

MEXICO

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Oscar López Velarde and Diego Guerrero Segura

Mexico announces 2022 Tax Bill

Oscar López Velarde and Diego Guerrero Segura of Ritch Mueller describe the key tax measures announced in Mexico's 2022 Tax Reform Bill on September 8 2021.

Every September, alongside the forthcoming yearly budget, the Mexican Executive customarily submits a bill amending several tax laws – the Income Tax Law, the Value Added Tax Law, the Excise Tax Law and the Federal Fiscal Code – to Congress. This year's bill (the '2022 Tax Reform'), was presented by President López Obrador on September 8 2021.

This bill may change if amended by Congress. However, as it currently stands, the 2022 Tax Reform proposal includes changes that may impact transactions in Mexico.

Claiming treaty benefits on capital gains on the sale of shares

It is necessary to appoint a Mexican legal representative to claim treaty benefits in connection with capital gains obtained for the transfer of shares.

The 2022 Tax Reform requires such legal representatives to expressly assume a joint and several liability, which was already assumed by law, and demonstrate their economic solvency in case liabilities arise from Mexican-sourced operations carried out by the foreign residents they represent. This may represent an obstacle when claiming treaty benefits on capital gains for the sale of shares or international reorganisations, as foreign legal representative must appoint a solvent Mexican legal representative to pay taxes in Mexico, but it would complex finding a Mexican representative that may cover the taxes of large transactions.

Joint and several liability in asset deals

The acquirer of the ongoing concern of a Mexican taxpayer is jointly and severally liable of any taxes due by the seller. The 2022 Tax Reform imposes such liability even in the case of transfers of a partial on-going concern.

Transfer of shares at tax cost

The 2022 Tax Reform increases requirements to transfer shares at tax cost in cor-

porate restructurings or to defer capital gain taxes in corporate restructurings carried out by foreign residents.

Authorisations will now be subject to greater scrutiny, including operations carried out by the restructuring entities within five years before and after the restructuring process. Moreover, corporate restructures lacking a valid business reason may be ruled to be ineffective and therefore subject to taxation at market value.

Additional requirements to implement tax-free mergers and spin-offs

Tax free mergers and spin-off are possible in Mexico; however, the 2022 Tax Reform allows the tax authorities to determine that a merger or spin-off lacks a valid business reason in order to regard the transaction as a taxable event. This provision is not expressly linked to the Mexican general anti-avoidance rule (GAAR) included in the Mexican Federal Fiscal Code by virtue of the 2020 tax reform, which could lead to more subjective assessments by the tax authorities.

Additionally, the 2022 Tax Reform establishes new requirements to perform tax free mergers and spin-offs and establishes new rules to offset losses obtained by the companies that took part of the transaction going forward.

TP documentation requirements

Transfer pricing (TP) obligations are now explicitly applicable to operations carried out between Mexican-resident related parties, and the 2022 Tax Reform clarifies the requirements applicable to TP supporting information and documentation.

Back-to-back loans

Financing operations carried out between entities or Mexican permanent establishments, which (i) result in interest in favor of foreign residents or other permanent establishments and (ii) lack a business reason will now be considered to be back-to-back loans, and therefore interest arising therefrom would be treated as dividends for tax purposes.

This new provision would basically eliminate the possibility of having inter-company or shareholder loans with the only objective of reducing taxes.

Thin capitalisation

Interest payments derived from debts related to the construction, operation, or maintenance of productive infrastructure related to strategic activities or the generation of electric power may only be excluded from thin capitalisation rules by entities that may legally carry out these activities by themselves and have the corresponding permits.

Also, the 2020 Tax Reform amends the alternative procedure to compute the thin capitalisation ratio based on tax attributes (capital contribution account and net after tax profit account) to reduce any tax losses pending to be offset.

Mexican financing companies

The 2022 Tax Reform includes certain provisions that impact non-regulated *Sociedades Financieras de Objeto Múltiple* ('SOFOM' as per its acronym in Spanish). In general, debts of non-regulated SOFOMs that mainly carry out operations with related parties will not be excluded for purposes of the thin capitalisation rules as debts contracted by a member of the financial system. Moreover, interest paid by non-regulated SOFOMs to foreign related parties will no longer be subject to the reduced 4.9% withholding rate.

'Controlling beneficiaries' of trusts or legal vehicles

Beneficiaries and members of trusts or legal vehicles, which are normally used to create fund structures or joint ventures, are now obliged to keep updated information regarding their 'controlling beneficiaries', which must be submitted to the Mexican tax authorities upon request. New examination powers are granted to verify compliance.

These provisions will be particularly relevant for private equity funds that have incorporated investments structures through Mexican trusts, as trustees will more likely impose more severe KYC procedures.

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