

EY TAX Flash

Legal defense opportunities in 2015

The tax reform enforced in 2014 establishes several amendments to the Income Tax Law (hereinafter "ITL") and to the Federal Tax Code (hereinafter "FTC"), that might affect the taxpayers. In this sense, an analysis should be performed to determine the particular case of the taxpayers to consider the possibility of filing a legal defense in 2015.

Therefore, this tax alert details the legal defense opportunities that will be triggering in the subsequent months.

Electronic Accounting

Section IV of Article 28 of the FTC establishes the obligation for the taxpayers to keep and upload accounting books and records through the electronic tax drop box (*buzón tributario*) of the Tax Authority's website on a monthly basis, in accordance with the general provision issued for that purpose.

In this regard, in terms of section IV of Article 22 of the Federal Revenue Law and the Seventh Modification to the Fiscal Miscellaneous Resolution for 2014 and the Fiscal Miscellaneous Resolution



for 2015, establishing that the aforementioned obligation shall be fulfilled in tax year 2015 and will have specific due dates for legal entities, individuals, stock exchange taxpayers, legal entities and individuals dedicated to agricultural, livestock, forestry or fishing activities. As an example, the legal entities shall be submitting the electronic accounting information within the first three days of the second following month.

It is important to mention that during 2014, diverse taxpayers filed Amparo suits considering that the obligation to keep and upload information through the Tax Authority's website infringed several Constitutional rights, the Supreme Court of Justice has issued a precedent granting the provisional injunction against the aforementioned obligation. The Companies obtaining the injunction might not be obligated to file such information until the corresponding Amparo trial is resolved definitely.

For the taxpayers that did not file an Amparo suit against the electronic accounting information in 2014, a second opportunity arises during the first 15 business days following the first filing of the accounting information, for example if the chart of accounts is filed on April 3, 2015, the due date to file the Amparo suit will be on **April 24, 2015**.

In this manner, the taxpayer shall analyze the applicability of the provisions regulating the obligation to upload the accounting electronic records through the Tax Authority's webpage, to file the Amparo suit in duly time and form.

Income Tax Law ("ITL")

In terms of the tax reform published in the Federal Gazette in December 13, 2013, we consider there are elements to support that certain provisions of the ITL 2014 might affect the taxpayers, such as the following:

- ▶ Limitation to the deductibility of the exempted income paid to the employees that are partially or totally exempted from income tax.
- ▶ Limitation to the deductibility of the contributions paid to create or increase pension fund complementary reserves.
- ▶ Non deductibility of the contributions to the Social Security Mexican Institute (IMSS) in charge of the employee and paid by the employer.
- ▶ Computation of the profit sharing basis (PTU).
- ▶ Limitation to the deductibility of the payments under the concept of social benefits (prevision social).
- ▶ Limitation to the deductibility to related parties abroad under the concept of interests, royalties and/or technical assistance.
- ▶ Limitation to the deductibility of payments made to Preferential Tax Regimes (REFIPRES).
- ▶ Deductibility of exploration expenses carried out by companies dedicated to extraction activities.
- ▶ Presumptive determination of dividends derived from Transfer Pricing adjustments.
- ▶ Additional requirements in Law to apply international treaty benefits.
- ▶ Dividend distribution withholding.
- ▶ Additional tax to distributed dividends.
- ▶ Crediting of income tax paid abroad.
- ▶ Cost of goods inventory revaluation.
- ▶ Annual inflation adjustment derived from credit provided to an individual.
- ▶ Pre-taxed earnings account recalculation (CUFIN).
- ▶ Back-to-back loans.

Certainly it is necessary to evaluate the particular case of the taxpayers on a detailed manner, to determine which provisions affect them and which will be applicable derived from the filing of the annual tax return of 2014.

In this sense, the Amparo suit must be filed during the 15 business-day term following the filing of the annual tax return for 2014. For example, if the annual tax return is filed in March 30th, the due date to file the Amparo will be April 20, 2015.

Significant Transactions

It was published on October 20, 2014 through the Official Gazette, the latest modification of Annex 1-A of the Fiscal Miscellaneous Resolution of 2014, establishing the guidelines to submit the “significant transactions information return”, as set forth in article 31-A of the Federal Tax Code and filed through the official form 76 “Information of Significant Transactions”.

The following have been classified by the Tax Authorities as “Significant transactions”:

- ▶ Financial transactions established in articles 20 and 21 of the Income Tax Law.
- ▶ Transfer pricing transactions.
- ▶ Equity participation and tax residence.
- ▶ Restructures.
- ▶ Significant transactions (alienation of intangible or financial assets, alienation of goods on mergers or spin-offs, among others).

The deadline to submit the “Form 76” regarding the significant transactions of the tax year 2014 is on April 30, 2015, in terms of the Ninth Article of the Seventh Modification to the Fiscal Miscellaneous Resolution for 2014.

In this regard, the Fiscal Miscellaneous Resolution for 2015 established the following due dates to submit the “Form 76” regarding significant transactions:

Transactions to be conducted in	Due date to file the Official form
January, February and March 2015	Last day of May 2015.
April, May and June 2015	Last day of August 2015.
July, August and September 2015	Last day of November 2015.
October, November and December 2015	Last day of February 2016.

Regarding this obligation, we consider there are arguments to challenge its unconstitutionality of such provision by resulting contrary to the rights of legality and legal certainty.

The date to file the Amparo suit will be under the 15 business days following the submittal of the Form 76. Therefore, as an example, if the deadline to file the Form 76 for purposes of tax year 2014 is on April 30, 2015, the Amparo suit shall be filed on May, 25, 2015.

Mining duties

In terms of the tax reform for fiscal year 2014, three new duties applicable to mining concession holders were added: the special mining duty, the additional mining duty and the extraordinary mining duty.

The **special mining duty** shall be paid for all mining concessions holders no later than the last business day of March of the following year (an option to make advanced payments exists), by applying the rate of 7.5% over the profits deriving from the extractive activity. Mining concession owners are allowed to deduct authorized expenses for income tax purposes, except for depreciation of investments (except for mining prospecting and exploration investments), interest expenses, and inflationary adjustment.

As an incentive to small mining companies (i.e., with annual sales of minerals of less than \$50 million Mexican pesos), the Federal Budget Law for 2015, allows them to credit the special mining duty against their income tax.

The **additional mining duty** is imposed as a penalty when a concession has not being developed. The additional mining duty shall be calculated by taking 50% of the general mining duty (per the size of the property); in case a concession holder does not perform any exploration or exploitation works for two consecutive years during the first 11 year period of a concession. As from year 12, the penalty will be 100% of the general mining duty. This duty shall be paid on a semi-annual basis, in January and July of the corresponding fiscal year.

The **extraordinary mining duty** is applicable on the gross value of sales of gold, silver and platinum, without any deductions at a rate of 0.5%. This duty shall be payable no later than the last business day of March of the following year, but there is an option to make advanced payments.

In this regard, we have identified several controversial issues with respect to the interpretation on the scope and application of the new mining duties, which might affect taxpayers. In addition, there are arguments to support that these duties are against certain constitutional taxpayers' rights.

For instance, there are certain cases in which it is not possible to clearly identify the taxpayer, such as cases where the concession holder and the person exploiting the mine are different legal entities. In this case, the provision creates legal uncertainty, which could be challenged through an Amparo. Of course, it is important to analyze the particularities of the case to determine who of the both companies should file the Amparo suit.

Also, there are different interpretations regarding the calculation of the base for paying the new mining duties. This uncertainty allows taxpayers to challenge the constitutionality of the mining duties through an Amparo, in order to have legal certainty of the determination of the base.

It is important to mention that due to recent legislative changes, there is a possibility that the favorable resolutions granted in 2014 (and those pending to be ruled) to taxpayers that already filed an Amparo, may no longer be applicable in further years. Therefore, it is important to prepare a defense strategy to ensure better benefits to the company.

For those companies that are not obligated to pay the mining duties (due to a negative basis), there is a possibility to file the Amparo suit in the following months, even though no actual payment should be made.

Nevertheless, as in all cases, it is necessary to evaluate the specific circumstances of the case, in order to determine the best defense strategy, and the alternatives and term for filing the Amparo suit.

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