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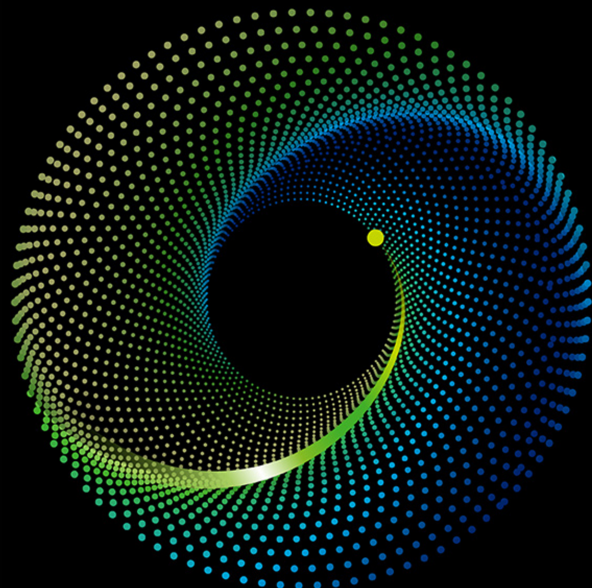

Tax Alert

New SAT Institutional Criteria regarding "bankarization" for Tax Matters to facilitate deductibility of costs and expenses and VAT credits

Decree 20-2006 establishes that companies that make payments that support their deductible costs and expenses or that constitute tax credits, for amounts as of GTQ.30,000, should make such payments through the means made available by the banking system, in which the seller of the goods or provider of the services can be demonstrated and identified.

Due to business, financial, legal, and operating complexities, companies have used various means that differ from the direct bank payment to the supplier required by tax law. In these cases, they have made payments using different alternatives such as: payments to third parties designated by the supplier pursuant to commercial contracts, settlements of their transactions through current account contracts, use of the services or intermediation of a third party that makes the payments to the supplier, and other forms in cases related to judicial proceedings or trusts that preclude the use of the bank account.

These different payment alternatives triggered for taxpayers the tax risk of adjustments being made by the Superintendency of Tax Administration -SAT-, based on the literal application of the requirement to use direct bank payments, and thus rejecting the tax deductions and/or tax credits of the transactions paid through the other alternatives mentioned above.

Based on the above, SAT issued Institutional **Tax Opinion 5-2021** "Application of the Use of Banking Services in Payments to Suppliers through Third Parties or Payments Made by Third Parties," which establishes that to ensure the proper application of the tax laws as a whole, forms of payment other than electronic transfers, checks and credit and debit card payments will be accepted, provided that they comply with the following guidelines:

a. Invoices and Contracts. It is necessary to have the supporting documentation, that is, invoices that support the costs and/or expenses and recognition of the tax credit. Furthermore, SAT will take into account the contracts related to the payment alternatives used by the taxpayer and that are recorded in a notarial instrument (e.g.: outsourcing, management, current account, factoring and discount contracts, and trusts, etc.)

b. Current Account. When payments are documented using mechanisms established through current account contracts, these must be executed in a notarial instrument from the moment the compensation arises and not when the tax administration initiates oversight actions. The current account contract should include at a minimum an annual settlement at the closing of each accounting period.

c. Payments to Third Parties Other Than the Supplier. If in payment checks or transfers it is observed that the beneficiary of the payment is a third party, there must be contractual evidence executed in a notarial instrument that supports the transaction.

d. Factoring and Discounts. Factoring and discount contracts used as forms of payment should be documented in writing, either through a notarial instrument or private instrument, and must adhere to the specific pertinent law and the Law of Security Interest in Personal Property, when applicable.

In these cases, the tax administration will verify the application of interest and discounts, and the documentation that supports the factoring and/or discount transaction.

e. Trusts. When a company's cash flows are subject to a trust, it must be verified that the company's revenues are deposited into such trust so that SAT can proceed to review the payments to suppliers in the trust's accounting.

f. Payments Made by Third Parties. In cases in which a third party is the one making the payments, the tax administration will request the contract between the entity requesting the tax credit refund and/or deduction of the expenses stemming from the invoices paid and such third party.

g. Payments Made by Another Company due to Judicial Attachments. When a third party makes payments on behalf of the entity that records the costs and/or expenses and tax credits due to judicial attachments or precautionary measures that impede the normal use of its bank accounts, the tax administration will verify that there is an account of another taxpayer, designated exclusively for the purposes of handling the funds of the entity claiming the deductible expenses or tax credits, provided that this transaction does not imply a violation of the court order.

This new institutional opinion of SAT promises more flexible oversight criteria that reflect the substance, and not just the form, of the payments of taxpayers claiming tax deductions and tax credits. This provides comfort to companies that if they adapt to the specifics detailed in such opinion, they will not be exposed to the rejection of their deductible expenses and tax credits because they used supplier payment alternatives that differ from direct bank payments.

Finally, it must be kept in mind that SAT's institutional opinions do not provide absolute legal certainty for taxpayers in general. In the past, the SAT's institutional opinions have changed over time when the current administration does not share the opinion of the previous administration. Therefore, it is recommended that taxpayers perform an in-depth evaluation to identify all the applicable risks whenever they use forms of payment that differ from direct bank payments to their suppliers.

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