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1.New foreign exchange regime for free trade zones

Tbrough External Resolution 7 of September 19, 2008 (which modifies External Resolution 8 of 2000) and Interna) Regulatory Circular DCIN 83 of the same date, the Bank of the Republic substantially modified the foreign exchange regime applicable to operations conducted in free trade zones in Colombia.

Under these regulations users of free trade zones will be subject to the same conditions, rules and restrictions applicable to the operations of residents in the national customs territory. In other words, the fiction of foreign exchange "extraterritoriality" that govemed free trade zones in the past has been eliminated.

The following aspects of the new regulations should be taken into account:

l. All sales of goods from free trade zones to the rest of the world will have to be reintegrated into the country through known foreign exchange channels (foreign exchange market intermediaries or compensa tion accounts). Trus obligation is also subject to the time periods established by the Jaw for residents. That is, if the reintegration is not accomplished within the following year, the sale will be considered an active foreign debt transaction that must be registered with the Bank of the Republic.

2. Goods that are introduced into free trade zones from the rest of the world must also be paid within six months following the date of the bill of lading. If the payment is made after six months, the respective foreign indebtedness must be registered anda 40% deposit must be made.

The new regulations will have a profound impact on the business structure of sorne companies. While they may continue to maintain goods in the free trade

zone, they will have to make payment within the following six months. Othetwise, the corresponding foreign debt transaction will have to be reg.istered.

3. Finally, the regulations eliminate the ability of free trade zone users to maintain foreign cu.rrency bank accounts in Colombia. Under the new regulations, foreign currency accounts held by free trade zone users with

foreign exchange market interrnediaries had to be Ji-quidated before October 17, 2008.

As can be seen, the new regulations place free trade zone users in the same position as other residents of the country from a foreign exchange perspective.

2. Road infrastructure project concessionaires can use the deduction for investments in productive fixed assets

Through Opinion 085073 (53001-495) of September 3, 2008, the DIAN revoked the interpretation under which concessionaires could not take the deduction for investments in productive fixed assets for road infrastructure construction, rehabilitation and conservation projects implemented under the concession system.

With this new opinion the tax authority modified its initial interpretation, and it now allows the value of amortizable investments in road infrastructure projects to serve as the basis for calculating the 40% benefit for investments in productive fixed assets.

This interpretation applies exclusivel y to amortizable in vestments in concession projects, but it opens the door to the debate over whether amortizable investments can be used as the basis for the 40% benefit in all cases.

Under this new interpretation, concessionaires can make use of the deduction withoul objection or questioning by any administrative (DIAN) or judicial authority. This is because Article 264 of Law 1995 guarantees that actions taken by taxpayers in accordance with DIAN opinions may not be questioned, as follows:

"Taxpayers who act on the basis of written opinions of the Legal Office of the Directora/e of National Taxes and Customs may defend tlzeir actions on said basis in administrative and judicial proceedings. Ta.,'<-related actions taken in reliance on suclz opinions during their eQective periods mav not be ohjected to by the ta.x autlwrities. Wllen the Directora/e of National TcL es and Customs changes its position under a previous/y issued opinion it must publicize said change".

Therefore, we believe that as long as this new tax authority interpretation remai ns in effect, it will be possible for concessionaires to use the deduction wi thout running the risk of being questioned by the authorities.

3. Tax treatment of foreign debt transactions

The Colombian tax regime provides rules on the management and tax effects of foreign
debt transactions, relating to (i) the deduction of interest paid to foreign entities; and (ii)

the possíbility of giving tax treatment to the liability, with its corresponding effects on the basis for calculating presumptive income.

I. Deduction of interest paid to foreign entities for loans obtained abroad.

By general rule, interest paid to fmancial entities abroad is not subject to withholding tax and is fully deductible by the Colombian debtor.

This treatment is derived from the rule established by Article 25 of the Tax Code, in accordance with which the majority of these transactions do not generate Colombian source revenue.

It should be kept in mind that the law establishes that national source revenue is not generated by '•Joans obtained abroad by domestic, .foreign or mixed companies e8tahlished in the country, or autonomous patrimonies administered by fiducimy companies established in the country, whose activities are considered o.f interest .for the economic and social development of the countty, in accordance with the policies adopted by the National Economic and Social Policy Counci/".

Decree 2105 of 1996 establishes that the following constitute activities of interest for the economic and social development of the country:

a) All activities pertaining to the primary, manufacturing and service provision sectors, with the understanding that the service sector includes activities such as those related to transportation, engineering, hotel services, tourism, health care, comrnerce and housing constmction.

b) Activities related to Colombian investments abroad that are duly authorized by the National Planning Departrnent.

e) Investments made by domestic, foreign or mixed companies that reside or are domjciled in Colombia, consisting of the purchase of shares or equity interests in privatization processes or the capital ization of privatized companies withín two years following the date of privatization.

Now, although the majority of activities performed by companies located in the country fall within the above-described framework, it should be recognized that under the jurisprudence of the Council of State sorne activities (such as the purchase of accounts receivable) may not enjoy the above-mentioned tax benefits because they are not considered to be activities of interest to the country. This leaves the issue open to debate.

(a) Tbe purchase of accounts receivable:

The attainment of foreign financing for the purchase of accounts receivable has been considered not to be an activity that is of interest for the economic and social development of the country.

Judicial authorities have held that the purchase of accounts receivable for collection could not be classified as a service activity and, therefore, the deduction of interest on loans obtained abroad that were not subject to withholding at the source was improper.

In this regard, it sbould be noted that Decree 2105 of 1996 onl y lists activities that are considered to be services.

(b) Tbe purcbase of sbares or equity interests in domestic com panies that are not derived from privatization processes:

Altbough we know of no tax authority opinion on this matter, we are disturbed by the doctrinal position that has arisen on this point, which holds that the attainment of foreign loans for the purchase of shares or equity interests in domestic companies does not qualify asan activity of interest for the economic and social development of the country.

11. Tax treatment of tbe liability wben it is owed to a foreign entity that is associated with or related to tbe Colombian debtor.

Although Colombian companies can onl y obtain loans abroad from financia! entities, this does not prevent a financia!company, once it grants a loan, from assigning it to a non-financia! entity that mayor may not be associated with the debtor company located in Colombia.

In cases in which the Colombian company becomes a debtor of an associated or related foreign company, it becomes necessary, for purposes of presumptive income, to defme the tax treatment applicable to the liability owed toa related party abroad.

In ou r opinion, if the tra nsaction is subject to the transfer pricing regime (w hich is presumed because it was initiated with a financia!entity abroad), the liabili ty owed by the Colombian company to the related foreign company is a tax liability.

Our conclusion is derived from the following analysis:

(i) Article 287 of the Tax Code establishes tbat all debts owed by domestic companies to related parties abroad are considered for tax purposes as part of their own patrimony. Excepted from this treatment are balances owed that give rise to interest costs or deductions, and other financia! costs i n accordance with the provisions of Article 124-1.

(ii) Article 1 24-1 establishes that interest and other financia! costs or expenses related to debts owed to parent companies abroad are not deductible.

(iii) Finall y, Article 260-7 establishes that tbe limitation of Article 124-1 of the Tax Code is not applicable to domestic companies that are subject to the transfer pricing regime.

(iv) We believe that the following can be concluded on the basis of the above- mentioned laws:

The limitation on the deduction of interest and excha nge rate differences does not apply wben the loan has been obtained in accordance with the transfer pricing regime.

If it can be concluded tbat interest and exchange rate differences are deductible in compliance with the transfer pricing regime, it should be eq ually proper to conclude that the corresponding liability is a tax liability that reduces the base for calculating

presumptive income.

However, it should be noted that the DIAN, through Opinions 094036 of December 16, 2005 and O11052 of February 7, 2006, has concluded that Article 260-7 refers only to costs and deductions and, therefore, its application cannot be extended to balance sheet accounts sucb as those related to liabilities.

Consequently, we believe that arguments exist to defend the treatment of loan debts owed to related foreign companies as tax liabilities, when the transfer pricing regime has been complied with.

4. The principle of territoriality in the application of the industry and commerce tax

The principie of territoriality in the application of the Industry and Commerce Tax ("ICA"), enshrined in Law 14 of 1983, presumes that a given municipality can collect the tax only on revenues earned within its jurisdiction.

The taxpayer is considered to bave eamed revenues in a municipality when it has engaged in commercial, industrial or service activities in that jurisdiction.

It is not difficult to determine the activity subject to the tax when it is conducted in only one municipality. The problem arises when a taxpayer simultaneously performs activities in different municipalities and must assign to each of thern the corresponding portian of the ICA revenue base.

Unfortu nately, the law does not cover all eventualities, and it is left to municipal regulations to determine the treatment applicable to coexisting activiti es. In sorne cases the solutions have given rise to multiple conflicts.

The Council of State has held that certain criteria must be applied in each case m determining the territoriality of the tax[1]

This High Court has held that the detennining factor for the accrual of the tax is the place where the taxable event occurs[2]

Thus, according to the jurisprudence, legal formalisms are not relevant in detennining the municipality's taxi ng jurisdiction. Rather, the detennining factor for the assessment of the tax is the place in which the taxpayer physically conducts the taxed activity.

Some municipalities, such as Bogota, address the matter of ICA territoriality in thei r Municipal Tax Codes, which state that revenues obtained from activities performed in other territorial jurisdictions cannot be taxed, and that in such cases revenues eamed in other municipalities should be deducted from the taxing municipality's tax base, provided that the corresponding taxes ofthe other municípalities have been declared and paid.

The city of Bogota's Tax Code (Decree 352 of 2002) allows a taxpayer to excl ude from its taxable base the revenues it eams outside the Capital District for commercial and service activities, as long as the taxpayer can demonstrate the extraterritorial origin of the revenues through sales invoices, accounting records and other probative means.

Revenues eamed outside the District from industrial activi ties performed in various municipalities can be excluded from the taxable base if such revenues can be veri fied by separate accounting records for each production plant or site, sales invoices issued in each municipality, or other evidence that establishes the relationship between the territorial activity and the revenue derived from ie.

A particularly sensitive point involves the rules applicable to the withholding of taxes by companies domiciled in one municipal jurisdiction from payments made to providers of goods and services located in other jurisdictions who are not necessarily ICA taxpayers in the jurisdiction in which taxes are withheld.

Sorne taxpayers from whom taxes have been withheld in the above scenario bel ieve that they can exclude from their taxable base the revenues that were subject to the withheld taxes in other jurisdictions, without being sufficiently clear about the jurisdiction in wbich they are actually ICA taxpayers.

1 Council of State, Fourth Section, Decision ofNovember 16,2001 i n Case No. 12440, issued by Justice
Ligia López Díaz.
2 Council of State, Decision of J uly 7, 1989.

5. Sales taxes on technical services and technical Assistance provided in colombia from abroad

There is considerable confusion in our legal system about the definitions of, and the applicability of sales tax (VAT) to, technical services and technical assistance. These issues have been addressed by both the National Tax Authority and the jurisprudence of the Council of State.

The definition of technical services and technical assistance has been the subject of profound analysis in the jurisprudence as a result of the uncertainties generated by the interpretations of the Directorate of National Taxes and Customs (DIAN), under which both concepts have been given the same VAT treatment.

The confusion generated by the similar treatment of technical serviccs and technical assistance arises from Paragraph 3 of Article 420 of the Tax Code, which establishes that for purposes of applying VAT *"professional consulting, advisory ancl auditing services (...)" that are "rendered from abroad for users or recipients located in the national territ01y are deemed to be provided in Colombia, and, consequcntly, are subject to the sales tax ".*

Because of the foregoing, uncertainty has arisen about the proper definition to be applied to technical services and technical assistance for the purpose of detennining whether or not they constitute consulting or advisory services pursuant to Section 3(b) ofParagraph 3 of Article 420 ofthe Tax Code.

It is necessary to clarify that the problem posed by said article involves only the issue of the appl ication of VAT to technical services and technical assistance provided from abroad to users in Colombia, as it is clear in both the doctrine and the jurisprudence that VAT accrues when said services originate in Colombia, as provided in sub-section (b) of Article 420 of the Tax Code: ''Sales ta.:t sha/l be applied to: (..) b) The provision qf services in the nalional territaty (...) ''. Further, the problem does not involve technical services and technical assistance provided abroad for use entirely abroad, which are not subject to VAT.

It should be noted that the DIAN has sought to treat technical services as a type of consulting that is subject to VAT pursuant to Section 3(b) of Paragraph 3 of Article 420 of the Tax Code. In its view, technical services involve the application of technical knowledge by a provider for the benefit of a user, and this constitutes the provision of consulting services. However, the Council of State has repeatedly held that "technical services involve tite provision of temporary or continuous intellectual or physica/ labor that is completed upon its rendition and that does not go beyond tlle contracted purpose ", such that the user of said services does not receive any kind of illustration, training or guidance with respect to the work performed, and, therefore, such services cannot be understood to fall within the framework of consulting services.

The Council of State has used these arguments to nullify DIAN opinions based on the above interpretation, which have caused legal uncertainty among taxpayers with regard to the applicability of VAT to technical services provided from abroad to users in Colombia. In nullifying the most significant opinions on this matter, 003 of 2002 and 001 of 2003, the Council of State provided guidelines for the interpretation and definition of technical services and technical assistance.

Under the case law, it is understood that for a service to be considered a form of consulting or advising, it must involve the transmission of knowledge by the provider of the service. There is thus no major conflict between the DIAN and the jurisprudence of the Council of State with respect to the concept of technical assistance; for both, this concept necessarily involves the provision of advice by the provider of the service, which inevitabl y leads toa transfer ofknowledge to the user.

The Council of State has repeatedly held that technical assistance should be understood in its natural and obvious sense, and that it involves *''the qffering qf counse/ or opinions by an expert or consultant so that the user can resort to or be guided by said opinion. which uecessarily involves the transmission of said knowledge, and not only the receipt qf aid or collaboration to resolve the matter of interest or to learn the opinion of tite expert ".*

The foregoing deftnition leaves no doubt that technical assistance involves the transmission q(knowledge, while technical services involve only the provision of aid or collaboration to resolve a matter of interest, and they cannot be classified as advisory services that are subject to VAT when provided.from abroad.

3 Bogota Municipal Decree 352 of 2002.

Thus, the basic conclusion that should be reached is that VAT should not be appl ied to technical services provided from abroad to users in Colombia. This is because said services are not deemed to constitute consulting provided to the user, as they involve onl y the direct application of a technology without the necessary transfer of knowledge. The contrary applies in the case of technical assistance services, which should be subject to VAT because they contain all of the elements required to be considered advisory services under Section 3(b) of Paragraph 3 of Article 420 of the Tax Code.

6. Manage ment of vat paid in pre-operatlonal stages

Sales tax is imposed on the sale of tangible goods, the provision of services in the national territory[4] , the importation of tangible goods, and the distribution, sale or operation of games of luck and chance, with the exception of lotteries.

Thi s tax is assessed on the value added at each stage of production and distribution of the subject goods and services. Under this mechanism, the taxpayer may credit the tax collected in its operations against the V AT that it in tum must pay as a consequence of the acquisition of tangible goods and/or tbe provision of services that are necessary for the performance of its activitíes, which must be duly invoiced. In this way, the creditable tax becomes a factor in the determination of the balance payable on the taxpayer"s VAT retums.

In this regard, Article 488 of the Tax Code allows a credit only for VAT paid on the acquisition of tangible goods and services, and on i mports that comply with the following requirements: i) the imports must constitute a cost or expense of the business in accordance with the provisions that govem the sales tax, and ii) the imports must be used in operations that are assessed with VAT.

Taxed operations are those that entail the performance or perfecting of the VAT generating event, even when the tax rate is zero, as in the case of goods or services that the legislature has classified as exempt. Thus, there is no right to credit V AT paid on the acquisition of goods or services when the taxpayer's acti vities have been excluded from the tax, and any V AT paid in such case must be treated as an income tax-deductible expense.

Given the above considerations, the VAT credit applies only to VAT that has been duly invoiced and that complies with the above-mentioned requirements. In all cases, the maximum that can be credited is determined by the VAT rate applicable to the transaction performed. Accordingly, the credit is limited by the rate applicable at each stage of production or sale. Thus, if the VAT rate applicable to products used as raw materials is 16%, but the final product is su bject to a rate of 10%, the proper V AT credit would be 10%, and the V AT paid in excess of this rate would constitute an income tax expense.

However, in cases in which costs or expenses are incurred i ndistinctly for taxable, exempt and excluded activities and it is not possible to assign them directly to each of these types of activities, it is necessary to apportion the creditable V AT in the same manner as that in which the revenues from taxable, exempt and excluded activities are invoiced.

The legislature has imposed restnct1ons on the ability to credit VAT paid on the acquisition of goods or services. Tbus, it has expressly prohibited crediting the a mount of the tax paid on the importation or acquisition of fixed assets[5], or on acquisitions from those who ha ve canceled their taxpayer registrations or from fictitious or insol vent vendors.

In any case, creditable taxes can be booked only in the fiscal period that corresponds to the date on which they accrue, or in one of the two subsequent bimonthly periods. However, the request for a VAT credit must be made on the tax return for the bimonthly period in which the transaction is booked. Thus, the VAT taxpayer has a maximurn period of three bimonthly periods in which to book the transaction and request the VAT credit. Otherwise, the VAT paid must be treated as an additional cost of the good or service provided and as a deductible income tax cost or expense.

Now, it is pertinent to determine the tax treatment of VAT paid on the purchase of goods or services during the pre-operational stage, in which invoicing has not yet been initiated and the volume of taxable, exempt and excluded activities is not yet known.

In our opinion, VAT pa id during the pre-operational stage should be taken as a VAT credit on the bimonthly return that corresponds to the booking of the transaction.

4 Paragraph 3 of Article 420 of the Tax Code establishes an exception to the principie of territoriality as applied to the provision of services, by expressly enumerating the conditions under which services provided from abroad are deemed to be provided in the country, and, therefore, subject to the sales tax.

5From 2005 until A pril 30, 2007, the legislature authorized the crediti ng of VAT paid on the acquisition or importation of industrial machinery, and such credit could be requested within three years following the bimonthly period in which the acquisition or importation occurred, in the following manner: 50% during the first year, and 25% during each of the remaining two years. However, the amount of the VAT credit could not exceed the VAT owed in the corresponding bimonthly period.

7. Associated work cooperatives ano pre-cooperatives must pay payrolltaxes

On July 22, 2008, the President of the Republic signed Law 1 233 of 2008, which created special contributions to be paid by associated work cooperatives and pre cooperatives for the benefit of the National Training Service (SENA), the Colombian Institute ofFamily Welfare (ICBF), and the Family Assistance Funds.

The enactment of this Law put an end to the debate about. the collection of payroll taxes from associated work cooperatives and pre-cooperatives.

We should note that the obligation of associated work cooperatives and pre cooperati ves to pay payroll taxes took effect on January 1 , 2009.

Law 1233 of 2008 establishes the legal obligation of associated work cooperatives to make payroll tax contributions to the SENA, the ICBF and the Family Assistance Funds in the same amounts that are applicable to company employers. This amounts to a contribution of 9% of the ordinary montbly compensation received by the cooperati ves, with 3% for the JCBF, 2% for the SENA and 4% for the Family Assistance Funds.

It is worth noting that Law 1233 of 2008 provides an exemption from the payment of payroll taxes for associated work cooperatives and pre-cooperatives whose annual billing does not exceed 435 times the mínimum legal wage.

Finally, this legal provision contains a series of regulations applicable to the functioning of associated work cooperatives and associated work pre-cooperatives. such as those governing mínimum inalienable rights, control procedures, social security affiliation, prohibitions, social purpose and conditions for contracting with third parties.

8. Tax treatment of collective portfolios

I. Legal regulation and classification.

Decree 2175 of 2007 regulates collective portfolios (carteras colectivas), defining them as "any mechanism or vehicle for attracting or administering sums of money or other assets ". Collective portfolios can be open, staggered (escalonadas) or closed.

Open collective portfolios are those whose shares can be redeemed at any time. Funds are always open unless otherwise provided in their rules (Articles 1O and 11 of Decree 2175 of2007).

Staggered collective portfolios are those whose shares can be redeemed only a t the end of the periods established by the fund's rules. Also, the mínimum redemption period may not be less than 30 calendar days (Article 12 of Decree 2175 of 2007).

Finally, closed collective portfolios are those whose shares can be redeemed only at the end of the period provided for the duration of the fund.

2. Applicable tax regulations.

Collecti ve portfolios, as currently defmed, are not subject to special ta x regulations, and therefore it is necessary to look to the tax regulations that govem investment funds, securities funds and mutual funds, as these are also designed to attract and administer sums of money or other assets.

In this regard, Article 23-1 of the Tax Code provides that collective portfolios are not income tax payers. However, the remuneration received by the portfolio manager is considered to be revenue that is subject to withholding at the source. Also, collective portfolio revenues are distributed to the beneficiaries, after deductions, with the same character with which the fund received them and under the same ta x conditions as if the beneficiaries had received them directly (see Articles 23-1 and 368-1 of the Tax Code).

3. Transparency of Collective Portfolios.

It is necessary to analyze two aspects of collective portfolio transparency: (i) whether or not the nature of the collective portfolio's activities and tax revenue can be attributed to the shareholders, and (ii) wbether the distribution of revenues is subject to withholding at the source in the same manner as the activities perfonned by the collective portfolio.

a. Transparency of tbe revenue

In order to be able to analyze this issue, it is important to determine whether or not the nature of the activities of the collective portfolio should be attributed to the shareholders.

The DIAN has made it very clear that collective portfolios and their shareholders should be given the same tax treatment:

"On the contrary, {{ the revenues are earned by the mutual fimd as exempt income or as revenue that does not constitute income or capital gain, they maintain the same tax status at the time of their distribution to shareholders, that is, as exempt income or income that does not constitute income or capital gain" (DIAN Opinion 87004 of2007).

"[...} tlze revenues qf these funds, after deduction qf the e:xpenses charged to the same and the compensa/ion of the fund manager, are distríbuted among the subscribers or sharelwlders with the same character wíth whic/1 they were received by the .fund and under the same tax condilions as i{they had been earned directly by the subscriber or sharelrolder" (DIAN Opinion 49854 q{2007).

The foregoing establishes transparency to the extent that all collective portfolio eamings maintain the sa me tax status with respect to the shareholders.

b. Witbbolding at tbe source.

With respect to the second issue of transparency, which involves withholding at the source, Article 368-1 of the Tax Code provides that collective portfolios must withhold taxes from revenues that are distributed to shareholders at the time of the payment or account deposit. Also, Article 23-1 of tbe Tax Code establishes that the remuneration received by the collective portfolio manager is subject to withholding at the source.

4. Double Taxation Agreements applicable to tbe distribution of collective portfolio profits.

Article 48 of the Tax Code provides that profits distributed to collective portfolio shareholders are to be treated as dividends.

This dividend treatment would provide a great advantage for the foreign investor Jocated in a country wi th whicb Colombia has signed a Double Taxation Agreement.

This will be analyzed with respect to agreements that Colombia has signed with Spain, Chile and the Andean Community of Nations.

The Double Taxation Agreement signed between Colombia and Spain establishes that dividends distributed in Colombia will not be taxed when the Spanish recipient of the dividends owns at least 20% of the company that distributes them. When it owns less than 20%, the tax imposed my not exceed 5% of the amount distributed.

The treaty signed between Colombia and Chile establishes benefits that are similar to those provided by the agreement with Spain, with the difference being that for the recipient of the dividends to be free from taxes it must own at least 25% of the dividend-issuing company, and if the ownership percentage is less the tax may not exceed 7% of the di vidends.

The agreement with the Andean Comrnunity ofNations provides that dividends will be taxed only in the country in which the company that distributes them is domiciled, and they may not be taxed to either the company or the shareholders in any other member country of the Andean Community of Nations. Collective portfolios located in Colombian territory can be taxed only in Colombia.

9. Elimination of restrictions on foreign investment

On September 1 , 2008, the National Goverrunent lifted the capital control measures applicable to investments in shares traded on the stock exchange. These measures required an unremunerated deposit of 50% of the amount invested and that direct foreign investments remain in place for a mínimum of two (2) years.

The new policy applies exclusively to investments in shares or mandatory convertible bonds (bonds redeemable in sha res - bonos obligatoriamente convertibles en acciones BOCEAS) that are registered with the National Registry of Securities and Issuers (Registro Nacional de Valores y Emisores- RNVE) and traded on the stock exchange or any other system authorized by the Office of the Superintendent of Finance, as well as investments in shares of collective portfolios that invest only in the above securities.

As a second measure, the government revoked the requirement that direct foreign investments remain in place for a mandatory mínimum period of two (2) years. Also, this requirement will no longer

be applicable to past direct foreign investments or to transfers abroad of capital obtained from the liquidation of such investments.

In view of the global economic situation, the Govemment, through Decree 3913 of October 8, 2008, eliminated the deposit obligation that remained for investments in fixed income securities, and it ordered the retum of all deposits made by foreign investors that were less than 6 months old.

10. "Simplified stock corporatjon" bill

One more step toward the disappearance of partnership agreements in order to encourage the incorporation of companies.

Congress is considering a bill that would create a special corporate modality, called a simplified stock corporation (sociedad anónima simpl ficada - SAS), whose purpose is to add flexibility to the way in which corporations are established by encouraging the formalization of the economic activities of micro and small entrepreneurs, allowing for greater exercise of prívate autonomy, modernizing corporate laws to make them compatible with intemational trends, and, fmally, allowing interested parties to more freely determine the conditions under which the activities of the company will be performed.

The first article of the bill approved so far establishes that: "The simplified corporation may be cstablislzed by one or more natural or legal persons (...) ". Further on (i n Article 5) it states that: "The simpl fied corporation sha/1 be created by a contract or unilateral act that is evidenced by a private document (..) ".

This wording implies two c01porate structural changes that demolish the traditional concept of a corporation, given that now the establishment of a corporation will not require a the collaboration of severa) willing parties, a contract, or the formality of a deed, as prescribed by the rules that presently govem the matter.

The most traditional notion of contract, as expressed in Article 1549 of the Civil Code[6] involves a bilateral agreement in which the parties are seen as confronting each other. A more contemporary notion includes multilateral contracts and collaborative or organizational agreements in which the parties can be seen as being side by side. This new contractual discTi íne is recognized by Article 864 of the "new" Code of Comrnerce (of 1971) . The jurisprudence and doctrine have included pa rtnership agreements within this second group of contracts.

Because of the importance that the creation, amendment and dissolution of companies have for the business world, the law requires that these acts and contracts be evidenced by public deeds, which must be registered in the commercíal register in order to be effective with respect to third parties.

The bill seeks to create a type of individual cmporation, and therefore it is worth mentioning that one of the doctrinal classifications of business forms is that which divides non-stock business associations (sociedades de personas) from corporate enterprises (sociedades de capital). This classification groups together, on the one hand, companies in which the parties become partners mainly in consideration of the personal qualities of the other partners. These generally do not require the association of many persons and or the investment of very large amounts of capital. Under our law, this group includes general partnerships, limited partnerships and limited liability companies.

On the other hand are the corporate enterprises. It does not matter who the shareholders are, and the number of persons required for the pursuit of the goals of the company and the amount of capital necessary to achieve them are, in general, large. Accordingly, these types of entities are designed for businesses that require large investments. The most characteristic corporate enterprises are those whose shares are publicl y traded on securities exchanges. Under our law, this group includes stock corporations, and it will also include the Simplified Stock Corporation ifthe bill becomes law.

For purposes of the analysis of the company as a multilateral agreement, it is important to note that until now the following have been considered to be essential elements of a partnership agreement, as provided in the Code of Commerce:

6 A RT. 1495.- A contract or agreement is an act by which one party becomes obligated to give, do, or not do something. Each party can be one or more persons.

7 A RT. 864.- A contract is an agreement of two or more parties for the creation, regulation or termination of a legal patrimonial relationship between them and, except as otherwise stipulated, it shall be deemed to be exuted in the place of residence of the proponent and at the time in which the proponent receives an acceptance ofthe offer.
Jt shall be presumed that the offerer has received the acceptance when the reci pient of the offer proves that i t was sent within the terms of Articles 850 and 851.

(i) The intention to become associated with a plural number of persons[8]
(ii)The contribution, whether or not monetary, and
(iii) The distribution of profits among the partners.

Under current law[9], the absence of these three elements will convert the act or agreement into a different type of contract (consortium, temporary union, community, joint venture), or there will be no actor agreement recognized by the law (nonexistence of the act).

However, as a result of the approval of a series of laws and their respective regulatory decrees which have allowed for unipersonal business and corporate fonns, including the simplified stock corporation bill, the flfSt essential element, the requirement of existence, is disappearing.

Following is a list of the steps that have been taken in Colombia prior to the bill under discussion that are designed to encourage the creation of companies by making the formal requirements for creation more flexible. This has been accomplished mainly through abolition of the requirements of plurality and formalization by deed.

I. Law 222 of 1995 and the uiúpersonal company.

This law did not classify the unipersonal company as another associative fonn, but rather granted it sorne elements that make it similar, in the most significant respects, to a corporation; these elements are patrimonial separation and the limitation of liability to the amount of the contribution. The law allowed for the creation and amendment of unipersonal companies through prívate documents.

2. Law 1014 of 2006, the incorporation of companies by private document and the creation of unipersonal companies.

Special company modalities were created to stimulate the creation of micro, small and medium businesses. The company could be established through a prí vate document if any of the following requirements was fulfilled: (i) if the company's total assets were less than five hundred (500) times the mínimum monthly legal wage in force, which in
2008 amounted to two hundred thirty million seven hundred fifty thousa nd pesos ($230,750,000.00), or (ii) if the company had ten (10) or fewer workers. Corporate amendments could also be made through a prívate docwnent, as long as the shareholders declared that one ofthe above-mentioned requirements was fulfilled at the time of the amendment.

Similarl y, Law 1O14 of 2006 created tbe concept of unipersonal company, under which all of the types of companies recognized by the law, except for limited partnerships, could be created with a single shareholder, as long as said companies included the word "Unipersonal" or the letter "U" after the company name and type, in addition to complying with the above-mentioned requirements related to the amount of assets or the number of workers.

Benefits of increased flexjbility

The arguments in favor of abolishing the plurality requirement are based mainly on the notion that in order to enhance tbe agility of modem businesses, thei r creation or amendment cannot be subject to archaic fonnalities which, far from serving the purposes for which they were instituted (promoting the security of, and confidence in, legal entities), today only constitute obstacles that discourage dynamism in commercial relationships, and, therefore, the debate about whether a company is by defmition an entity constituted by two or more persons is merely one of semantics.

Those who favor the measures designed to increase flexibility also argue that the guarantees required by creditors and other participants .in commercial relationships with companies exceed the legalliability limits of the company's shareholders, which is the amount of their capital (and which is often misrepresented as too high or low).

As an example, it has been pointed out that the unipersonal company, far from embodying all of the risks that the most conservative jurists posited at the time of its creation, has proved to be a success in terms of fulfilling the purposes for which it was created.

Similarly, it has been said that these kinds of measures prevent simulations that are often perpetrated with the help of relatives or employees (spouses, parents,

subordinates, dependents, agents) simply to comply with the unnecessary requirement of the plurality of partners or shareholders in the creation of a company, with the further difficulty that in the case of corporations, not onJy the spouse but also several

8 Pursuant to Article 98 of the Code of Commerce, one of the essential elements for the creation of a corporation is the plurality of shareholders ("two or more persons").
9 The Civil Code distinguishes the elernents ofa contrae!as follows: ART. 1501 .- "A distinction is made in each contrae! among elements that are of its essence, those that are of its nature, and those that are
purely incidental. Elements that are of the essence of a contrae!are those wi thout which the contrae! would have no effect or would be transforrned into a different type of contract; elements that are of the nature of a contrae!are those non-essential el ements that are understood to bel ong to it without the need for a special clause; and elements that are incidental to a contract are those non-essential elements that do not narurally belong to it and that are added by means of special clauses".

friends and even the lawyers must become involved. Many foreign investors have a strong aversion to including third party strangers as shareholders in arder to meet this requirement.

The opponents

The most orthodox position against the new measures bolds that the debate goes far beyond an issue of semantics, because the measures undercut the bases on which corporate theory has been constructed througbout years of accumulated experience. Opponents maintain tbat the effort to provided flexibility in the creation of companies leads to a proliferation of vehieles that do not offer sufficient confidence and security to either the market in general or company creditors in particular.

Relevant changes

It is worth highlighting some of the relevant changes that the bill would make to the current regime, without attempting to make an exhaustive list:

It ca nnot be said that a new type of company would be crea ted, because the bill deals with a special modality of an existing type (the corporation).

The bill makes patrimonial separation mucb more explicit by stating that "the shareholder(s) shall not be fiable for labor, tax or any other Aind o.f obligations incurred by the company ", with the exception that if the vebicle is used in a fraudulent manner, the corporate veil can be pierced.

The cornmercial activity is treated more subjectivel y, given that all simplified stock corporations wíll be consídered to be commercial in nature, regardless of the activities contemplated by their purpose, even íf the activities are of a civil nature. The companies can stipulate to indefiníte purposes, such as "to cany out any legal activity ".

Tbe new companies cannot be open corporations (whose shares are traded on the public securities market). This prohibí tion was included, according to the reconciliation report, ''because of the informality o.f this type o.f company ". This is somewhat incoherent, gi ven that the creation of simplified stock corporations addresses the need to encourage the creation of companies in a formal manner.

Companies that are governed by the Code of Commerce, for which the number of required shareholders is reduced for each specific type, may avoid dissolution by transforming themselves into a simplified stock corporation within the period established for curing causes for dissolution.

It should be noted with respect to unipersonal companies that the creation of simplified stock corporations brings with it the disappearance of the incon venient prohibition of Law 222 de 1995, under which it was not possible for an entrepreneur to enter into contracts with the company.

The required minimum content of the bylaws is quite general, which reflects the clear intention of fully allowing the corporation to stipulate any type of bylaw provision, as long as it does not contravene legal imperatives, the public order or good practices. This is due to the fact that the provisions of the Code of Commerce which govem corporations leave little room for the shareholders to exercise free will in certain matters, which obligates them to enter into shareholder agreements.

Based on the above, it should be noted that:

a. The amounts and periods for the payment and subscription of shares can be freel y stipulated, as long as the period for the payment of the shares does not exceed two (2) years.

b. The shareholders are free to create the following classes of shares, among others: (i) preferred shares; (ii) non-voting preferred dividend shares; (iii) fixed annual dividend shares; and (iv) shares issued for money or other consideration. The latter two classes are not contemplated for the company types created by the Code ofCommerce.

c. The non-transferability of shares can be agreed to for up to ten yea rs.

d. Non-universal meetings held outside the corporate domicile will not be ineffective as long as the requirements for the meeting notice and the quorum are complied with.

e. The right of inspection is reduced to 5 business days, un1ess a longer period is agreed to.

f. The shareholders may expressly waive in writing their right to be called to a specific shareholders' meeting and their right of inspection.

g. Shareholders who attend a meeting for which they have not received a notice will be deemed to have waived their right toa notice, thus el iminating the ability of attending shareholders to invoke the lack of notice as a basis for challenging the validity of decisions and minutes with which they disagree.

h. The traditional limitation on holding meetings without a plurality of shareholders is eliminated.

1.The period in wbich to cure the cause for dissolution related to losses that reduce the patrimony below 50% of subscribed capital is increased to 18 months.

In practice

If the bill is approved, there are sorne practica) issues that will surely have to be resolved over time in arder for the purposes for which simplified stock corpora tions were created to materialize. Among these is the issue of who will certify the existence of the shareholders who create the corporation, and in what manner, when said

shareholders are legal entities; how the identities of the natural persons who sign the incorporation document will be verified; and what the role of the chambers of commerce will be with respect to the formal inco11>oration requirements, that is, whether the chambers of commerce will in any way replace notaries in making the verifications for which the latter have been responsible.

Simila rl y, it is appropriate to consider the difficulties that extremely creative bylaws could generate for court dockets with respect to, for example, a company's management bodies and the powers granted to them, or the conflicts that could be generated among shareholders by bylaws that do not clearly and exhaustively establish the rules relating to meeting notices, quorums and the majorities required for decision-making by the highest co11>orate body.

The above is subsumed in the inertia tbat exists with respect to the bylaws, practices and corpora te uses that have been greatly standardized by decades of using models repeatedly, with all of the advantages and disadvantages that this carries with it.

Conclusion

Regardless of the relative superficiality of the debate with respect to the contractual relationship and plurality of shareholders required for the creation of companies, it should be kept in mind that approval of the bill will necessarily generate discordance between two coexisting coll>orate regimes, and it would be desirable if they were consolidated into a single regime.

On the other hand, approval of the bill will engender the optimization of the decision making processes of corporate bodies, which is something very positive for enhancing corporate agility. However, the interested parties should anticípate that many conflicts will arise as a result of differences among shareholders concerning decision-making by the corporate bodies, and therefore it is important to underscore the need for the bylaws to regulate the decision-making mechanisms and conditions when the law does not do so.

Finally, the fissure generated by tbe current regime is clear, but regardless of which system is tbe most coherent and legally correct, a debate that will haveto be resolved in practice once tbe new law is implemented, the intention is to strengthen príva-te initiative, eliminate the barriers to investment, and reduce unnecessary costs and procedures, goals that are always welcome.

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