

For the Director

Notice about loans, contributions for future capital increase or capital increase received in cash

It is essential to consider the enforcement as of this month of the periodical obligation stated in Income Tax Law to inform fiscal authorities (through SAT [equivalent in Mexico to United States' IRS]) within fifteen working days after the date when any amount over \$600,000.00 is received in cash as:

- a) Loans (no matter who grants the loan)
- b) Contributions for future capital increase (partners or stockholders)
- c) Capital increase (partners or stockholders)

This must be done using the electronic form 86-A released by SAT last December 31, by uploading it to their Webpage. The form must include the following information:

- a) Name or corporate name of the person or firm who provided the cash
- b) Taxpayer number (RFC)
- c) Population Registration Number (CURP), (for Mexican individuals)
- d) Address
- e) Amount in Mexican Pesos and, whenever applicable amount in foreign currency, and concept for the cash received
- f) Whenever applicable, name of corresponding foreign currency.

Failure to submit this notice on time means the amount received in cash will be considered **accruable income** (only for purposes of Income Tax), and therefore the taxpayer would not prevent said income from being considered **accruable** even if the taxpayer voluntarily submits the return at a later date. This is in addition to the Tax on Cash Deposits that would be payable in case such amounts are deposited in an account the person who receives the cash has opened in any bank or institution.

It is important to point-out that whenever this "income" is considered **accruable** for Income Tax purposes, the basis for Workers' Share in Profits (PTU) will also be increased; also, this "income" will have no effect whatsoever on Flat Tax (IETU).

Legislators justified the enforcement of this measure on January 1, 2008 on grounds that fiscal authorities have detected significant transactions or deposits in taxpayers' accounts, being legally unable to verify where the money came from or knowing if taxes had been paid on said amounts, because the three concepts mentioned above have been used to hide income that must be considered to compute taxes payable; this was a frequent vehicle for simulation which up to then was not detected by authorities when exercising their auditing faculties because oftentimes they are not recorded or are not recorded on due time.

We must mention that if this obligation regarding amounts received in each of 2008 months has not been observed by January 31 there is the possibility to produce an extemporaneous and voluntary notice, to avoid a fine that ranges between \$980.00 and \$24,480.00.

Something to think about

DEM disregard Law!

After DEM-2009 version 1.4.0. was uploaded in SAT's Webpage on December 29, 2008, taxpayers have realized the impossibility to perform some of the credit and setoff procedures related to Income Tax and Flat Tax, stated in Flat Tax Law. Below we provide some examples of said applications:

1. Article 11 of Flat Tax Law – Negative basis credit

Article 11 of Flat Tax Law states in the third paragraph that the negative basis credit "may be credited by taxpayers... *against income tax accrued on the fiscal year when the credit was generated*".

Unfortunately, DEM form must be completed in such a way that forces crediting the following concepts against Income Tax payable for the fiscal year, before the negative basis credit:

- a) Fiscal incentives
- b) Provisional payments
- c) Withholdings
- d) Income Tax paid abroad
- e) Creditable Income Tax from distributed dividends or profits.

As a consequence, most of the times crediting of the negative basis credit (referred to in DEM as Flat Tax Fiscal Credit for deductions over income) is postponed for one or some of the 10 fiscal years after the one when the credit was generated; of course, provided in such term Flat Tax payable is determined for an amount equal or below the updated credit (otherwise, as everybody knows, it would be lost) annulling the great advantage included as a possibility in Flat Tax Law to credit it even in one sole fiscal year, in spite of having other credits during the fiscal year when the above-mentioned credit is generated. Under such circumstances there will be but a few situations when it may be partially applied in the fiscal year when it is generated and only in some cases it will be possible to credit it in the same fiscal year when it is generated.

Let us assume the following figures:

Concept	Amount
IT payable in the fiscal year	100,000
Credit for major deductions to income	102,000
Fiscal incentives	40,000
Provisional payments	80,000
IT withheld	3,000
Creditable IT from dividends	20,000

Upon completing DEM, figures would be as follows:

Concept	Amount
IT payable in the fiscal year	100,000
Fiscal incentives	(40,000)
Provisional payments	(80,000)
IT withheld	(3,000)
Balance in favor	(23,000)
Credit for major deductions on income to be applied	102,000
Not credited fiscal incentives	0
Unapplicable creditable IT from dividends	20,000

Obviously, if Income Tax from dividends corresponds to 2008 fiscal year it may be considered against 2009 and 2010 Income Tax; if it were from 2007, in 2009; and if it were from 2006, there would be no right for credit, but CUFIN balance would not be decreased either.

According to Flat Tax Law, it should be:

Concept	Amount
IT payable in the fiscal year	100,000
Credit for deductions larger than income	(100,000)
Provisional payments	(80,000)
IT withheld	(3,000)
Balance in favor of IT for the fiscal year	(83,000)
Credit for deductions larger than income to be applied	2,000
Not credited fiscal incentives	40,000
Unapplicable creditable IT from dividends	20,000

In addition to ratifying the comment regarding Income Tax from dividends as per figures above, it is wise to point-out that in case fiscal incentives are lost, this turns out to be the best for the taxpayer, because this avoids accruing said incentives as income for Income Tax purposes.

What is important to emphasize is that the amount of Income Tax balance in favor becomes higher, which is positive for taxpayer's circulating capital because in addition to being able to request a reimbursement, it is possible to make a universal offset using it, for example, to pay VAT in the month when the return is submitted (either Flat Tax, Income Tax, or some other).

The right to setoff recoverable Tax on Assets as per the third paragraph of Third Transitory Article of Flat Tax Law is under the same situation because said offset can only be applied after determining Flat Tax payable for the fiscal year, which means applying it even outside DEM; i.e. in SAT's Banks Webpage, which annuls or minimizes the merits of said provision:

"Whenever Income Tax paid in the fiscal year is lower than Flat Tax for the same fiscal year, taxpayers may setoff against the resulting difference the amounts on which, per the terms of the paragraph above, they have the right to request for reimbursement".

Consider this

New standard criteria

Since last January 9, SAT has been informing about the issuance of the following criteria in its Webpage:

- Fiscal incentives are considered accruable income for purposes of Income Tax Law.
- Aid or Charity Institutions are non-profit organizations which must pay taxes as per Title III of Income Tax Law.
- Observance of the generality requirement stated in article 109, fraction VI of Income Tax Law.
- Credit to Salary. It may be recovered through reimbursement of non credited remnant.
- Exemptions. Electronic publications.
- Goods international air transportation service.

From the list above, it is important to make the following comment regarding the first item:

a) **Fiscal incentives are considered accruable income for purposes of Income Tax Law.**

It is unfortunate that the criterion states that fiscal incentives are an income in credit, which by not being listed in the exception contained in the second paragraph of article 17 of IT Law (which allows not accruing some income), they may only be considered not accruable if there is some other provision which expressly states said treatment.

We think the criterion should state that any fiscal incentive – which due to its nature is an income – must be accrued provided there is no express provision stating otherwise; our reason for concern is that it could be thought that incentives such as immediate deduction (for IT) or accounts payable deduction based on the Sixth Article of the Decree dated November 5, 2007 (for Flat Tax) should be accrued when in essence they are not income and therefore rightfully it is impossible to consider it accruable income for IT purposes.

SAT informs

Last February 12 the following press release was published in SAT'S webpage:

If you submit your Return Informing About Operations with Third Parties (Declaración Informativa de Operaciones con Terceros, DIOT), the Flat Tax Listing (Listado del impuesto empresarial a tasa única, IETU) and the Multiple Tax Return for Information Purposes (Declaración Informativa Múltiple, DIM) and you do not receive the acknowledgment of receipt, it is due to updates and improvements we are making on ours systems to increase our receiving capacity.

Acknowledgments of receipt are being generated and you will receive them within a few days. There is no need to ask for them or sending your return again.

Give unto Caesar...

"Love may be at first sight, but friendship comes from frequent and sustained snaring". Octavio Paz