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Recent Developments

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Taxation

Venezuela

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Tax reform in Venezuela: a constitutional problem

On 29 January 2020, the National Constituent Assembly (Asamblea Nacional Constituyente or ANC) published three laws in the Official Gazette with tax content, framed in what they called 'tax reform'.

It is important to keep in mind that, in Venezuela, Parliament and the body of legislative power is the National Assembly (Asamblea Nacional or AN), and therefore, it is only the AN and not the ANC that is constitutionally competent to discuss and enact laws.

Despite the political crisis that Venezuela has been suffering for decades, the AN was elected through the popular vote. As a consequence of the foregoing, the government party convened and established an ANC as a political counterweight to the actions of the legitimate AN, but without following the procedure provided in the National Constitution.

The competence of an ANC, according to Article 347 of the National Constitution, is to 'transform the State, create a new legal system and draft a new Constitution', not to replace (usurp) the legislative power (AN), which is what really happened. From 2017 to date, the ANC has not discussed any draft to the National Constitution, and has only usurped the functions of Parliament.

The so-called 'tax reform' of 2020 promulgated by the ANC emerged from an entity that was not properly constituted and does not have the power to enact laws, which means that said laws were enacted without following the constitutionally foreseen procedure, without due public consultation and economic impact studies.

All of the above makes the reform that we will comment on completely unconstitutional, regardless of its content.

Additionally, the content of the 'tax reform' seriously infringes constitutional rights and violates the elementary principles of the rule of law established both in the National Constitution and in the network of human rights protection treaties, such as the principle of legality, property law, economic property, the presumption of innocence and due process, among many others.

Despite all of the above, the said reform is recognised and applied both by the government of Nicolás Maduro and the Supreme Court of Justice, which has put Venezuelan taxpayers in a legally uncomfortable situation and in a serious constitutional problem, where the rule of law is not imposed over such serious violations.

What are the changes?

As stated, the ANC enacted three important tax laws: (1) a 'new' Organic Tax Code (Código Orgánico Tributario or COT); (2) a reform of the Value Added Tax (Ley de Impuesto al Valor Agregado or LIVA) Law; and (3) a reform to the Organic Customs Law (LOA).

The most relevant changes in each of these three laws are as follows:

COT

Despite the fact that it has been promulgated as a new Tax Code, the structure is the same as the 2014 COT, and only 13 per cent of the articles were reformed, but that small portion is materially significant and seriously affects the rights of taxpayers.

We have grouped the changes into four subjects:

CHANGES RELATED TO THE EXISTENCE AND VALIDITY OF THE TAX OBLIGATION

- The use of the 'tax unit' as a monetary updating unit was limited only for the determination of national taxes, creating a regulatory gap for regional taxes and non-tax sanctions.
- The exemptions can only be issued by the executive in a single act with a maximum duration of one year, and the rule of the intertemporal application of tax benefits was repealed, leaving a regulatory gap.
- The jurisdiction of the Central Bank of Venezuela was attributed to establish cases in which taxes will be paid in foreign currency.

CHANGES RELATED TO THE POWERS OF THE TAX ADMINISTRATION

- A procedure called 'subsequent control' was created allowing the tax administration to revise acts that have generated administrative *res judicata*.
- The powers of the tax administration were expanded to collect debts and to issue any precautionary measure without judicial intervention, including the freezing of taxpayer's bank accounts.

CHANGES RELATED TO THE SANCTIONING REGIME

- All the fines related to the formal and material fulfilment of tax obligations will be updated through the currency of greater value that is quoted in the Venezuelan Central Bank (Banco Central de Venezuela or BCV).
- Assumptions to consider a breach as a withholding agent are aggravated with prison terms and fines of 1,000 per cent of the amount withheld and not paid.
- Cases to extinguish criminal action to prosecute fiscal crimes were restricted in situations that may violate the presumption of innocence.

CHANGES RELATED TO PROCEDURAL ASPECTS

- The terms for the taxpayer to present allegations and defences are substantially reduced when the tax administration considers that there are indications of fraud.

VAT law reform

The main change brought by the reform of the Value Added Tax Law is related to the establishment of a differential and higher rate for operations in which the taxpayer makes the payment of goods and services with currencies and cryptocurrencies other than those issued by the national government (eg, Petro).

Additionally, a tax is established on the sale of real estate when it is paid with currencies and

cryptocurrencies other than those issued by the national government (eg, Petro). All of these new regulations have not been properly developed, which causes problems of harmonisation and economic and fiscal distortion.

Customs law reform

The main changes in the LOA are related to granting more powers to the executive to vary the tariff and customs treatment of merchandise and, as implemented in the COT, all fines related to formal and material compliance with tax obligations will be updated through the currency with the highest value listed on the BCV.

The impact of the Venezuelan economic crisis on the tax system

As reported last year, in recent years, the Venezuelan economy has suffered a considerable contraction, combined with rising inflation and currency devaluation. During the past five years of continuous recession, from January 2013 to December 2019, the gross domestic product receded by 46.2 per cent, while oil production and international reserves fell 50.7 per cent and 70.9 per cent, respectively. Inflation, for its part, exceeded 2.5 billion per cent during this time. This has been paired with an increasingly complicated devaluation by way of a foreign exchange regime that has, at times, featured up to three official exchange rates, in addition to the generally employed 'parallel rate'. As per official rates, on average, the value of the Venezuelan bolívar has fallen by nearly 1.5 billion per cent, while the 'parallel rate' has experienced a 429 million per cent devaluation.

Additionally, Petr6leos de Venezuela, SA (PDVSA), the BCV, the Supreme Court of Justice and the government of Maduro, as well as the main political actors, have been subject to strong sanctions by Office of Foreign Assets Control (OFAC), which has directly affected companies that had hydro-carbide operations or provided services to state-owned companies and, in general, for cross-border operations. Even between private companies not subject to sanctions, all acts of due diligence have increased considerably, all of which has an influence on companies' profits.

This situation has resulted in many taxpayers facing audits and tax procedures in which the tax authorities seek to determine income where there are constant and true losses due to the lack of adaptation of fiscal norms that can actually verify the economic reality of the taxpayers who live in an economic crisis environment.