

“LEGAL INSECURITY IN FISCAL REFORM FOR 2001:
“CUENTA NUEVA Y BORRON”

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By: Raul Merigo; Hernández, Mérito & Hurtado S.C.

On January 1st., a new fiscal reform bill passed in Mexican Congress, as a part of the yearly and not very successful tax laws package, in our Mexican Tributary System.

Among many other reforms made to the Mexican Fiscal Code, a second Transitory Article was issued by Congress, in which a type of “fiscal amnesty” has been called by the government, as “Cuenta Nueva y Borrón”, that in English could be translated as “Settled account and erasure”, meaning that the Mexican Revenue Agency will give tax payers the opportunity to straighten their fiscal status and will only audit recent years, leaving past “behind”.

In such “fiscal advantage”, congress is apparently giving a security in which authorities have been restricted regarding their attributes to practice legal audits,¹

In other words, whoever has an outstanding fiscal status and has complied to all of the fiscal duties and obligations, cannot be subject to a legal audit by authorities for the “restricted” years.

In said order, authorities must proceed to determine tax payment obligations according to the date of issuance of the written order, in which cases they can only revise and determine the following fiscal years:

TAX PAYERS WHO DO NOT DECLARE AND PAY TAXES THROUGH A CERTIFIED ACCOUNTANTS’ OPINION	
<i>Audit beginning:</i>	<i>Fiscal Year that can be revised and determined</i>
From April 2001	2000

¹ Such advantages do not apply legal audits related to welfare and social security contributions, import taxes of goods, Vehicles Use and Possession Tax and New Vehicles Tax.

through March 2002	
From April 2002 through March 2003	2000 y 2001
From April 2003 through March de 2004	2000, 2001& 2002
From April 2004 through March 2005	2000, 2001, 2002 & 2003
TAX PAYERS WHO DECLARE AND PAY TAXES THROUGH A CERTIFIED ACCOUNTANTS' OPINION	
<i>Audit beginning:</i>	<i>Fiscal Year that can be revised and determined</i>
From September 2001 through August 2002	2000
From September 2002 through August 2003	2000 y 2001
From September 2003 through August 2004	2000, 2001 & 2002
From September 2004 through August 2005	2000, 2001, 2002 & 2003

We consider important to advise you that such type of “fiscal amnesty” has been present in our legal tributary system from 1983 to 1995, contained in article 64 of the Federal Fiscal Code (now removed from said Code), and real situations has given Us the experience that there is no “legal security” and that an opportunity to correct past mistakes is not present, but otherwise it could be used as a shield for revenue authorities to commit abuse.

There are certain cases, of course, in which authorities could act well beyond the legal restrictions imposed by the reform, and in these cases it must had been proved that certain irregularities detailed in the same law, have been committed .

Those “irregularities” are varied, and are amongst the following:

1. No presentation of yearly declarations on any contribution or tax;
2. Not paying the yearly profit compensation for workers;
3. Reporting of any tax deduction or compensation without a legal reason, or obtaining tax returns for more than 3%;
4. Not paying more than 3% of the resulting Income Tax or the Tax on Assets;
5. Not paying more than 3% of the withheld taxes;
6. Whenever authorities find suitable dictation of a presumptive determination of taxable profits, according to Mexico’s Federal Fiscal Code.
7. Not complying with fiscal duties on registering, change of address, and all types of notices to revenues authorities;
8. To provide or fail to provide wrongful information related to income, I more than 3% than the amount determined by authorities;
9. Failure to present, or to incur in past due presentation of the fiscal legal opinion on financial statement for fiscal purposes, subscribed by certified accountant;
10. Failure to correct errors on the report mentioned on the previous number.

Although these privileges give companies the opportunity to securely continue its fiscal duties compliment according to law, apparently giving them legal security and benefits, reality is that the variety of exceptions and rulings will not give legal stability and opposing to what the fiscal reform is saying, it could make companies and all tax contributors in a position in which they can omit compliance to all fiscal rulings because of the apparent benefits and only being updated on their fiscal duties “as of the day”, that is, without taking any concern on past fiscal years.

That is why we widely recommend to maintain the highest levels of compliance with fiscal laws for, at least, the last five fiscal years, to avoid being “protected” by the insecure and misleading reform.

Besides our recommendations on said matter, in case authorities decide to initiate a legal audit to a company and at the conclusion determines the existence of a fiscal debt against it, we consider that in that such resolution must be notified deciding with respect to the fiscal years

authorized by the reform (see chart), withholding the right to determine a fiscal debt on past fiscal years, and only after the mentioned resolution becomes *res judicata* (that cannot be defended by legal remedies), proceed to establish the existence of past years debts.

The legal interpretation we have made on the reforms in comment, is that when authorities become aware of the existence of irregularities, they have the obligation to give the audited person the right of defense, not only during the administrative procedure, but before Administrative Courts and, at the last case before Federal Courts by the Constitutional Injunction trial there is available. That is to preserve individual rights prevailed in Mexico's Constitution, regarding the due legal process.

Only after such right of defense have been given or taken by individuals, fiscal agencies will be duly authorized to determine fiscal debts regarding past fiscal years.

It cannot be different than we have said it, because if authorities do not act according to our interpretation, it would be widely easy to disobey the reforms and proceed to determine past fiscal years with the excuse that they have found irregularities (the ones not mentioned in the charts), which would be equivalent to act under the "normal" tributary rules, leaving aside the "legal security" that the fiscal reform has given in this "borrón y cuenta nueva"

If a fiscal decision of such nature such occur to any person or company, in which authorities disobey the rules on determining fiscal years different than the ones established in the chart indicated, there is a high possibility that Administrative Courts will nullify the audit procedure, due to the existence of a violation on the fundamental rights of due legal process and legal security.

As a conclusion, we state that:

- Fiscal Agencies and Authorities can only legally audit for the periods stated in the chart established by the reform;
- In order to determine past fiscal years (other than the one in the chart), authorities must proceed to previously determine the existence of a fiscal debt for those years authorized by the chart, and only after such decision becomes legally judged (*res judicata*), dictate another resolution on those past fiscal years.

- It is illegal to dictate audit procedures for additional fiscal years than the ones authorized by the reform (see chart).
- Authorities' visiting personnel cannot review or request to the company or audited person, documents, or any type information related to "past fiscal years", other than the ones stated by the reform (see chart).

In case of disobedience to the mentioned, Administrative Courts should consider our arguments, and good and early counseling will give companies or persons success on such matter.

For more information on this and other matters, please [contact](#) us, will be more than happy to assist you.