate to all the amounts resulting from payments for salaries, payments considered equivalent to salaries, and contributions to social security.

As a transitory provision, the rate for fiscal years 2008 and 2009 will be 16.5% and 17%, respectively.

1.4. Taxable base

1.4.1. Income

In order to determine the taxable rate, the law establishes three different classes of taxpayer income for this tax: (a) taxed income, (b) exempt income, and (c) income not subject to this tax.

a. **Taxed income** is the income that the taxpayer must accrue in order to apply the authorized deductions. In general terms, this type of income is income derived from the execution of the activities taxed under this tax, as well as the amounts that are charged to a purchaser for taxes or fees charged to the taxpayer and the amounts that are paid to the taxpayer as normal or late-payment interest, contract penalties, or any other concept, including advances or deposits.

   Taxes that have been transferred are not considered within this income. Special rules are established for income related to (i) advances or deposits returned to the taxpayer and previously deducted, (ii) amounts received from insurance companies for payments under a policy, (iii) financial institutions, and (iv) exchanges and payments in kind (market value or appraisal value).

   For purposes of its calculation, the taxed income is understood to be obtained when the amounts charged are actually collected, in accordance with the VAT Law.

b. The law establishes generally that the following **income** is **exempt** from IETU: (i) income derived from alienation of partnership interests or stock, documents pending collection, and negotiable instruments; (ii) income resulting from the alienation of nonredeemable real estate certificates of participation that are alienated by individuals on a nonregular basis or on the stock market by trusts engaged in real estate construction or acquisition; (iii) income resulting from the purchase and sale of Mexican or foreign currency, except for money exchange firms; and (iv) income of individuals from non-regular sources.

c. Finally, in order to avoid the decrease of the taxable base through unjustified deductions, the lawmaker established the existence of **income not subject** to this tax, which should not be taken into consideration at all for the calculation of the payment of the tax. Included in such income are royalties between related parties, interest that is not included in the price, and derivative financial operations when the underlying operation is not taxed by the IETU.

   As to royalties between related parties, only the payments between related parties for the temporary use or enjoyment of industrial, commercial, or scientific equipment will be taxed income and therefore authorized deductions. Royalty payments between independent parties are considered taxed.

1.4.2. Deductions

In order to determine the taxpayer's income under the IETU, the authorized deductions should be applied. In very general terms, all expenditures resulting from the execution of the activities subject to the tax can be deducted. The following are the requirements for doing so:

a. That the expenditures correspond to the activities subject to the tax;

b. That they are strictly indispensable;

c. That they comply with the deductibility requirements established in the ISR law;

d. That they have actually been paid.

1.4.2.1. Deductions of investments

Some authorized deductions are regulated separately, as with the deduction of investments. In fact, this special regulation is one of the concepts that make the bases for the payment of the IETU and the ISR different.

According to the IETU Law, investments made on or after January 1, 2008 will be deducted in their entirety (100%) in the fiscal year in which they are actually paid. On the other hand, the ISR Law provides that investments are deducted by depreciation in each fiscal year, applying the percentages authorized by such law.

With respect to new investments made between September and December 2007, one third may be deducted in each fiscal year beginning in 2008 until exhausted. In relation to provisional payments, one twelfth part of the amount corresponding to the fiscal

year will be applied, multiplied by the number of months passed in the fiscal year.

Finally, it is established that with respect to investments that have not been deducted according to the above paragraph and that were made between January 1, 1998 and December 31, 2007, a credit in the taxpayer's favor may be assessed, which will be applied against the IETU. To calculate this credit, the balance to be deducted from the ISR as of December 2007 must be adjusted for inflation. The amount will then be multiplied by a factor of 0.175 (0.165 for the year 2008 and 0.170 for 2009) and the result obtained will be credited at 5% in each fiscal year for ten fiscal years, beginning in 2008. This credit also affects the provisional payments.

With the above, practically 50% of the pending investment deduction is lost, and the remaining 50% is credited at a rate of 5% annually. If this credit is not taken during the corresponding fiscal year, is lost.

1.4.3. Credit for excess deductions

When the deductions authorized in a fiscal year are greater than the taxed income, the taxpayers will have the right to a tax credit against the IETU, determined by the amount resulting from applying the factor 0.175 (0.165 for 2008 and 0.170 for 2009) to the difference between said deductions and income. This credit can be applied against the ISR or against the payment (provisional and annual) of the IETU of the ten subsequent fiscal years until exhausted, being gradually adjusted for inflation.

If taxpayers do not apply such credit in the fiscal year in which they had the right to do so, they will lose the right to apply it in subsequent fiscal years in the amount that it could have been credited.

1.4.4. Credit for wages and salaries

Wages and salaries are expenditures resulting from a subordinated personal service and therefore they are not subject to the IETU, and may not be deducted. However, the law establishes a credit that the taxpayers may apply against the tax of the fiscal year for such payments, partially recognizing the economic effect of such expenditures.[2]

[2] The official definition of each of these activities is that included in the VAT Law. The name of this Law derives, precisely, from the activities it taxes.

The credit relates to expenditures for contributions to social security and income taxed under the ISR for wages and salaries, as well as for concepts considered equivalent to these, but it excludes expenditures for wages and salaries that are exempt from ISR, such as social welfare payments.

The application of this credit has an order of ranking below that of the credit for excess deductions referred to above; this credit may only be used against the tax generated in the fiscal year in which the credit was obtained.

1.4.5. Credit for inventories

A decree of the Federal Executive published in the *Official Federal Gazette* on November 5, 2007 established a credit against the IETU for inventories existing as of December 31, 2007, when the cost of what has been sold from these inventories is deductible for purposes of the ISR.

This credit can be applied according to the following rules:

a. The value of the inventory will be determined based on the valuation methods that have been used for purposes of the ISR;

b. The value of the inventory will be multiplied by the factor equivalent to the rate of the IETU, and the result obtained will be credited at a rate of 6% in each of the following ten fiscal years, beginning in 2008.

With respect to the provisional payments of the IETU, taxpayers may credit against them one-twelfth of the creditable amount corresponding to the fiscal year, multiplied by the number of months from the beginning of the fiscal year up to the month of the payment.

1.4.6. Crediting of the ISR

Since the IETU is a complementary tax to the ISR, the new law provides for the crediting of the ISR of the same fiscal year, the ISR being understood as the amount actually paid in terms of the ISR Law. For these purposes, also considered as ISR paid is the amount paid for dividends when they do not come from a CUFIN (Cuenta de Utilidad Fiscal Neta) and the ISR paid abroad with respect to income taxed by the IETU. The ISR is not considered actually paid when it has been covered through credits (except for taxes on Cash Deposits) and legal reductions.

1.5. Calculation of the Tax

According to what has been explained above, the tax for the fiscal year is determined by applying the tax rate to the result of subtracting the authorized deductions from the income and crediting several items, according to the following operation:

	Taxed income
(-)	Authorized deductions
(-)	Deduction of new investments [last quarter of 2007 (x) 1/3]
(=)	Resulting taxable base
(x)	Applicable rate [17.5% in 2010, 17% in 2009, and 16.5% in 2008]
(=)	IETU of the fiscal year
(-)	Credit for excess deductions
(=)	Subtotal
(-)	Credit for taxed salaries and social security paid by the employer
(-)	Credit for investments [1998-2007]
(-)	Credit for inventories
(-)	ISR of the fiscal year [without taking into account the amount covered by crediting (except taxes on Cash Deposits) and legal reductions]
(=)	IETU to be paid
(-)	Provisional payments of IETU
(=)	**IETU to be paid by the taxpayer**

One very relevant aspect of this new law is the so-called **mandatory order** in the application of the credits. In general terms, we can say that except for the Credit for Excess Deductions, which may be applied against the ISR or in subsequent fiscal years of the IETU, tax credits are only credited against the IETU to be paid by the taxpayer and only in the fiscal year to which they correspond—the right to apply them in subsequent fiscal years is thus lost.

1.6. Provisional Payments of the IETU

The provisional payments for the IETU of the fiscal year must be made monthly by declaration that will be filed at the same time as the provisional payments of the ISR. These payments shall be made on the basis of accrued income and deductions as of the month in question. They will be calculated by subtracting from the total accrued income of the period—from the beginning of the fiscal year until the last day of the month the payment is made—the authorized deductions corresponding to the same period. The corresponding tax rate will be applied to the result.

Finally, to calculate the provisional payments of the IETU, just as in its annual determination, the proportional application of certain additional credits previously explained in relation to the annual payment is allowed.

In the event it is not possible to totally or partially credit the provisional payments against the IETU, such amount can be offset against the ISR of the fiscal year, and the return can be requested when, after making such offset, there is a balance in favor of the taxpayer.

1.7. Refund of the IMPAC

In view of the fact that the entrance into force of the IETU Law repeals the IMPAC Law and its regulation and administrative provisions, the law establishes that taxpayers that were obliged to pay the IMPAC, and that actually pay the ISR in the fiscal year in question, can request the refund of the amounts, adjusted for inflation, that they actually paid for the IMPAC in the ten fiscal years immediately prior to the one in which the ISR is actually paid, provided such amounts have not been refunded previously and the right to request their refund under the repealed law has not been lost.

This refund cannot be greater than the difference between the ISR actually paid in the fiscal year and the lowest of the amounts of IMPAC paid in fiscal years 2005, 2006, or 2007 in terms of the repealed law, but in no case may the refund be greater than 10% of the IMPAC for which the refund may be requested. In calculating this difference certain reductions established in the regulation of the IMPAC Law are not to be considered.

The law also provides that when the ISR of the fiscal year is less than the IETU of the same fiscal year, the amounts taxpayers are entitled to request as a refund can be offset against the resulting difference.

Finally, it is provided that when the taxpayer does not request the refund or take the offset in a fiscal year in which the taxpayer could have done so, the right to do so in subsequent fiscal years will be lost.

1.8. Powers of the Authorities

The law specifically establishes the power of the tax authority to presumptively determine a tax liability for the IETU, determining the accrued income and applying the documented deductions and the corresponding tax rate thereto.

In any case, the taxpayer can choose to have the tax authorities apply, instead of the above, the coefficient of 54% on the presumptively determined income and the corresponding tax rate to the result.

1.9. Special Rules

We believe the above provides a general description of the regulation of the IETU. However, the same law establishes a special regulation of the following matters, among others: companies that consolidate fiscally, members of nonprofit entities, trusts, the financial system and derived financial operations, and the small taxpayer regime.

This special regulation is set forth in several chapters of the law, but for purposes of this study we will not enter into detail.

2. TAX ON CASH DEPOSITS

2.1. General

On October 1, 2007, the decree creating the Tax on Cash Deposits (Impuesto a los Depósitos en Efectivo) (IDE) was published in the *Official Federal Gazette*. This tax will enter into force on July 1, 2008.

Its purpose is to create a mechanism against informal economy, identifying and taxing those persons who engage in commercial activities and receive payments in cash that are subsequently deposited in the banking institutions of the country.

Among the most important characteristics of the IDE are the following:

2.2. Persons Subject to the Tax, Items Taxed, and Tax Rate

The persons obliged to pay this tax are the individuals and entities that receive cash deposits in Mexican or foreign currency in any type of account they hold in any of the institutions of the financial system. The cash deposits will be taxed at the rate of 2% on the total amount.

"Cash deposits" are considered to be those having such nature according to the General Law on Negotiable Instruments and Credit Operations (Ley General de Títulos y Operaciones de Crédito, LGTYOC), as well as the cash acquisitions of cashier's checks. The LGTYOC only refers to "bank money deposits," consisting of the deposit of money, in Mexican or foreign currency, and the transfer of its ownership to the one receiving it, the latter being obliged to return the amount deposited in the same specie.

Not considered cash deposits and therefore not taxed are deposits received in the accounts by electronic transfers, account transfers, negotiable instruments, and other documents and systems agreed with the financial system institutions; thus, all transfers that do not fit under the concept of cash bank deposits alluded to previously are excluded.

Financial system institutions are those considered as such by the ISR Law, among which are savings and loan companies; banking, insurance and bond institutions; financial group holding companies; public bonded warehouses; retirement fund administrators; financial leasing companies; credit unions; popular financial companies; variable rent investment companies; debt instrument investment companies; financial factoring companies; brokerage firms; money exchange firms, and special purpose financial institutions. Mutual fund management companies and companies that offer services of investment company stock distribution will also form part of the financial system.

2.3. Exemptions

The IDE will not be paid for the first 25,000.00 pesos that are received during each month of the fiscal year in one or more accounts of the same account holder in the same financial system institution. On the excess, the tax will be determined by applying the rate indicated in the above section.

As a general rule, the cash deposit will be considered made in favor of the registered account holder. As an exception and by written communication to the financial institution, the account holder can request that the amount of the exemption and of the tax be distributed among the persons that appear as co-holders of the account and in the proportion requested.

2.4. Tax Collection

The tax corresponding to the cash deposits made during the calendar month will be collected by the financial institutions themselves on the last day of the same month and will be delivered to the Federal Treasury no later than the third business day following the date of collection.

The total amount of the monthly tax will be collected, at the election of the institution, from any of the accounts that the taxpayer has open with it. If time deposits are made without the depositor having another type of account open, the tax will be collected by the institution after the due date of any of the time deposits.

If the taxpayer's funds are not sufficient to cover the corresponding tax, the tax or the balance will be collected when the taxpayer makes a deposit in said financial institution.

The financial institution must maintain the Tax Administration Service (Servicio de Administración Tributaria, SAT) duly informed with respect to the taxes not collected for lack of funds or failure of the institution itself. Otherwise they will be jointly and severally liable with the taxpayer with respect to the uncollected amounts.

2.5. Compulsory Collection

If it is found, from the information that the financial institutions provide to the SAT, that there are tax amounts pending collection, the tax authorities will automatically determine the corresponding tax liability, give notice to the taxpayer, and grant the taxpayer a term of ten business days to respond, with the understanding that once said period expires, the payment and collection of the tax liability plus adjustments for inflation and surcharges will be ordered.

2.6. Annual Crediting, Offsetting, and Refund

The IDE paid during the fiscal year can be credited first against the ISR to be paid by the taxpayer. If the IDE is greater, the difference can be credited against the ISR withheld from third parties and, if there is still a difference, it can be offset against the federal taxes owed by the taxpayer pursuant to the Federal Tax Code (CFF).

If there is still a difference, the taxpayer can request the return of this tax.

It is important to specify that the right to a credit will be lost if it is not taken, this with respect to a fiscal year and up to the amount allowed. In addition, the right to a credit is non-transferable with respect to who paid the IDE by either assignment or merger.

2.7. Monthly Crediting, Offsetting, and Refund

It is also possible to credit the IDE that has been paid (by collection) in a specific month against the provisional payment of the ISR corresponding to the same month.

As with the annual tax, if the tax paid in a month is greater than the amount of the corresponding provisional payment for the ISR, the difference can be credited against the ISR withheld from third parties in said month. If there is still a difference, it may be offset against the federal taxes of the taxpayer and, if there is still a balance in the taxpayer's favor, such taxpayer may request its refund.

In contrast to the fiscal year tax, a refund will only be possible if it is certified by a registered public accountant complying with the requirements established by the SAT according to general rules.

2.8. Monthly Crediting Option

Taxpayers can choose to credit against the amount of the provisional payment of the ISR corresponding to a specific month, an amount equivalent to the estimated amount of the IDE that they would pay the following month.

Once the amount of the IDE actually paid (by collection from the financial institutions) in the month in question is determined, the comparison with the tax credited in that month will be made.

If the IDE credited was greater than that actually paid, the difference must be paid together with the provisional payment of the ISR corresponding to the month following the one in which it was credited. If said difference represents 5% or more of the IDE actually paid, the difference must be paid with adjustments for inflation and surcharges.

If, on the other hand, the IDE that is credited is less than the amount actually paid, the difference can be credited, offset, or requested as a refund, as explained above.

3. INCOME TAX LAW

The principal changes introduced to the ISR Law are explained below.

3.1. Income – Loans, Capital Contributions, and Contributions for Future Capital Increases

As a measure to gain better control over the origin of cash flows and avoid certain transactions that can be re-characterized as loans, capital increases, or contributions for future capital increases, taxpayers are required to give notice to the tax authorities when they receive loans, contributions for future capital increases, or capital increases in cash, in national or foreign currency, greater than 600,000.00 pesos, within 15 days from the date on which such amounts are received.

The consequence of not giving the notice mentioned in the above paragraph is that the amounts received will be considered income accruable for purposes of the ISR.

3.2. Deductions

3.2.1. Donations

A maximum is established for the amount that can be deductible as donations. For legal entities it is up to 7% of the profits obtained by them in the immediately prior fiscal year, and for individuals it is up to 7% of their accruable income in the fiscal year prior to which the donations are granted.

Furthermore, the requirements données must comply with to be considered authorized données and for donors to be able to deduct the donations granted are made stricter. In this regard, beginning in 2008, données must inform the SAT of the donations received in cash, foreign currency, or gold or silver that amount to more than 100,000.00 pesos.

In addition, authorized données must inform the SAT of the transactions they execute among related parties and the services or goods they receive from the persons that have granted them deductible donations.

Finally, the authorized données must comply with the administrative requirements contained in the regulation of the ISR Law.

3.2.2. Salaries

As a result of the substitution of the credit for salary with the subsidy for employment, the new provisions that regulate the subsidy for employment must be complied with in order to deduct salaries.

3.2.3. Loss in sale of shares and partnership interests

The "cedular" regime continues. Thus, the taxpayer will only be able to deduct the losses generated by the sale of shares against the profits that the taxpayers obtain from the sale of shares; in addition, the ISR Law itself now includes the requirements for the deductibility of these losses, which were previously in the Regulation of this law.

Furthermore, to give greater opportunity to taxpayers to recuperate said losses, the period of application of the losses generated is increased from five to ten years, beginning in 2008.

In addition, measures are incorporated that indicate as an obligation that shares or partnership interests that are not quoted on authorized stock markets be alienated at market prices and the respective notices and transfer pricing studies be presented in the event these transactions occur between related parties.

3.2.4. Interest from guaranteed credits

It is provided that interest from credits that provide financing to a person and that are secured by stock or debt instruments of any kind, held by the borrower or parties related to the borrower that are residents of Mexico, can be deducted when the lender cannot legally dispose of it, except when the borrower is in default of any of the obligations agreed to in the respective credit agreement, as the result of these transactions not being considered guaranteed credits anymore.

3.3. Individuals

3.3.1. Alienation of stock by individuals on the stock market

Beginning on October 2, 2007, the alienation of shares issued by Mexican companies on the part of individuals on the stock market is taxed in any of the following circumstances:

a. The person or group of persons that directly or indirectly hold 10% or more of the shares representing the capital stock of the issuing company alienates, in a period of 24 months, 10% or more of the shares paid to the company in question, through one or more simultaneous or successive operations, including those carried out through derivative financial operations or any other analogous or similar operation;

b. The person or group of persons that has control of an issuer alienates this control through one or more simultaneous or successive transactions within a 24 month period;

c. The alienation of the shares is carried out outside of stock markets located in recognized markets;

d. The alienations are made as registration operations or protected cross trades or with any other name that prevents the persons carrying out the alienations from accepting more competitive offers.

We consider that this reform will require several clarifications and regulation by the tax authorities.

3.3.2. Rate for calculating the employee tax

The salary credit is substituted by the employment subsidy and both the ISR and the tax subsidy applicable to individuals are integrated into a single rate.

3.4. Tax Residents Abroad

3.4.1. Recognized markets in the alienation of stock

As a consequence of the reform of the CFF, the legal reference was adjusted by substituting the term 'markets with high trading volume' with 'recognized markets'.

3.4.2. Interest

Again, in the provisions applicable for one year the rate of 4.9% is established for 2008, which applies to the interest paid to banks that are registered and are residents of a country with which Mexico has in force a treaty to prevent double taxation, provided that the requirements of such treaty are complied with and that the banks are the actual beneficiaries of the interest.

3.5. Preferential Tax Regimes

The chapter that regulates the preferential tax regimes is restructured, with the following principal changes:

a. Foreign transparent legal entities are penalized, their income considered to come from preferential tax regimes, regardless of whether or not the corresponding income is subject to a preferential regime;

b. It is clarified that each one of the operations must be considered to determine if the income is or is not subject to a preferential tax regime. Notwithstanding this, when the operation is carried out through a foreign entity that pays taxes abroad, the tax profit or loss generated by said foreign entity must be considered;

c. The concept of passive income is modified, including therein the alienation of intangible goods; derivative financial transactions when the underlying transaction refers to debts or stock; commissions or brokerage fees; the alienation of goods that are not physically in the country, territory, or jurisdiction where the foreign legal entity or figure resides or is located, and of goods arising from services provided outside of such country, territory, or jurisdiction. Furthermore, income obtained without payment or generated from the alienation of real estate and the granting of temporary use or enjoyment of goods is excluded from the concept of passive income;

d. Previously, the option existed of not considering as income subject to a preferential tax regime the income coming from a country with which Mexico had in force an agreement for the exchange of information, or when the taxpayers had their financial statements audited by an accounting firm that was present in Mexico. However, beginning in 2008 this option is eliminated;

e. Provided certain requirements are complied with, the possibility is established of not considering the royalties from industrial patents as income subject to a preferential tax regime;

f. There is also the possibility of not considering as income subject to a preferential tax regime the income from the alienation of stock between companies of the same group resulting from an international restructuring, provided certain requirements are met.

3.6. Tax Simulation

A new power is arbitrarily granted to the tax authorities, consisting of the possibility of determining the simulation of legal acts exclusively for tax purposes.

This power can be exercised in relation to (i) preferential tax regimes, (ii) transfer pricing, and (iii) the determination of income from a source of wealth in the country.

Finally, although in order to determine whether there is tax simulation the authority can make presumptions, the authority must duly base the ruling in which the tax simulation is determined by fact and law.

4. FEDERAL TAX CODE

The primary changes introduced to the CFF are discussed below.

4.1. Receipts

Beginning in 2008, the tax authorities are enabled to require taxpayers to ratify the signatures of the filings they present, provided that the signature is not legible or its authenticity is in doubt.

This gives the tax authority a great deal of discretion in requiring said ratification, so it will have to be seen how this article is applied in practice and if its application results in slowing down tax procedures.

4.2. Representation Before Tax Authorities

For representation before the tax authorities through a power of attorney, a requirement to those already existing was added, consisting of the need to attach a copy of the identification of the taxpayer or legal representative, and allowing it to be checked against the original.

4.3. Refunds

The authority of the tax authorities to exercise review and enforcement powers exclusively to verify the validity of refunds is clearly established. In this respect, the following is established:

a. First of all, the exercise of these review and enforcement powers allows for the suspension of the time periods the authority has to process and carry out the refund of taxes paid;

b. In addition, the maximum term for the exercise of these powers will be 90 days from the date on which notice of their initiation is given to the taxpayer. This term can be extended for up to 180 days if in its exercise information is required from third parties or if the tax or customs authority requests information from authorities of another country or is verifying the origin of exporters or producers of other countries, pursuant to international treaties executed by Mexico, or powers are being exercised to verify compliance with the obligations established in articles 86, section XII (related parties abroad; 215 (transactions between related parties), and 216 (transfer pricing) of the ISR Law;

c. In addition, the exercise of these powers is considered independent from any other review and enforcement powers that the tax authorities may carry out. Furthermore, the exercise of the review and enforcement powers to verify the validity of refunds of taxes paid will be individual for each refund request;

d. It is established that once a refund has been authorized based on said review and enforcement powers, the tax authorities will have a term of ten business days to carry it out; if they do not, interest at the rate of surcharges will be generated.

It is established that when a refund is authorized without the review and enforcement powers having been exercised, the refund authorization will not constitute a favorable ruling of the authority, the review and enforcement powers being reserved, given that, if in the future it is determined that the refund authorization was incorrect, surcharges will be assessed on the amounts refunded, updated for inflation.

Finally, regarding refunds, the minimum amount under which the refund request must be filed electronically is decreased from 25,000.00 to 10,000.00 pesos.

4.4. Joint and Several Liability

A new premise for liability is added for administrators, managers, and directors of entities, consisting of vacating

the tax domicile without previously presenting the notice of change of tax domicile.

Likewise, with respect to the profit-sharing agreement, consistent with the tax treatment of this institution, the one jointly and severally liable for the activities of the profit-sharing agreement is changed. Thus, instead of the silent partners, the general partners—that is, the persons who act as representatives of the entity—will be jointly and severally liable.

4.5. Review and Enforcement Powers

4.5.1. Legal stay of merchandise

In relation to the exercise of powers to verify the legal stay of imported merchandise, it is specified that the tax authorities may request the documentation that proves the stay, holding, or import of the merchandise, and not only the receipts that prove their ownership or possession, as was previously indicated in the article.

4.5.2. Carrying out more than one domicile inspection in the same fiscal year

Two adjustments were made in relation to the possibility of carrying out more than one domicile inspection with respect to the same taxes, governmental charges, and periods:

a. First of all, in favor of the taxpayer, it is provided that any new inspection may be carried out only when facts different from those already reviewed are proven. Previously, the inspection was carried out and only if different facts were proved could a new payment of taxes be imposed. Now, the taxpayer is not obliged to go through a new review if new facts that could justify it are not first proven. Furthermore, it is provided that omitted taxes or governmental charges may only be imposed when they are based on different facts;

b. A new source of information that can justify a new inspection is established, which is any documentation that, offered by the taxpayers in the legal actions they file, has been objected to as false by the tax authorities and their objection has been declared valid by the court;

c. A new premise under which domicile inspections and desk reviews can be extended is established, consisting of the existence of causes of *force majeure* or an act of God. The term is extended until said causes disappear, which, in order to provide certainty to private parties, must be published in the *Official Federal Gazette* and on the SAT's Internet page.

4.5.3. Term for issuance of rulings

In relation to the ruling resulting from a domicile inspection, it is clarified that such ruling must be issued within a term that does not exceed six months from the expiration of the three-day term granted to the taxpayer to prove it did not violate the tax provisions.

4.5.4. New circumstances for not following the normal order of a domicile inspection

New circumstances are indicated in which the normal order of a domicile inspection should not be followed: (i) when the auditor's certificate is not effective for tax purposes, (ii) when the public accountant who formulates the certificate is not authorized or his/her registration is suspended or cancelled, (iii) when said accountant vacates his/her tax domicile without filing a notice of change of domicile, and (iv) when the purpose of the visit involves taxes or governmental charges on foreign trade.

Particularly, in relation to the review and enforcement powers regarding foreign trade, the possibility of initiating said reviews directly with the taxpayer (instead of carrying them out before the tax certificate is presented) will make the exercise of said powers more effective and authoritative.

4.6. Powers in Relation to the Determination of the Value of Acts, Activities, or Assets

With respect to the presumption of lack of correspondence between the deposits in the bank account of the taxpayer and its accounting records, it is established that such correspondence does not exist if the taxpayer does not present its accounting records to the authority when the latter exercises its review and enforcement powers.

Similarly, amounts greater than 1,000,000.00 pesos that are deposited in accounts of persons not registered in the RFC or not obligated to keep accounting records will be presumed as income, except when the taxpayer informs the SAT of such deposits before the powers of review and enforcement are initiated.

4.7. Facts on which Rulings May Be Based

In relation to the source of the facts on which tax rulings are based, it is established that the information provided by any authority, in addition to the tax authorities, may be considered as such. In this case, a term of 15 days from the moment the taxpayer is provided with the file or with information for him/her to state his/her arguments against any liability must be granted to the taxpayers. Said arguments will become part of the file that the tax authorities use in establishing the facts on which their rulings are based.

It is also important to mention that the tax authorities are expressly obliged to maintain confidentiality with respect to the information provided by independent third parties that affect the competitive situation of the taxpayers.

Finally, consistent with the inclusion of information provided by any authority as a source of facts on which to base tax rulings, digital copies of said information will be considered authentic, provided they have been certified by the competent authority.

4.8. Statute of Limitations on Powers

The conditions for finding joint and several liability are expanded to include cases of partners of legal entities and general partners of profit-sharing agreements. The statute of limitations in these cases is expanded from three to five years.

4.9. Reservation of Information and Data

In relation to the confidentiality obligation imposed on the tax authorities with respect to the information and data provided by third parties, the exceptions are updated and now include information that the tax authorities provide to the credit-reporting companies authorized by the SAT in terms of the Law Regulating Credit-Reporting Companies, as well as information provided for purposes of the notification by third parties referred to in the last paragraph of article 134 of the CFF. A new exception is also established regarding the information provided to third parties that are authorized by the SAT to make administrative notifications of tax acts or rulings.

Another exception is established for cases in which the tax authorities require information from the Federal Commission for Protection from Sanitary Risks of the Health Ministry, upon analyzing the requests for issuance of tax stamps and labels.

Finally, in support of workers the tax authorities are authorized to provide the Ministry of Labor and Social Welfare, upon an express request from the latter, with information regarding the sharing of the workers in the profits of companies contained in the institutional database and systems of the SAT.

4.10. Violation for Failure to Comply with the Obligation to Provide Information on the Subsidy for Employment

The violation for not providing information on the persons to whom cash amounts have been paid as a salary credit was adjusted to now reflect that said violation occurs if information on the amounts paid for the subsidy for employment is not provided.

4.11. Violations for Tax Advice

Providing services for not paying taxes is included as a violation, although this violation does not occur when counsel, advice, or services are given to not pay a tax *and* the written opinion provided to the taxpayer states that the interpretation in it is different from that of the tax authorities, or that his/her advice may be contrary to the interpretation of said authorities.

The fine for this violation in giving tax advice ranges from 35,000.00 to 55,000.00 pesos and it will be considered an aggravating factor if the advice has been given in relation to operations that have been identified as undue tax practices, unless this is stated in the written opinion provided. In this case, the fine will be increased by 10% to 20% of the amount of the unpaid tax, but this increase may not exceed twice the fees charged for the counsel, advice, or services.

4.12. Tax Fraud

The crime of money laundering can be prosecuted by the tax authority together with the crime of tax fraud.

4.13. Definition of Post Offices for Purposes of the Motion for Reconsideration

In order to facilitate the remote filing of motions for reconsideration, the tax authorities are authorized to

indicate by means of general rules other messenger service companies, in addition to the Mexican Postal Services, that can receive the documents for the filing of the motion for reconsideration.

4.14. Notice by Posting on Courthouse Bulletin Board

The way to calculate the time period for giving notice by posting on the courthouse bulletin board is clarified. The time period is calculated from the day on which the document to be notified is set or published, in which case the date of notice will be the sixteenth day after the day following the date on which the document was set or published.

4.15. Suspension of the Collection of the IETU Following Bankruptcy Proceedings

For taxpayers declared to be in bankruptcy proceedings, the collection of the IETU is suspended during said proceedings, that is from the issuance of the declaration till the signing of the agreement with the creditors or the declaration of the bankruptcy. In fact, in this context taxpayers subject to bankruptcy proceedings are authorized to request the exemption from payment of the IETU, even when there is no tax obligation determined by the tax authorities.

4.16. Disposition of Income by the Receiver of an Attached Business

The receiver has the obligation to separate from funds and pay, in addition to the amounts corresponding to salaries and preferred credits, those amounts corresponding to costs and other expenses indispensable for the operation of the business, prior to separating 10% of the income for the tax enforcement office. This modification allows the continuation of the business, avoiding its decapitalization.

Furthermore, receivers are obliged to approve the movements in the bank and investment accounts of the business in receivership, in order to maintain better control of the income and the expenditures of the business.

Finally, in order to prevent the federal tax authorities from absorbing the responsibility for labor debts when businesses are not alienated in the foreclosure sale and are awarded to the tax authorities, these are authorized to request the declaration of bankruptcy proceedings.

These are in our opinion the principal changes to the tax regime in Mexico for fiscal year 2008. These comments, however, are only illustrative of the general regulations, and any particular case must be analyzed individually, especially to identify any special rules that are beyond the scope of this review.

ENVIRONMENTAL

NOTE

AMENDMENTS TO THE GOVERNMENT PROCUREMENT AND PUBLIC SECTOR SERVICES LAW IN RELATION TO ENVIRONMENTAL REGULATIONS

On September 5, 2007, the Decree amending provisions of the Government Procurement and Public Sector Services Law (Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público, LAASSP) was published in the *Official Federal Gazette*.

In said Decree a second paragraph was added to section three of article 22 of the LAASSP. A second paragraph was also added to article 27.

Article 22 of the LAASSP establishes the responsibilities of the procurement committees created by governmental agencies and the states. The article is composed of nine sections, which, except for the third, remained intact.

Section three of article 22 only established that said committees had the responsibility of proposing the policies, terms and conditions, and guidelines in relation to procurement, and to authorize the conditions not established in them, informing the head of the governmental agency or entity so that, after an evaluation, it may include them.

With the amendment, a second paragraph was added to said section, which establishes the obligation of the committees to include in their policies, terms and conditions, and guidelines the criteria of environmental sustainability that must be observed in government procurement. The purpose of this obligation, according to the text of the now-amended section, is to optimize and utilize resources sustainably and thereby lower financial and environmental costs.

Furthermore, article 27 of the Law establishes that government procurement projects will be awarded, as a general rule, through a public bidding process, resulting in the presentation of solvent proposals in closed envelopes. The article contained seven paragraphs explaining in detail what we briefly indicated above. With the amendment, a paragraph was added, which, consistent with the addition to article 22 discussed above, establishes first of all that, in the case of purchases of wood, furniture, and office supplies made of that material, certificates granted by third parties registered with the Ministry of Environment and Natural Resources that guarantee the sustainable management of the forests are required; and, secondly, that bidders, in the case of purchases of paper for office use, must use a minimum of 50% recycled fiber and whitener free of chlorine. Sanctions apply to those who violate these provisions.[1]

As can be seen from these amendments, the Mexican State, through its laws, is beginning to develop a pro-environmental culture, which is a great step forward. The new reality affecting not only Mexico but also the entire world with respect to human-caused environmental deterioration means that these amendments to our laws in the name of environmental protection are correct and necessary.

[1] According to the second paragraph of article 27 of the LAASSP *in fine*, for the imposition of such sanction the provisions of that law and other applicable provisions will apply.

LABOR

ANALYSIS

OUTSOURCING COMPANIES

In today's business environment many companies use the external services of outsourcing companies in different areas, seeking to optimize their productivity and achieve administrative and labor savings.

In this article we will discuss the topic of outsourcing and mention the advantages and risks the contracting of this type of companies and their services represents.

1. What Is an Outsourcing Company?

It is a specialized and economically solid company that provides external, independent services to other companies or individuals with its own personnel and with sufficient resources of its own to cover its legal obligations.

It is very important that companies that intend to contract the services of outsourcing companies do not confuse them with so-called intermediaries, which are not financially solid and are defined by the Federal Labor Law as persons who hire or intervene in the hiring of another person or persons for them to provide services to an employer and who do not have their own resources to cover their labor obligations.

This is important in view of the fact that, in the event of a conflict, companies that use intermediaries—that is to say companies without sufficient resources to cover their legal obligations—for the hiring of personnel services will be considered by the labor authorities to be the true employers of such personnel and therefore could be obliged to:

a. Ensure that the personnel provided by the intermediary enjoys similar terms and conditions of employment as those who are employees of the company and work in similar positions within it, or

b. In case of a dismissal without justification, pay:

   i. An indemnification consisting of:

      - Three months of salary of the employee's daily integrated salary, which is composed of the daily cash payments (daily wage), bonuses, benefits, housing, premiums, commissions, benefits in kind, and any other amount or benefit provided to the worker as compensation for his or her work;
      - Twenty days of salary for each complete year worked, with the corresponding integrated salary;

   ii. Seniority premium, which is equivalent to 12 days of salary for each year worked, without exceeding double the minimum wage in the geographic area where the company is located;

   iii. Any other benefits that the intermediary owes to the employee, such as vacation, vacation premium, year-end holiday bonus, etc.

Furthermore, the companies that contract intermediaries could have problems with the Mexican Social Security Institute (Instituto Mexicano del Seguro Social, IMSS) and the National Fund for Workers' Housing Institute (Instituto del Fondo Nacional de la Vivienda para los Trabajadores, INFONAVIT), in the event that the intermediaries are in breach of their obligations to these institutes with respect to the personnel assigned to provide the services. In such case, the company can be ordered to pay retroactively the IMSS and INFONAVIT fees for up to the last five years from the date of breach by the intermediary, with the respective fines and adjustments for inflation.

2. What Are the Services that the Outsourcing Companies Provide?

Outsourcing companies provide a large variety of services. The most common are personnel management, guard, cleaning, cafeteria, transportation, and machinery and equipment maintenance services.

3. What Should Companies Be Careful of When Contracting Outsourcing Companies?

Companies that wish to contract outsourcing companies should ensure that:

a. The services that the outsourcing companies offer are carried out by personnel assigned and contracted by them for such purposes;

b. The services are carried out in the domicile of the contracting company only if it is necessary. In any

other case the services should be provided from the domicile of the outsourcing company;

c. The outsourcing companies have the following characteristics:

   i. They are independent and execute the services with sufficient resources of their own to comply with their labor obligations to their workers, which is to say that the outsourcing company must be financially solid enough to respond to and comply with the labor obligations it has with its employees;

   ii. They have been in business for some time and are known in the market;

   iii. They are registered in the Federal Taxpayers Registry;

   iv. They have a domicile where they conduct their business;

   v. They provide their services to different companies or clients (it is advisable to request information on the outsourcing company from other clients);

   vi. They prove that they are registered as employers before the IMSS and the INFONAVIT;

   vii. They prove that they have complied with their obligations as employers to their employees and that they have executed individual employment agreements with each of their employees, in which they are indicated as the employer;

   viii. They are up to date with regard to withholdings, payments, fees, income tax payments, payments to the IMSS and the INFONAVIT, and deposits with the Retirement Savings System (Sistema de Ahorro para el Retiro, SAR) in relation to their employees.

4. What Happens if the Outsourcing Company Does Not Have the Above-Mentioned Characteristics?

As explained in section 1, if the outsourcing company does not have sufficient resources of its own to comply with its employment obligations to its workers, the company benefiting from the services, in the event of a dispute, could be considered by the labor authorities to be jointly and severally liable for such obligations.

5. How Should the Contracting of an Outsourcing Company be Documented?

The contracting of an outsourcing company should be documented with the execution of a services agreement that should contain, among other, the following elements:

a. Representations and warranties by the outsourcing company that it meets the requirements referred to in section 3 above;

b. A clause that adequately justifies the need for the service or services being contracted;

c. A clause clearly indicating that what will be paid to the outsourcing company for the services provided will be fees, excluding any other type of payment such as salaries, benefits, or social security payments of the employees of the outsourcing company. It is very common for this type of agreements to mistakenly include provisions that establish an indirect economic dependency between the company contracting the service and the personnel assigned to provide the service; since economic dependence is one of the elements constituting employment, it could be assumed that the outsourcing company is a mere intermediary and that the contracting company is the real employer of the personnel assigned to provide the services;

d. A clause in which the outsourcing company assumes responsibility as employer of its employees and agrees to comply with all its labor obligations;

e. A clause in which the outsourcing company (i) releases the contracting company from any labor liability with respect to its employees, (ii) agrees to hold the contracting company safe from harm from any dispute, and (iii) agrees to pay any expenses and fees that the company contracting the service may incur.

It is very important that the services agreement to be executed with the outsourcing company be carefully reviewed in order to avoid from its drafting the presumption of the existence of an employment relationship between the employees of the outsourcing company and the company contracting the services. In this regard, it is very common for the drafting of these contracts to suggest some type of subordination (work instructions, work schedule, etc.) between the compa-

ny contracting the services and the employees of the outsourcing company, which, together with the above-mentioned economic dependence, can be presumed to constitute an employment relationship.

6. Conclusion

We recommend that before executing any agreement with an outsourcing company, it be verified that such company has the above-mentioned characteristics and that legal assistance be requested for the drafting and review of the services agreement.

ADMINISTRATIVE

NOTE

PROCESSING OF AMPARO PROCEEDINGS IN ADMINISTRATIVE MATTERS

On February 23, 2007, ruling 5/2007 was issued by the Supreme Court of Justice of the Nation. This ruling has special relevance for the processing of amparo proceedings in administrative matters and was issued in order to facilitate the processing of amparos in review and direct amparos in review in administrative matters in which constitutionality problems persist. The following procedure was structured for the processing of the above-mentioned matters:

1. As a general rule, the Chambers of the Court will have jurisdiction over said amparos;

2. In the event that the Chambers consider that the matter should be resolved by the Plenary of the Court, they will justify their position and send it to the Plenary. The same remission will occur in the event that the Chambers consider that with the resolution of the matter they would depart from some precedent established by the Plenary itself;

3. In the event that there are three or more matters with analogous constitutionality problems, a Commission of Court Clerks of the Federal Supreme Court of Justice will be created, which shall draft a ruling to resolve the problem set forth within a term of two months. In the proceedings initiated to resolve these matters, any time limits will be stayed upon the formation of such Commission;

4. If the Plenary or the Chambers resolve on the constitutionality of federal laws, international treaties, or constitutions of the states, the Court will remit the matters pending resolution to the Collegiate Circuit Courts through their Assistant Office of the Court Clerk.

In view of the issuance of ruling 5/2007, the Chambers of the Court will have jurisdiction over matters that involve administrative constitutionality issues with respect to the resolution of amparos in review and direct amparos in review. In the case of the explained exception, the Plenary will have jurisdiction.

ARBITRATION

NOTE

RESOLUTION OF INCONSISTENT JUDICIAL PRECEDENTS CONCERNING VALID APPEALS DURING THE PROCESSING OF AN ANCILLARY PROCEEDING FOR THE ENFORCEMENT OF AN ARBITRAL AWARD

When two bodies of the Federal Judicial Branch entitled to issue binding interpretations of a particular legal provision do so with different results, thereby creating what we know as inconsistent judicial precedents ('*contradicción de tesis*'), the intervention of the Supreme Court of Justice of the Nation (*Suprema Corte de Justicia de la Nación*, SCJN) is necessary in order to establish a consistent interpretation that creates a predictable legal framework and thereby strengthens legal certainty in the country.

On June 13, 2007, the First Chamber of the SCJN resolved inconsistent judicial precedents on appeals that are valid during the processing of an ancillary proceeding for the enforcement of an arbitral award. The source of such inconsistent judicial precedents was the interpretations issued by the Seventh Collegiate Court in Civil Matters of the First Circuit and the Fourth Collegiate Court in Civil Matters of the First Circuit, in relation to the interpretation of article 1463 of the Commerce Code, which establishes that the rulings in an ancillary proceeding for the execution of an award will not be subject to appeal.

The first of these courts established that the definitive rulings of an ancillary proceeding of recognition and enforcement of an arbitral award cannot be appealed, and that the decisions issued during the ancillary proceeding may only be challenged through an appeal for reconsideration.

On its part, the Fourth Collegiate Court in Civil Matters for the First Circuit established that all actions during the ancillary proceeding for the recognition and execution of awards—court orders, interlocutory judgments, and any other—are unappealable.

As can be seen, the inconsistency lies in the possibility of challenging the non-definitive rulings (decrees; provisional, definitive, or preparatory orders, and interlocutory decisions) issued during the proceeding for the recognition and execution of awards through an appeal, since for one of the courts the appeal for reconsideration that allows the same judge who hears the case to revoke his or her own rulings is valid, while for the other court such possibility does not exist.

On the above, the First Chamber of the SCJN, with Minister José Ramón Cossío Díaz as drafting judge, concluded by unanimous vote that nondefinitive rulings issued during an ancillary proceeding for the recognition and execution of arbitral awards cannot be appealed.

The First Chamber based its conclusion on the argument that, since arbitral proceedings are intended to rapidly and expeditiously resolve commercial disputes, the ancillary proceedings filed for the recognition and execution of the decisions issued in these types of proceedings should have the same speed, practicality, and expeditiousness, since it would be illogical to allow, on the one hand, the matters submitted to arbitral proceedings to be resolved simply and promptly and, on the other hand, the processing of ancillary proceedings for the recognition and execution of their awards to involve greater procedural complexity for their resolution, as would occur if the appeal of intermediate decisions was allowed.

The above was established in court precedent 105/2007, identified under the heading of "Ancillary proceeding of recognition and execution of arbitral award. The intermediate rulings issued in it are not appealable (Interpretation of article 1463 of the Commerce Code)." This interpretation strengthens the legal framework applicable to arbitration in Mexico, being a true reflection of the commitment of the highest judicial body of the country to recognize and promote the resolution of disputes through alternate mechanisms to the jurisdiction of State institutions.

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