

# RITCH

## M U E L L E R

### **Publication of the decree that toughens consequences for tax evasion**

In order to counter tax evasion schemes more effectively, on November 8, the Federal Official Gazette published the Decree which amends, adds and repeals several provisions of the Federal Law against Organized Crime, the National Security Law, the National Code of Criminal Procedures, the Federal Tax Code and the Federal Criminal Code (“Tax-Crime Reform”), which will enter into force on January 1st, 2020.

The following is a summary of its contents and legal consequences for individuals and entities:

#### **I. Fiscal offenses**

The Tax-Crime Reform focuses on three tax crimes (“Crimes”):

1. Smuggling and its equivalent.
2. Tax fraud and its equivalent.
3. Issuance, purchase or acquisition of tax invoices that cover non-existent or counterfeit transactions or simulated acts.

#### **II. Pretrial detention**

Under the Tax-Crime Reform, Crimes will call for pretrial detention, provided that:

- a) Smuggling and its equivalent are aggravated.
- b) Tax fraud and its equivalent exceed MXN\$7,804,230.00, and only where aggravated.
- c) The amount covered by apocryphal invoices exceeds MXN\$7,804,230.00.

In such cases, offenders will remain in prison during the proceedings and will not have the right to any reparatory arrangements nor the conditional suspension of such proceedings.

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On the other hand, the Public Prosecutor's Office ("PP") may refrain from exercising criminal actions only if the defendant agrees to appear in court and provides reliable information that will contribute to the investigation and prosecution of the final beneficiary of the Crime.

### **III. Organized crime**

The Tax-Crime Reform provides that where three or more individuals or entities organize to commit the Crimes, they will be considered members of organized crime.

However, to consider individuals or entities as members of organized crime, the amount of both the tax fraud or the false invoice issued, acquired or purchased by them must exceed MXN\$7,804,230.00.

### **IV. Asset forfeiture**

According to the National Asset Forfeiture Law ("NAFL"), which entered into force on August 10, offenses committed by members of organized crime may give rise to asset forfeiture.

Therefore, where tax offenses are classified as organized crime, the PP may exercise asset forfeiture actions over the private property of individuals or entities, as the case may be.

Action for asset forfeiture proceeds over assets whose legitimate origin cannot be established, or property which, although legitimate, is destined for unlawful purposes.

It is worth mentioning that, as provided by the NAFL, the legal action of asset forfeiture will be exercised through a civil procedure, completely independent from any parallel criminal proceeding. Hence, the PP in charge of all legal actions regarding asset forfeiture may exercise it with independence from any existing criminal process, and even where no criminal responsibility has been established. The NAFL also provides that no criminal acquittal will prove the legitimacy of assets and, therefore, will not affect the course of the forfeiture.

Under certain circumstances, property subject to forfeiture may be sold before the issuance of any ruling, but may not be disposed of where, as a result of an ongoing criminal procedure, their preservation has been ordered for evidentiary purposes.

If the action of asset forfeiture is declared inadmissible, the property shall be returned immediately. Where assets were sold in advance, all sale proceeds, plus interests, returns and accessories, minus management expenses, shall be paid. Finally, if the property was donated or destroyed, or its return is not feasible, the owner will receive the appraisal value of the assets at the time they were secured.

### **V. Criminal responsibility for entities**

Prior to the Tax-Crime Reform, entities could only be criminally responsible for smuggling and its equivalent, and tax fraud and its equivalent. Currently, though, entities that issue, purchase, transfer or acquire tax invoices that cover non-existent or counterfeit transactions or simulated legal acts will also be criminally responsible.

### **VI. Retroactivity and statute of limitations**

Transitory articles of the Tax-Crime Reform provide that, as of its entry into force, all contrary provisions to it shall cease to have effect. However, the purchase or issuance of apocryphal invoices, as well as transactions involving illegally sourced funds previously committed, will continue to be prosecuted under the original provisions.

Finally, regarding asset forfeiture, the NAFL provides different statutes of limitations.

- a) Legal action for asset forfeiture will have no statute of limitations regarding assets with an illicit origin.
- b) For lawful property, albeit intended for illicit purposes, the action shall be subject to a statute of limitations of 20 years from the date the assets were used to such purposes.
- c) If the PP in charge of a criminal procedure informs the PP responsible for exercising forfeiture actions of any property that may be forfeited, and the latter fails to do so, his legal powers will expire within 10 years of being informed.