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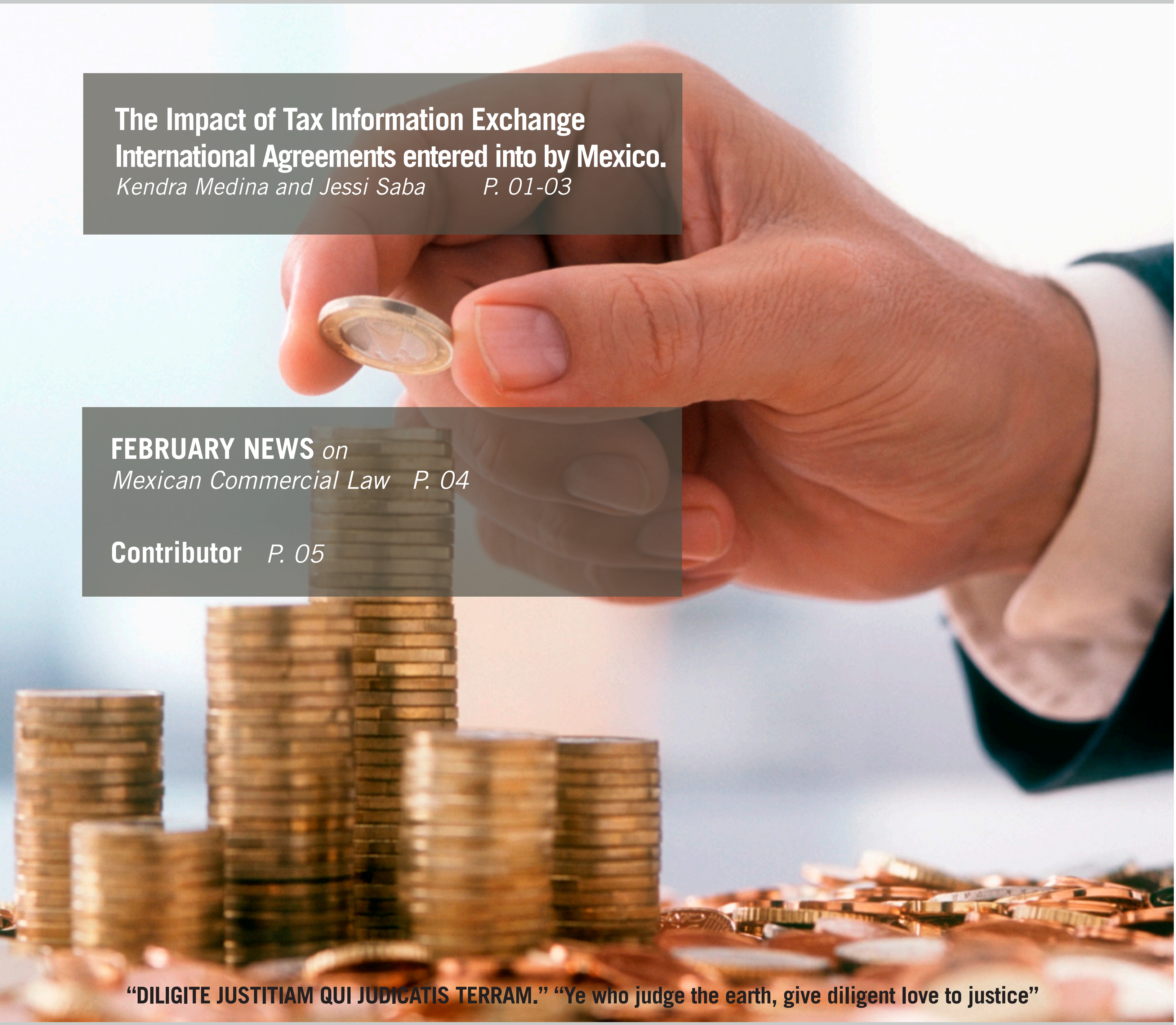

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Kendra Medina and Jessi Saba *P. 01-03*

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"DILIGITE JUSTITIAM QUI JUDICATIS TERRAM." "Ye who judge the earth, give diligent love to justice"

The Impact of Tax Information Exchange International Agreements entered into by Mexico.

by Kendra Medina and Jessi Saba.

The need that countries have for international treaties regarding the exchange of tax information has grown due to the increase in the number of taxable individuals and corporations with activities in jurisdictions different from their tax residence and because the scope each local tax authority had was limited to their own territory. The limited information that tax authorities could have access to in relation to the activities of such taxpayers in different jurisdictions, and particularly, in low taxation jurisdictions, known also as tax havens[1], promoted tax evasion and circumvention, as well as criminal practices such as money laundering and the financing of terrorist acts. These limits to information were based in concepts generally accepted and even protected by local laws such as banking secrecy.

In order to minimize tax evasion and circumvention practices to the extent possible, many jurisdictions, among them Mexico, decided to impose as an obligation, a withholding of income earned by foreign residents whose income is subject to a preferential tax regime (for instance tax heavens). Consequently, taxpayers that allocate their income or revenue in such jurisdictions, through the creation of special purpose vehicles and/or their participation therein, which otherwise could be taxed in the jurisdiction where such taxpayers are resident for tax purposes, will result in an obligation to the pay the taxes that were originally expected to be evaded or circumvented by means of the obligation to withhold and deliver such withholding to the national tax authorities.

In the case of Mexico, the income earned by individuals or entities that are considered to be legal persons for tax purposes in their country of residency or that are considered to be transparent in the same or any other legal figure created or constituted in accordance with foreign law, whose income is subject to a preferential tax regime[2], are subject to a 40%, withholding equivalent, to be withheld by the Mexican resident (or foreign resident with permanent establishment in the country, as the case may be) in respect to the payments made to such individuals or entities, unless, in other cases, such legal entity is a resident of a jurisdiction with which Mexico has a broad treaty for the exchange of tax information.[3]

"members and non-members to the OECD, have entered into multilateral and/or bilateral agreements with the purpose of implementing at a domestic level the means of cooperation and exchange of tax information."

1.-These jurisdictions are characterized of being small economies that implement tax policies that offer favorable results to non-resident individuals and companies, with the purpose of attracting foreign capitals in order to strengthen their internal economy. There is not an agreed worldwide list, since each country has its own list of countries that are considered low tax rates in relation to their own rates, yet, the OECD elaborated in 1998 a report that described as "tax havens" a list of jurisdictions that comply with certain characteristics such as the lack of transparency or whose legislation or administrative practices impede an effective exchange of information in fiscal matters with other governments.
2.- Article 212 of the Income Law in Mexico defines as income subject to preferential tax regimes, the one that are not subject to taxes or are taxed with an income tax less than 75%of the tax that would be required to be paid in Mexico.
3.- Articles 204 and 205 of the Income Law, and resolutions 1.3.17.14 and 1.3.17.15 of the Miscellaneous Fiscal Resolution 2013.

In order to address the need for cooperation and information at an international level from a tax perspective, the Organization for the Cooperation and Economical Development (OECD) created a treaty model for the exchange of tax information (the "Model")[4], which contains the standard of transparency and exchange of information accepted internationally. This standard provides that tax information shall be exchanged for purposes of enforcement of the national tax laws of the requiring party, without impediment of the local laws, including banking secrecy, but protecting the confidentiality of such information (the "International Standard").[5]

Based on the International Standard, members and non-members to the OECD, have entered into multilateral and/or bilateral agreements with the purpose of implementing at a domestic level the means of cooperation and exchange of tax information in order to prevent tax evasion and circumvention practices, including jurisdictions classified as low tax jurisdictions or tax havens. In this way, the tax authorities can have access to the information at the level of detail that is necessary to determine if the income is subject to taxes in a foreign jurisdiction and have been paid, therefore, if applicable, such payment can be credited against the tax to which the taxpayer is subject to in the country where it is obligated to pay taxes, be subject to certain deductions or exemptions or as the case may be, be subject to any applicable withholding.

The structure of the Model is generally as follows:

- Objective of the Treaty
- Jurisdiction
- Taxes Covered
- Definitions
- Exchange of Information through previous requirement
- Foreign Tax Inspections
- Possibility of denying a request
- Confidentiality
- Costs
- Legislation for the fulfillment of the Treaty
- Language
- Other International Treaties
- Friendly Procedure
- Depositary Functions
- Entry into Force
- Termination

It is important to point out that the Model is not binding, but certain measures have been imposed by member countries of the OECD in such jurisdictions that have not committed to comply with the International Standard, such as restriction on the money transfers, as well as political and economical isolation.

4.- Agreement for the Exchange of Information in Fiscal Matters. 2002. Modified in 2005.
5.- Developed by the OECD in cooperation with non-member countries of the OECD, promoted by the ministers of finance of the G20 countries in the meeting in Berlin in 2004, and for the Expert Committee for International Cooperation in Fiscal Matters of the United Nations in its reunion in October 2008.

In 2009 a report made by the Global Forum of the OECD and the G20 was published,[6] which categorized and classified jurisdictions in accordance with the degree of compliance of the International Standard, and since then the number of treaties concerning the exchange of tax information has increased exponentially. From the 87 jurisdictions that were evaluated in 2009, 40 were classified as the "white list" (jurisdictions that have substantially implemented the International Standard), 37 were classified as the "grey list" (jurisdictions that have committed to the International Standard but have not substantially implemented it yet) and 4 in the "black list" (jurisdictions that have not committed to the International Standard at all). Up today, the jurisdictions that are classified as the "black list" are practically null.[7]

Mexico committed to adhere and implement the International Standard from its beginnings, and from 2010 up to today, has entered into bilateral agreements in this matter with jurisdictions considered as low tax regime jurisdictions or tax havens, such as, Dutch West Indies, The Bahamas, Bermuda, Belize, Costa Rica, Cayman Islands, Cook Islands, Isle of Man, Guernsey, Jersey, and Samoa.

The impact of the ratification by Mexico of these treaties with these jurisdictions is very important, because the withholding tax referred to in article 205 of the Mexican Income Tax Law will not be applicable to the income earned by legal persons or entities constituted in accordance with foreign law, with related parties residents of Mexico considered as legal persons for tax purposes in such jurisdictions (for example, the so called special purpose vehicles, which are usually constituted for purposes of leasing goods), by virtue of having entered into a treaty for the exchange of information for tax purposes with Mexico.[8]

For example, a resident of Mexico that constitutes an entity in accordance with foreign law resident of any of the jurisdictions considered to be a low tax jurisdiction, but with whom Mexico has a treaty for the exchange of tax information in place, as a special purpose vehicle for purposes of acting as lessor in a leasing agreement between such entity and a Mexican resident, the 40% withholding referred to in article 205 of the Income Tax would no longer be applicable, but only the withholding that corresponds to the income earned by virtue of granting the use and enjoyment of goods[9] that is generally applicable, which is substantially less (that is, 25%), since the Mexican resident participating in such entity would be subject to pay taxes in accordance with Title V of the law.[10]

6.- OECD "A Progress Report n the Jurisdictions Surveyed by the OECD Global Forum in Implementing the Internationally Agreed Tax Standards", April 2, 2009.
7.- As of May 2012 there is no longer a jurisdiction that has not agreed to comply with the International Standard. Except for Nauru, Niue (small islands in the central and south Pacific, respectively), and Guatemala, which has agreed to comply but has not yet taken any action to implement the agreement..
8.- Resolutions 1.3.17.14 and 1.3.15.17 establish the cases that, for the purpose of article 205 of the Income Law, the income earned by foreign legal figures subject to the jurisdiction of a country with which Mexico has a broad exchange of information treaty; will not be considered as subjects to a preferential tax regimen.
9.- Article 186 of the Income Law.
10.- There is an exemption for certain type of goods, as it is the case for aircraft, to which as an exception the applicable withholding is of 5% which has been further reduced by Presidential decree to an approximate 1%.

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Extract of Mexican Commercial Law News

The Search for the Train Route has begun.

According to Queretaro's governor, Jose Calzada Rovirosa, the best route for the Mexico-Queretaro train is one that runs parallel to Highway 57. "A main issue and concern is the rights needed for the lane. If we use the one that has been authorized already, parallel to highway 57, construction may begin a lot sooner." He also stated the need for coordination with the local government as to where is the train arriving and the logistics to move people in and out of the station. Reforma. 01/February/13.

In March, public bids will be advertised.

President of the Mexican Chamber of the Construction Industry announced that by March "will launch a cascade of public bids, including such important projects as the passenger train transpeninsular of Yucatan and road axes ". Most, he said, are works that were pending in the past administration. At a press conference, the business leader called to invest in studies and projects in order to give a "real" planning in infrastructure. Also, asked to establish a realistic payment policy to builders, because today builders still suffer delays affecting the public sector finances. El Universal. 18/February/13.

Mexican Trains Will Run on Electricity.

The Minister on Transport, Carlos Almada, stated that due to terrain issues, the trains in routes Mexico-Queretaro and Mexico-Toluca will run on electricity. According to the INEGI, the Mexican National Institute for Geography and Statistics, the altitude between these cities exceeds 400 meters, and will require more power to overcome the terrain. In this matter, the Tran Peninsular train will run on biodiesel, which is more eco-friendly and won't have the altitude problems that the other route has. Reforma. 19/February/13.

Enactment of the Education Reform due Today.

It is anticipated that today the President Enrique Peña Nieto will enact the Constitutional Reform to articles 3 and 73, both related to education. The main goals for this reform are four key aspects: the creation of the Teacher's Professional Service; the National System of Education; a School Census; and will give constitutional autonomy to the National Institute for Education Evaluation (INEE). The Teacher's Professional Service, which is one of the most argued issues, establishes the mandatory evaluation for teachers, and based on this, they can aim for promotions as well as determining their income. Reforma. 25/February/13.

New Amparo Law Eliminates Suspension Acts.

Last February 20 the new Amparo Law was approved by Congress. This law is regulative of articles 103 and 107 which mainly regulate the Amparo figure. This new law is very similar to the old one, but two main issues are still unresolved: first the removal of the arraigo, which still is part of the Constitution and second, removes the possibility of a judge to grant a suspension act before the final resolution is dictated. This prohibition in restricted to the Article 129 of this law, fractions XI and XIII related to financial entities and concessions of national assets, when the suspension hinders the possibility of the State to utilize that asset. Both issues are contained in International Treaties signed by Mexico, an apparent contradiction in the Mexican normative system. Milenio. 02/March/13.

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