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1.Applicability Of Withholding At Source Of ICA Tax On Dividends And Participations

Note: After this article was written, the Administrative Tribunal suspended the statute subjecting dividends and participations to ICA tax withholding. Because suspensions are only made when a statute clearly violates another statute of a higher order, it is likely that the final ruling will declare illegal the ICA tax withholding on dividends and participations.

It is well known that in recent weeks, there have been increasingly intense discussions regarding the applicability of the Industry and Commerce Tax, ICA, on dividends or participations of companies domiciled in the city of Bogotá.

The extent of the discussion covers not only to liability to ICA as such, but also to its withholding at source and to establishing the persons who are subject to pay it.

Some topics of the current discussion are:

- An evaluation of the treatment that should be given to the dividend or participationcaused in favor of natural, non-commercial persons whose shares or interest constitutepermanent investments.

- There is argument as to the treatment that should be applied to partners or shareholders who, as traders, consider and enter their shares or interest in accounts as fixed assets.

The treatment that should be applied to dividends or participations paid or deposited in favor of foreign companies or persons neither resident nor domiciled in Colombia.

From the operative point of view, there is also argument as to the treatment applicable to withholdings at source on dividends or participations decreed prior to April 15, 2005, the date on which Decree 118 was issued, and which are paid after said Decree came into force, because they were decreed or deposited with a term allowed for such payment.

As this is very topical subject, we set out below some considerations in this respect.

Backfround

Clearly, the subject of applicability of ICA on dividends and participations has been the subject of considerable debate for a many years, even within Section IV of the Colombian Council of State, which has, on some occasions, considered that dividends

1 Decision 9086 of March 5, 1999
2 Decisions 13385 of December 3, 2003, and 7444 of March 22, 1996.

are not subject to ICA Decision 9086 of March 5, 1999. New jurisprudence, already reiterated on several occasions by Section IV of the Council of State, states that dividends or participations are indeed subject to ICA Decisions 13385 of December 3, 2003, and 7444 of March 22, 1996..

The following are reflections that have led us to consider that this should not be an absolute conclusion, applicable equally to all dividends or participations received by partners or shareholders, regardless of their specific circumstances.

- Reasons why the Council of State considers that dividends are subject to ICA

In the first place, an analysis of the criteria expressed by the Council of State in support of the position it has adopted:

Law 14 of 1983 established that ICA is applicable on, among others, commercial activities. Article 35 of the Law defined commercial activities as those "involved in the purchase and sale or distribution of goods or merchandise, both wholesale and retail and all others defined as such by the Commercial Code..."

Therefore, Law 14 of 1983 considers that the commercial activities defined in that Law and those defined as commercial activity by the Commercial Code are subject to ICA. Consequently, ICA applicability should be in accordance with the definitions of commercial activity established in commercial statutes.

For its part, Numeral 5 of Article 20 of the Commercial Code established the following as commercial activities for all legal purposes: "intervention as an associate in the incorporation of commercial companies, acts involved in the administration of same or negotiation for valuable consideration of their interests, quotas or shares".

On the basis of the foregoing regulations, and through systematic application of the concept of a commercial company, the Council of State has stated that dividends received by commercial companies are subject to ICA, regardless of whether the shares or the contributions that generate such dividends constitute fixed or movable assets in the investor.

However, the Council of State's pronouncements should be understood within the context in which they were made, that is, in cases in which the taxpayer is a Colombian commercial company. In this case, it could be concluded that, concerning a commercial company, any dividends or participations it receives should be understood to be income arising from its activities as a commercial entity and, therefore, they should be subject to ICA.

- Limitations on the interpretation of Council of State pronouncements

As explained, the Council of State's interpretation is fully applicable when the investor is a national commercial company or an individual merchant. However, this interpretation should not be extended to other types of investors for the following reasons:

Law 14 of 1983 states that the commercial activities it established and those defined as a commercial activity by the Commercial Code are subject to ICA.

While Article 20 of the Commercial Code defines mercantile acts, it should be stressed that not all mercantileacts are acts of commerce. For a mercantile act to be considered a commercial act, it must be part of the normal course of business, that is, it must be undertaken or practiced reiteratively. Therefore, mercantile acts are generic while commercial acts are in kind.

The foregoing means that, if an act considered mercantile under Article 20 of the Commercial Code is carried out or implemented, mercantile regulations are applicable to it, but it should not be considered a commercial act or, for the purposes of ICA, a commercial activity.

Consequently, our understanding is that the Council of State's interpretation is applicable only to commercial companies and merchants who are individuals, in which case their commercial activity may be understood to involve all their mercantile acts. Nevertheless, it appears to us that the foundation of the discussion remains valid because, if the merchant has shares as permanent investments or fixed assets, it may reasonably be thought, as the Council of State itself once stated, that such investments do not, per se, constitute a commercial activity and, therefore, ICA should not be payable on dividends or participations resulting from such investments.

- Foreign investors and non-commercial individuals

In view of our reflections so far, we suggest that, in the case of foreign investors and non- commercial individuals, their dividends and participations should not be considered subject to ICA.

It appears to us fundamental to maintain that, as far as non-commercial individuals are concerned, no liable taxable item exists in this respect, because no commercial activity takes place.

In the case of foreign investors, the great majority

of whom are commercial companies, two arguments can be made: in the first place, it should be taken into account that, for these investors, their shares are, in the vast majority of cases, permanent investments that should be understood to be fixed rather than movable assets; in the second place, a territorial criterion should be applied in order to decide what activity is carried out in Colombia and, in particular, in the jurisdiction of Bogotá. Foreigners clearly do not carry out commercial activities in Colombia, but individual, non-recurring actions, involving investment in national companies.

To consider that a foreigner without domicile in Colombia undertakes commercial activity in this country merely because it holds shares in national companies would be tantamount to stating that, because of the fact of holding such investments, the foreigner involved carries out permanent activity in Colombia and that, therefore, a branch should be established in Colombia. This would be an unacceptable conclusion. Neither can it be said that the foreigner carries out permanent commercial activity subject to ICA in Bogotá, but that it does not do so for the purposes of the application of Commercial Code regulations to permanent activities in the country.

In spite of the foregoing, it should be stressed that the Bogotá Finance Secretary has stated the opinion that dividends earned on investments by foreigners, with no distinction among them, are subject to ICA. Opinion 1081 of February 22, 2005. Therefore, companies should consider in detail the fiscal contingency implied by the system of withholding ICA at source on dividends earned by foreign investors that has come into force in the jurisdiction of Bogotá and which would initially by payable by the national company that distributes such dividends.

- Corporate groups

Taxation of dividends implies another considerable disadvantage in the case of corporate groups with pyramidal structures, in which the dividends produced by the lower ranking companies would be taxable independently, making each of the shareholder companies or higher ranking partners liable to such taxation, up to the level of shareholders of the parent or holding company.

According to the ICA structure established under Law 14 of 1983, income that can be excluded from the taxable base is expressly established and it is thus impossible to exclude any other income from the taxable base. A review of the income that can be excluded clearly shows that there is no possibility of excluding dividends received from national companies. This could eventually result in one same dividend being taxed several times and even in the respective fiscal authority being the municipal jurisdiction itself. This does not seem reasonable either.

- Place where dividends are taxed

Under Law 14 of 1983, ICA is payable on industrial or commercial activity or services provided within a municipal jurisdiction. Taking the foregoing into account, in the cases in which investments are classified as a commercial activity, the respective tax authority will be the municipality where the company that distributes the dividends is located, because ownership of the investment is understood to be located in that municipality.

However, this interpretation would result in many commercial companies being required to be registered as subject to ICA in the municipalities where the companies in which they hold their investments are located and they would also be required to fulfill the formal obligations of filing tax returns.

We should mention that the criterion referred to for foreign investors is also applicable in this case. A merchant may engage in a commercial activity in a municipal jurisdiction and be a mere investor in another. The territorial nature of ICA is indisputable and, therefore, it may happen that no commercial activity is carried out in the jurisdiction in which the company distributing the dividends or participation is domiciled.

Consequently, to determine that a commercial activity is understood to be carried out within the domicile of the company that distributes the dividends would cause considerable confusion as to the place where a merchant actually carries out its commercial activity. The municipality where a merchant does so could validly claim that the dividends earned by it form part of the taxable base corresponding to that municipality, as the company does not carry out any commercial activity in the jurisdiction of the domicile of the company distributing the dividends.

- Withholding of ICA in Bogotá D.C.

Last April 15, 2005, the Bogotá Mayor's Office of issued decree 118 establishing that companies which are Industry and Commerce Tax - ICA withholding agents and whose principal domicile is in the Capital District of Bogotá, must apply a 11.04‰ withholding at source of ICA on dividends and/or participations decreed, provided they are in excess of the sum of COL$521.000 when paid or deposited as due to their

3 Opinion 1081 of February 22, 2005.

shareholders or partners, whichever occurs first.

On this point, it is important to establish what happens in the case of dividends or participations decreed prior to said Decree 118, under which the obligation to apply withholding at source on the payment or deposit of dividends or participations was established.

We consider that dividends that had already been deposited on the date of enactment of this Decree should not be subject to withholding at source.

In our opinion, these dividends and participations should be understood to have been deposited by way of payments due on the date on which they were decreed by the respective Shareholders' Meeting, regardless of the term defined for their payment.

Consequently, all dividends decreed but not paid on the date on which the Decree came into force should be understood to have already been deposited on account as payments due and, therefore, they should not be subject to withholding at source at the time of their actual payment.

- Change of domicile of a company domiciled in Bogotá as an alternative to avoid the duty of withholding at source

For the purposes of preventing commercial companies from changing their principal domicile to elude withholding at source applicable to their partners, Article 5 of Decree 118 established: "The District Tax Authority shall undertake the required investigations to detect any fraudulent maneuvers, such as a change of corporate domicile, that might be carried out... in order to prevent the application of withholding at source of industry and commerce tax, and shall impose the penalties applicable under the respective legislation". In this line of thought, there is a question to be asked: what is the penalty established in legislation for a change in domicile of a company for other than commercial reasons? We consider that there is none. Unfortunately, there could be a migration of companies to municipalities close to the Bogotá Capital District. In this eventuality, it should be remembered that the District Tax Authority can use the power vested in it under Article 591-1 of the Tax Statute to officially determine the fiscal domicile of taxpayers. Nevertheless, taking into account all the arguments to which we have referred in regard to the place where the respective commercial activity takes place, the situation could end in chaos, which would favor neither private investment nor the regulatory stability so keenly sought.

Definitively, it would be best to return to the initial situation in which dividends and participations were not subject to ICA

2. Fiscal Benefits Of Contributions To Severance Payment Funds

Much has been said by experts in fiscal doctrine about the benefits of contributions made by both employees and employers to private pension funds and private pension insurance. However, there has been very little thought on the fiscal benefits that could be derived from contributions to severance payment funds administered by the Severance Payments Administrators (Sociedades Administradoras de Fondos de Cesantías).

The Tax Statute establishes that contributions to cumulative severance payment funds made by independent participants are deductible from income up to the amount fixed annually by the National Government. This may not exceed one twelfth of the taxable income of the respective year. For the year 2005, the amount fixed by the National Government is COL$47,644,000 (close to US$21,000 at recent exchange rates).

But, what should we understand by independent participants? In its Opinion 14886 of March 14, 2005, DIAN, the national tax and customs authority, stated that the concept of independent participants must be understood according to the definition in the General Financial System Statute, that is, an independent participant is "Any individual who, not being subordinated to an employer, carries out an economic activity personally and directly, or who, as an employer, works in his/her own company". According to these provisions, independent participants may be affiliated and contribute to funds administered by Severance Payment Fund Administrator Companies.

In this line of thought, as far as contributions to cumulative severance payments are concerned, the benefit was not established only for employees, but also for the self-employed, as well as for entrepreneurs who are taxpayers and who file income tax returns.

What does this benefit consist of? Basically, the Tax Statute authorizes self-employed persons to deduct from their income any contributions they make to cumulative severance payment funds administered

by authorized companies. That is, the Law encourages savings not only by employees but also by the self-employed.

We must bear in mind that, in this case, unlike that of pension contributions, the Law does not state that these contributions do not form part of the taxable base for the application of withholding at source, nor do they constitute non-taxable income, but rather the Law establishes that such deductions are admissible for the self-employed. Therefore, such contributions will be subject to withholding at source by their own payer and must be declared as taxable income by the self-employed, without prejudice to their being subsequently deducted from their income.

As far as limits on fiscal benefits are concerned, the differences between pension contributions and contributions to severance payment funds are very important. It is well known that, while the fiscal regulations state that voluntary pension contributions made by employees and employers are deductible in the case of the former and do not constitute a taxable base for withholding at source for same, neither do they constitute either income or unearned income for the latter, up to the amount that, added to the obligatory contributions, does not exceed 30% of the employee's taxable income for the year. The law requires the employee to keep these contributions in the pension fund or in private pension insurance for a period of at least five (5) years or, otherwise, he/she loses the benefit. Consequently, withdrawal of these contributions prior to the expiration of this period makes the benefit disappear and, therefore, in such an event the fund administrator must proceed to apply contingent withholding at source that should have been applied to the contributions withdrawn and the employee must declare the amount involved as taxable income in the year of the withdrawal.

On the other hand, in the case of the benefit of contributions to cumulative severance payments funds, the regulation does not refer to limits other than that of its amount. The Tax Statute states that such contributions by independent participants is deductible from income up to the sum of COL$47,644,000, without this exceeding a twelfth of the taxable income of the respective year. That is, the regulation only establishes a limit on the amount of the benefit and, therefore, one must conclude that, for these purposes, there is no limit on the minimum period of such contributions' remaining in the severance payments fund.

Consequently, if an independent participant decides to withdraw these contributions from a fund, they will not be subject to withholding at source by the fund administrator, as they constitute reimbursement of capital, neither must they be declared as taxable income by the participant for the same reason. As to any financial yields payable on severance payment contributions, since they imply no fiscal benefit, they are subject to withholding at source at the rate fixed for financial yields.

In conclusion, in the case of the self-employed, contributions to severance payments funds may become a useful fiscal planning tool, as they are admissible deductions from income, and no minimum holding periods in the funds is required, this being a limit that often makes the contribution non-viable for reasons of cash flow.

3. Importation To Colombia Of Intangibles - A FiscalAnd Customs Perspective

In recent years, the subject of intangibles has acquired great importance in our country, not only because of the amount they represent for companies, which in many cases exceeds the value of tangible goods, but also by reason of the arguments that have arisen regarding their fiscal and customs treatment, especially in the case of imported intangibles. It is precisely on the latter aspect that we wish to comment.

The importation to Colombia of intangibles should be analyzed from the point of view of customs and tax, taking care to avoid contradictions between the two points of view. From the customs angle, the importation of intangibles is only significant if it is made with physical support, as it is only this that gives rise to the entry of merchandise into national territory as it is understood to be a tangible good. On the contrary, when the importation of intangibles is made electronically, there are no customs related implications and, therefore, it is not necessary to go through any importation process nor are any customs duties payable.

It is thus the importation of intangibles by physical means that requires compliance with all the requirements and procedures, including the payment of customs duties. There has been a great deal of controversy in this respect, especially concerning evaluation by customs of intangibles to establish the base on which such duties are to be assessed.

For a number of years, the Colombian customs authorities considered that physical supports through

which intangibles are brought into the country should be evaluated including not only the value of the support, which is often minimal, but also the value of the intangible, so that the importer was required to pay both duties and VAT on the value of the intangible, in addition to all other taxes payable, not on the importation, but based on the payment abroad of royalties on the intangible. In spite of this position being supported by the customs evaluation regulations under the GAAT Value Agreement of which Colombia forms part, it has been the subject of considerable criticism. In the first place, it was asserted that, in the majority of cases, the value of the intangible was that of the royalties paid by the user to its owner during the time its use was permitted. This made it impossible to determine such value at the time of the respective importation. Secondly, it was affirmed that, due to the fiscal treatment of payments abroad in respect of the importation of intangibles under our legislation, they were subject to excessive taxation because, in addition to customs duties, they were subject to VAT, as well as withholding at source of income and remittance taxes on royalty payments.

These arguments resulted in the Customs Statute regulations stating that, in matters of software, it is possible to evaluate imported intangibles on the basis of physical supports, including only the value of these as an item for customs, providing the invoice identified separately this value and that of the intangible Article 214 of DIAN Resolution 4240 of 2000.. Nothing was stated expressly regarding other intangibles, such as, for example, advertising clips, but the Council of State stated that such advertising clips should be neither treated nor evaluated as merchandise because they were services.

In spite of the arguments that arose regarding the importation of intangibles from the customs point of view, it would appear that it is the fiscal treatment applied to payments made abroad in this respect which produces an excessive fiscal burden on such payments. From the fiscal angle, the authorities have understood that intangibles can be exploited in two ways: i) the sale of the ownership rights of same, in which case such sale would not be subject to VAT because it was a sale of an intangible and, if the sale was made abroad, there was no income from a national source and therefore would not be subject to any withholding of income and remittance taxes at source; and ii) permitting its use by third parties under license agreements. In the second case, what is involved is a service that, even though provided by a foreigner from abroad, is subject to VAT in Colombia because the beneficiary or receiver of same is located in this country and the respective payment would also be subject to withholding income and remittance taxes at source. Consequently, intangibles licensed from abroad and imported into Colombia with a physical support, would be taxed for VAT twice, unless the corresponding invoice itemizes the software and the physical support separately as part of the importation procedure.

In addition to VAT and as mentioned above, payments abroad made with respect to the exploitation of intangibles are subject to 35% withholding at source on 80% of the payment or deposit on account with respect to income tax, plus 7% of 80% of the net value to be transferred with respect to remittances. These withholdings, although in principle they are taxes levied on the foreign owner of the intangible, in the majority of cases end up being paid by the user, which considerably increases their cost.

It would appear from an analysis of the combination of customs and fiscal treatment of the importation of intangibles that, while they are not directly contradictory, they do produce an excessively heavy fiscal burden on these goods. This excessive taxation should be changed, as it is inconceivable that, in a country whose need for technology is so great, its use should be taxed so onerously.

4. Supervision Of Technical Assistance And Technical Services Agreements With Foreigners

In tax matters, the terms technical assistance and technical services are widely used and are frequently applied to contractual instruments, especially in the case of international transactions. There is a clear reason for the repeated use of these concepts, and that is the income tax related treatment of payments made in respect of technical assistance and technical services to persons resident or domiciled abroad, which is considerably more favorable that the treatment of payments abroad for other professional services This favorable treatment is also applied to consultancy services. .

It is because of this that, in fiscal planning for payments of services abroad, it is fundamental to assess whether or not they may be classified as constituting technical assistance or technical services. In this case, that is, if the services can be classified within these concepts, it is equally important that both the

4 Article 214 of DIAN Resolution 4240 of 2000

agreements signed and the evidence of the services provided clearly demonstrate that the service being paid for constitutes technical assistance or a technical service, as the case may be.

But, what may we understand by technical assistance and technical services? The term technical assistance has no legal definition; however, doctrine and jurisprudence have understood it to be an advisory service that implies the transmission of technological knowledge through active training, education and advice to the respective beneficiary or user Council of State, Fourth Section, decision of February 2, 2004.. On the other hand, technical services consist of carrying out temporary or permanent intellectual or material work, which is exhausted by its own implementation and goes no further than the purpose contracted. Therefore, the fundamental difference between these services is that technical assistance implies the transmission of knowledge to the user of the services, while in the case of technical services this transmission does not exist, as the knowledge is applied directly to the work contracted, without providing the user of the service with any knowledge.

According to our tax legislation, payments made to persons resident or domiciled abroad with respect of technical assistance or technical services are subject to withholding of income and remittance taxes at source at a rate of 10% of the amount of the payment or deposit Law 863 of 2003 established an exception to the fiscal treatment to which payments abroad are subject with respect to technical assistance, technical services and consultancy. According to the said Law 863, payments in these respects made to an entity resident, incorporated, located or functioning in a tax haven are subject to withholding at source at the combined rate of 39.5% with respect to income and remittance taxes. This regulation has not yet come into force, as the National Government has not issued the list of the jurisdictions that must be considered tax havens.. This is substantially lower than the rate applied to payments made abroad in respect of other professional services, which are subject to 35% withholding of income tax at source on the amount of the payment or deposit, and 7% remittance tax on the net amount of such payment or deposit.

It is precisely due to the favorable treatment granted by the law in matters of income and complementary taxes on payments made abroad with respect to technical assistance and technical services that they are carefully monitored by DIAN. This supervision is not restricted to verifying correct liability and payment of the respective withholdings, but also verifies compliance with all the deductibility requirements of these payments and, specially, the reality of the services provided.

Regarding the requirements to allow deductibility of these payments, we must remember that the law requires technology importation agreements to be registered with the competent authority, which at present is the Ministry of Trade, Industry and Tourism. That is, this registration requirement is applicable exclusively to technology importation agreements; therefore, and when the technical assistance implies a transmission of technological knowledge and, consequently, an importation of technology, the respective agreements must necessarily be registered as such. In the case of technical services agreements, there has been some controversy regarding the need for registration since, as we have already mentioned, no transmission of knowledge is involved and, therefore, strictly speaking, no importation of technology exists; however, to avoid disputes with DIAN, it is advisable to register these agreements.

For this registration, it is a requirement to identify the parties of the agreement, their nationality and domicile, the modality of the technology transfer to be imported, the contractual value of each of the elements of the services, as well as their term of validity. In addition, restrictive commercial clauses, such as permitting the supplier to fix the sale price of the goods or services to the user, are not acceptable.

Registration of these agreements with the Ministry of Trade, Industry and Tourism, in addition to being a requirement for the deductibility of payments abroad in these respects, constitutes a source of information for DIAN on the taxpayers who have signed them and their value. This information can be crossed- referenced with its own databases to facilitate audit processes. It is therefore of the greatest importance for taxpayers to be especially careful in drawing up and implementing these agreements as, evidently, they are likely to be checked by the tax authorities.

Another very important aspect in view of a possible supervisory process by DIAN is for the taxpayer to sufficiently document the reality of the service. Documents such as partial and final reports on the service, summaries of meetings held between the parties, memoranda on the purpose of the service, among others, are fundamental to proving that the service was actually provided.

To conclude, there is no doubt about the fiscal effectiveness of payments abroad with respect to tech-

5 This favorable treatment is also applied to consultancy services.
6 Council of State, Fourth Section, decision of February 2, 2004.
7Law 863 of 2003 established an exception to the fiscal treatment to which payments abroad are subject with respect to technical assistance, technical services and consultancy. According to the said Law 863, payments in these respects made to an entity resident, incorporated, located or functioning in a tax haven are subject to withholding at source at the combined rate of 9.5% with respect to income and remittance taxes. This regulation has not yet come into force, as the National Government has not issued the list of the jurisdictions that must be considered tax havens.

nical assistance and technical services, but for this reason, added to the fact that DIAN has a very important source of information on the existence of these agreements, it audits them even more intensely. Therefore, as part of adequate fiscal planning, taxpayers should carefully analyze the nature of the services they are going to pay for abroad, to establish whether or not they can be classified as technical assistance or technical services and, if so, they should ensure that they sufficiently document not only the contractual relationship, but also the actual reality of the service in order to avoid disputes on these aspects with the fiscal authorities.

5. Consolidation of financial statements

The Commercial Code reform of 1995 introduced the concept of corporate groups into our legislation. According to this reform, a corporate group exists when two or more companies, in addition to their having a relationship or a situation of subordination, share the same purpose and administration.

The concept of a corporate group includes two elements. The first is the existence of a situation of subordination, which occurs when the decision making power of a company is subject, either directly or indirectly, to the will of another or other persons. This situation is presumed when there is a shareholding control, a control of deciding majorities - especially of majorities to elect the respective board of directors - or control of the administrative bodies under agreements or contracts. It should be taken into account that this control can be exercised jointly or by individuals or institutions. The second element in the concept of a corporate group is the existence of the same purpose and administration. A single purpose and administration are considered to exist when the related companies pursue an objective established by the parent or controlling company by virtue of its power over the companies it controls, independently of the individual implementation of their corporate purpose. That is, the same purpose and administration does not mean that the companies' corporate purpose has to be identical or similar, but that all the companies are administered in accordance with certain policies and guidelines issued by the parent company.

When a situation of control and/or a corporate group is established, a series of obligations arise for the controlling company. The first is that of entering such situations in the commercial register within a specific period as of the date on which the situation arose, which is solely for informative purposes; that is, the registration does not establish a situation of control or a corporate group, but only declares it. The Superintendency of Corporations has repeatedly made pronouncements to this effect.

The second obligation that arises for an economic or corporate group, and the one that causes greatest concern, is that of consolidating its financial statements in accordance with accounting standards. Colombian legislation states that a controlling or parent company must prepare and disseminate consolidated financial statements that show the financial situation of the parent company and its subordinates as though they formed a single entity. This information has to be sent to the competent supervisory entity. In addition, for fiscal purposes, the Tax Statute expressly establishes the obligation for economic and/or corporate groups entered on the commercial register of the respective Chamber of Commerce to present their consolidated financial statements, in magnetic media to the National Tax and Customs Directorate - DIAN - at the latest on June 30 each year.

It is important to stress on this point that, according to the Tax Statute, economic and/or corporate groups registered with the respective Chamber of Commerce are under the obligation to present consolidated financial statements to DIAN. The question then arises as to what happens when such economic and/or corporate groups are not registered with a Chamber of Commerce. In this event, we may conclude that DIAN may not require fulfillment of this obligation, as the regulation clearly states that it is registered economic and/or corporate groups that are required to do so. In any event, it should be taken into account that, if the Superintendency of Corporations, or in other cases that of Securities or Banking, should declare, either officially or at a third party request, the existence of the economic and/or corporate group, it could impose a fine for non-fulfillment of the obligation to register.

According to the Superintendency of Corporations, the regulation that establishes the controlling or parent company's obligation to enter any situation of control or of a corporate group on the commercial register, does not make any distinction as to the domicile of such a company. Therefore, in the opinion of this Superintendency, the obligation to register covers both controlling or parent companies domiciled in Colombia and those with domicile abroad. As regards the obligation for corporate and/or economic groups to prepare and disseminate consolidated financial statements, the Superintendency of Corporations states that, in the event that more than

one subordinate company exists within this country, they must consolidate their financial statements, even if the controlling or parent company's domicile is abroad. In this case, the obligation must be fulfilled by the subsidiary company in Colombia with the largest net worth.

To this same effect, DIAN has repeatedly stated that, in any event, this obligation affects groups that are duly registered with a Chamber of Commerce.

We must therefore conclude that, in the case of foreign controlling or parent companies, the obligation to consolidate financial statements exists, but is limited to those of the companies domiciled in Colombia, as a foreign company that is not required to keep its accounts according to Colombian accounting regulations cannot be required to carry out a consolidation process for Colombian purposes.

Finally, it is noteworthy that, in addition to the obligations of controlling companies when a situation of control and/or of a corporate group exists, our Commercial Code establishes the subsidiary responsibility of such companies for the obligations of the subsidiary when the latter is in a creditors' agreement or a process of obligatory liquidation. The law presumes - although this presumption can be refuted - that the reasons for the creditors' agreement or the mandatory liquidation were the result of actions by the controlling company, that is, that the affiliate's or subsidiary's difficulties in paying obligations arise from or are the result of acts of control exercised by the respective parent.

6. Law of legal stability for investors

On July 8, 2005, Congress approved Law 963, wherby the legal stability regime for investors in Colombia was established to create a legal framework guaranteeing legal security for investors, with the intention of making investment in this country more attractive. The following are some extracts from the regime approved:

- Purpose

Under this Law, investors are allowed to execute agreements with the Colombian State to continuously guarantee the application of legal regulations, administrative acts or binding interpretations during the term of same, even if such law, agreement or interpretation is revoked or amended.

On this point, we should highlight the possibility of including interpretations made by the fiscal authority because, as they are not binding upon private individuals Article 264 of Law 223 of 1995., they could be considered not to be covered by this law. We consider that it should necessarily be possible for these opinions to form part of these agreements.

- Amount of the investment

Each legal stability agreement must have behind it a minimum investment of 7,500 minimum legal monthly wages. In this respect, it is important to notice that this amount sets a high bar (above COL$22,800 million, or US$10 million), which is a clear indicator that the objective of the law is to provide incentives for large investments in Colombia. In any event, the question arises as to whether or not this law violates the legally established principle of equality of treatment for foreign investors.

- Investments for which these agreements are admissible

The Law states that the agreements may be executed on new investments, these being understood to be in projects that are to go into operation after the law came into force.

Taking into account the definition of new investment, it may be thought that, if by the date of the Law's coming into force, investments had been made in the construction phase, the possibility of requesting the execution of this type of agreements would still exist.

- Requirements for execution of these agreements

The Law requires investors to present a study of the origin of the funds to be invested. It also establishes the obligation to present a technical feasibility study of the investment project, showing the number of jobs it will create. This is an additional condition that requires of the investor a major expense in terms of preparing said studies, which are not always made as a step prior to the investments. The question thus arises as to whether or not an investor could be discouraged from seeking an agreement, by having to fulfill a large variety of requirements such as these.

A further requirement is established for the use of valid agreements in the event of a substitution of a

8 Article 264 of Law 223 of 1995.

foreign investor, which is that of obtaining the Committee's approval of the new investor; this also gives rise to concern as to whether or not this is contrary to the principle of equality.

Finally, the Law establishes express obligations for investors to comply strictly with all its legal and regulatory obligations for the respective activity, including labor related and tax requirements. In this respect, the legislator appears to have forgotten that the activity is not carried out by the investor but by the receiving company, which is also responsible for complying with the respective labor related and fiscal obligations.

- Premium

On signature of the agreement, the investor must pay a premium of 1% of the value of the investment made each year.

- Limitations

The execution of this type of agreements involving the following aspects or sectors is prohibited: (i) those relating to social security; (ii) the obligation to declare and pay contributions or obligatory investments that the Government decrees in states of emergency; (iii) indirect taxes (VAT); (iv) prudent regulation of the financia!sector and (v) the public services tariff regime.

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