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## International Trade and Customs, and Tax Practice Group Joint Newsletter



### CFDI Transfer and Income and Bill of Lading Supplement - Defense Actions

Rule 2.7.1.9. (hereinafter "the Rule") of the fifth anticipated version of the Second Resolution of Amendments to the Miscellaneous Tax Resolution for 2021, and its Annex 1-A, which is pending publication in the Official Gazette of the Federation, establishes that the owners of goods may demonstrate the transportation of the goods when they are moved within Mexican territory by land, rail, sea, air or river, only through the representation, printed or in digital format, of the digital tax receipts via internet (hereinafter "CFDI") of the transfer type issued by themselves, to which they must incorporate the "Waybill" complement.

Likewise, it establishes that in those cases in which the transfer of goods is carried out through an intermediary or a transportation agent, it will be they who must issue the CFDI of the transfer type and use its representation, printed or in digital format, to demonstrate the transportation of the goods.

Taxpayers engaged in the transportation of cargo by land, railroad, sea, air or river, must issue a CFDI of the income type that must contain the requirements established in Article 29-A of the Federal Tax Code, which will cover the rendering of this type of service, and with it they will be able to demonstrate the transportation of the goods with its printed representation or in

digital format, to which they must incorporate the complement "Waybill".

It is important to point out that according to the First Transitory Article of the fifth anticipated version of the Second Resolution of Amendments to the Miscellaneous Tax Resolution for 2021, the established effective date of the Rule is June 1, 2021, taking into consideration the one indicated in the Eleventh Transitory Article of the First Resolution of Amendments to the Miscellaneous Tax Resolution for 2021 and its Annex 1-A.

According to the Eleventh Transitory Article of the First Resolution of Amendments to the Miscellaneous Tax Resolution for 2021 and its Annex 1-A, during the 120 calendar days following the beginning of the effective date of the complement referred to in the previous paragraph, the taxpayers indicated in Rule 2.7.1.9. may choose to issue the CFDI without incorporating the "Waybill" complement, at the end of said period (September 30, 2021). The use of the "Waybill" complement will be mandatory for the mentioned taxpayers.

We consider that there exist arguments that can be enforced regarding the constitutionality and legality of such Rule through an indirect amparo trial before the

competent District Courts in Administrative Matters or, alternatively, before the Federal Court of Administrative Justice, through a contentious administrative trial.

In order to determine the strategy to initiate a defense against the Rule in question, we consider it appropriate to know the position of our clients regarding the Rule, and thus to determine the most efficient way to challenge it, either through an amparo trial or through an administrative litigation trial.

### **Amparo trial**

It is possible to challenge the constitutionality of Rule 2.7.1.9 by filing an indirect amparo lawsuit before the competent District Courts.

There are two moments to file such appeal; namely, within 30 business days following the entry into force, when the provision is self-applicable (it causes damage with its mere entry into force), or within 15 business days following the first act of application of the referred provision, when it is heteroapplicable (when it does not cause a damage with its mere entry into force, but until the taxpayer falls under the rule).

In the case at hand, we consider that the rule under analysis is of a self-application nature by causing damages with its mere entry into force. Therefore, it is possible to file the amparo lawsuit within 30 days from the publication in the Official Gazette of the Federation of the fifth anticipated version of the Second Resolution of Amendments to the Miscellaneous Tax Resolution for 2021 and its Annex 1-A.

Although we face a general resolution of administrative nature, which could be challenged through a contentious-administrative trial, it is possible to file an indirect amparo trial when arguments of direct constitutionality against the Rule in question are made.

It is important to mention that the suspension of the challenged act would be requested so that once 120 calendar days have elapsed, or on September 30, 2021, following the beginning of the effective date of the Rule, the companies may continue with the transportation of their own or third party merchandise, respectively, without having to comply with the Rule in question.

### **Contentious-Administrative Lawsuit**

The Federal Law of Contentious Administrative Procedure provides the possibility to file a contentious administrative lawsuit against administrative acts, Decrees and Agreements of a general nature, other than regulations, when they are self-applicable or when the interested party challenges them jointly with the first act of application.

In this particular case, the Rule in question is self-applying. Therefore, it is possible to file a nullity claim within 30 days from the publication in the Official Gazette of the Federation of the fifth Advance Version of the Second Resolution of Amendments to the Miscellaneous Tax Resolution for 2021 and its Annex 1-A, since it is a rule that causes an effect to the individual from the moment of its entry into force.

Likewise, the suspension of the challenged act would be requested so that once 120 calendar days have elapsed, on September 30, 2021, following the beginning of the effective date of the Rule, companies may continue with the transportation of their own or third parties' merchandise, respectively, without having to comply with the Rule in question until the legality of the same is resolved.

The analysis carried out by a Court of Administrative Justice would be properly of legality; however, this does not imply that arguments of constitutionality could not be made in the lawsuit, which could also be analyzed by a Collegiate Court in a second instance.

### **Act of application**

It is important to point out that in the event that there is an act of application of the Rule under analysis by the authority (including the Rule in force published in the First Resolution of Amendments to the Tax Miscellaneous Resolution of 2021), the term to challenge through an indirect amparo lawsuit would be 15 business days from the date the same becomes effective.

Likewise, in the event that the act of application of the Rule is challenged through a contentious administrative lawsuit, the term to file the respective lawsuit would be 30 business days from the date the effects of the notification of the same are effective.

### **Defense Arguments**

Depending on the assumption of application of the Rule in which the companies are involved, arguments related to violations of legality, legal certainty and hierarchy of laws, proportionality of penalties (taking into consideration customs and tax penalties, seizure of goods and transportation, suspension of importers' registry, fines, etc.), and legal certainty in relation to the principle of legitimate trust, among others, could be argued.

Our tax and foreign trade practices have conducted a constitutional and legality analysis of the Rule in question - the above mentioned arguments are illustrative. We are at your disposal to expand our comments and discuss the appropriate means of defense.

We hope that the information contained in this bulletin is useful, and we remain at your disposal to expand our comments if required.

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