

Third Resolution of Modifications to the Omnibus Tax Bill for 2020

This past November 18th the Third Resolution of Modifications to the Omnibus Tax Bill for 2020 (“**Third Resolution**”) was published in the Official Federal Gazette, which primarily contains the rules applicable to the disclosure of reportable schemes.

First it is important to recall that the obligation to disclose reportable schemes was incorporated by virtue of the Decree reforming and derogating various provisions of the Income Tax Law, the Value Added Tax Law, the Excise Tax Law and the Federal Tax Code, published in the Official Federal Gazette on December 9, 2019.

However, the periods for complying with such obligation and the other obligations contained in Title Six of the Federal Tax Code will begin to run on January 1, 2021 (on which date the rules applicable to the Third Resolution will also enter into force).

In relation to the above, it is particularly important to consider that the reportable schemes that must be disclosed are those designed, commercialized, organized, implemented or administered beginning in the year 2020, or prior to that year when any of their tax effects is reflected in the fiscal years beginning with 2020.

Below we mention the rules contained in the Third Resolution that we consider most relevant, specifically with respect to those schemes:

In principle, the Third Resolution establishes that tax advisers or taxpayers, as applicable, must file the “Informative return to disclose generalized and personalized reportable schemes”, in accordance with the terms of the processing sheet 298/CFF contained in Annex 1-A thereof. Furthermore, the form is established for filing complementary informative returns for modifying the disclosed reportable scheme, and for the tax advisers released from the obligation of disclosing the reportable scheme.

A PDF document should be attached to those informative returns with the information and documentation specified in detail in each rule applicable to each reportable scheme.

The detailed descriptions of the reportable schemes referred to in the rules of the Third Resolution are those having the following characteristics:

1. Avoid foreign authorities exchanging tax or financial information with Mexican tax authorities.
2. Avoid the application of article 4-B of the Income Tax Law relative to income obtained through tax transparent foreign entities, foreign legal figures and transparent foreign legal figures.
3. Consist of one or more legal acts that allow transferring tax loss carryforwards pending decrease from tax profits, to persons other than those that generated them.

4. Consist of a series of interconnected payments or operations that return all or part of the amount of the first payment of such series, to the person that made it or one of its partners, shareholders or related parties.
5. Consist of the application by a resident abroad of a double taxation treaty with respect to income that is not taxed in the country of residence or is taxed at a reduced rate.
6. Involve transactions between related parties in which:
 - a) Intangible assets difficult to put a value on are transferred.
 - b) Business restructurings are carried out in which there is no consideration for the transfer of assets, functions and risks or when as a result of such restructuring, the taxpayers that pay tax under Title II of the Income Tax Law reduce their operating profit by more than 20%.
 - c) The temporary use of goods and rights is transferred or granted without consideration or unremunerated services are provided.
 - d) There are no reliable comparable transactions because they are transactions that involve unique or valuable functions or assets, or
 - e) A unilateral protection regime granted by a foreign law is used.
7. Avoid creating a permanent establishment in Mexico in terms of the Income Tax Law and the treaties to avoid double taxation.
8. Involve the transfer of an asset totally or partially depreciated that permits its depreciation by another related party.
9. Involve a hybrid mechanism defined in the Income Tax Law.
10. Avoid the identification of the actual beneficiary of income or assets.
11. When there are tax loss carryforwards whose period for decreasing them from the tax profit is about to expire and transactions are carried out to obtain tax profits from which they will be decreased.
12. Avoid the application of the additional rate of 10% on distributed dividends.
13. In which the temporary use of a good is granted and the lessee in turn grants it to the lessor or a party related to the latter.
14. Involve transactions whose accounting and tax records present differences greater than 20%, except calculation of depreciations.
15. In the case of any mechanism intended to avoid the application of article 199 of the Federal Tax Code so that any of the premises provided for in that article arise to configure the reportable schemes (referred to in the above sections).

It is specified that any plan, project, proposal, advice, instruction, recommendation having the purpose of materializing a series of legal acts whose purpose is to impede the application of any of the premises established in article 199 of the Federal Tax Code for requiring a reportable scheme, are considered mechanisms to avoid the application of that article.

It is established that the tax advisers that disclose reportable schemes in the name and on behalf of other tax advisers must issue to each of the latter a record of release from the obligation of disclosing reportable schemes. Similarly, the information they must contain is indicated.

In relation to the record of non-reportable scheme or existence of legal impediment to disclose a reportable scheme, it is indicated that the tax advisers that consider that a scheme that generates or will generate tax benefits in Mexico is not reportable by virtue of the fact that the plan, project, proposal or advice does not have any of the characteristics established in the referenced Code, or because they consider that there is a legal impediment for the disclosure of the reportable scheme, must issue that record in accordance with the processing sheet 301/CFF contained in Annex 1-A.

Furthermore, the tax authority may request from the tax advisers or the taxpayers additional information and documentation to what is provided with respect to the reported scheme. In this case, the tax adviser or the taxpayer must file the additional information and documentation requested or manifest under oath that it is not in possession thereof, in the manner established in the processing sheet 302/CFF contained in Annex 1-A.

Finally, it is indicated that the tax advisers must provide the information of the taxpayers to which a generalized or personalized scheme was commercialized through the corresponding informative return in terms of the processing sheet 303/CFF contained in Annex 1-A.

We suggest analyzing internally if there are schemes that should be reported in order to comply with the obligations contained in the Federal Tax Code and in the Third Resolution in a timely and proper manner. This is to avoid the imposition of any sanctions, such as a fine to the obligated taxpayer of 50% to 75% of the tax benefit obtained or expected (in addition to the loss of such benefit).

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