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Mexico

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Developments in Mexican law in 2010 were highlighted by judicial upholding of the recognition of same-sex marriage in the Federal District as a civil right, updates to Mexican tax laws pertaining to the Mexican flat tax and international tax treaties with Barbados and Germany, and several developments in labor law. In recognition of the embrace by Mexico's Supreme Court of the increasingly central role of its rulings of general effect on the constitutionality of Mexican laws (in distinction to the *amparo* rulings of Mexican federal courts whose holdings have effect limited to the litigants), several of the developments reported in this article concern constitutional decisions of Mexico's Supreme Court, while others reflect legislative and treaty developments.

I. Domestic Relations—Same Sex Marriage

Same-sex marriage became lawful in the Federal District (Mexico City) during 2010, and the Mexican Supreme Court's review has affirmed that all the states of Mexico must recognize same-sex marriages performed in the Federal District. Mexico's Federal District amended articles 146 and 391 of its Civil Code by defining marriage as the union of two persons, without regard to their sex, and implicitly establishing the possibility of adoption of minors by persons so married. The law became effective on December 29, 2009, when it was published in the Federal District's *Gaceta Oficial* (Official Gazette). But on January 27, 2010, Mexico's *Procurador General* (Attorney General) filed an action before Mexico's Supreme Court to have those amendments declared unconstitutional. Under Mexico's Constitution, the *Procurador General* is entitled to challenge the constitutional legitimacy of a law before the Supreme Court within thirty days of its publication.

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The *Procurador General* argued that the new marriage law was unconstitutional because Article 4 of the Federal Constitution declares that men and women are equal before the law and that such equality “will protect the organization and development of the family.”¹ The *Procurador* argued that accordingly the only constitutionally-permitted marriages are those between a man and a woman.

Mexico’s Supreme Court issued its ruling on the challenge on August 16, 2010.² Mexican Supreme Court Justice Sergio A. Valls Hernández authored the decision in which a majority of the full Court joined. The majority rejected the *Procurador’s* arguments against the new law, including a related argument that the Federal District’s recognition of such marriages would create confusion because such marriages were not yet recognized in the other states of Mexico. In reaching this conclusion, Justice Valls noted that because the challenged legislative definition of marriage broadened, rather than restricted a civil right, it need not be evaluated under requirements of reasonableness and proportionality.³ Justice Valls further reasoned:

If we start from that the Constitution does not protect exclusively the family that arises from or is constituted through that institution [the institution of matrimony as legislatively defined at any point in time], because the protection is to the family, then within a democratic State of law, in which the respect of plurality is part of its essence, that which must be understood to be constitutionally protected is the family as a social reality, and, therefore, such protection must cover all its forms and manifestations as existing reality, achieving to cover those families that are constituted with matrimony, with unions of fact, with a father or a mother and children (single parent family), or indeed, any other form that denotes a similar bond.⁴

Justice Valls further reasoned that allowing adoption of children by all kinds of families recognized under the Federal District’s new definition of matrimony was protective of the interests of children, rather than threatening to them.

Justice Valls concluded:

[T]his Supreme Court judges that the sexual diversity of the parties is neither constitutionally nor legally a defining element of the matrimonial institution, but rather the result of the social conception that, in a given historical moment, existed, and not the essential core of matrimony and, consequently, the legislator, in approving the challenged reform, redefining the concept of matrimony as the union of two persons, thus extending this civil institution to homosexual persons, does not affect or deform said institution in its essential nucleus or nature, as the plaintiff urges, nor can it be sustained that the Constitution opposes itself to this option elected by the ordinary legislator, just as also it cannot be that matrimony between a man and a woman is the only means to constitute an “ideal” family.⁵

1. Acción de Inconstitucionalidad 2/2010 Promoviente: Procurador General de la República, Pleno de la Suprema Corte de Justicia [Supreme Court], Agosto de 2010 (Mex.), <http://www2.scjn.gob.mx/juridica/eng-roses/cerrados/207/10000020.019.doc>.

2. *Id.*

3. *Id.* ¶ 221.

4. *Id.* ¶ 235.

5. *Id.* ¶ 256.

II. Tax Update

A. JUDICIAL PRECEDENTS—MEXICAN FLAT TAX (IETU)⁶ IS CONSTITUTIONAL

The IETU became effective on January 1, 2008. Since it was adopted, it has become the single most challenged Mexican legislative provision of all time. It is estimated that almost 40,000 *amparo* actions were filed against the IETU.⁷ In February 2010, Mexico's Supreme Court upheld the constitutionality of the IETU.⁸

In Mexico, taxpayers can challenge the constitutionality of a new tax law by filing an *amparo* before a federal court. In the case of the IETU, due to the high number of claims filed, two district courts were created specifically to study and rule on the IETU. Once the district judges ruled that the IETU was constitutional, the Supreme Court attracted the appeals filed against those rulings to establish the criteria that would be used to solve all the constitutional claims. In a hearing unprecedented in Mexico before issuing the final ruling, the Supreme Court heard the oral arguments of officials from the executive and legislative branches, professional associations, business organizations, and various lawyers representing taxpayers.

One of the arguments against the constitutionality of the IETU was that it violated the principle of tax equity, with respect to the treatment it gives to royalties. In general terms, the IETU taxes income derived from the sale of goods, performance of services, or allowing the temporal use of goods. These concepts include royalty payments made between unrelated parties, which are taxable for the recipient and deductible for the payor. But, royalty payments made between related parties are not taxable for the payee or deductible for the payor. The Supreme Court held that this differentiation was justified and therefore not contrary to the principle of equal tax treatment, because the Mexican Congress considered that it would not be possible to determine with certainty the real value of such transactions and therefore excluded them from the scope of the IETU.⁹

Another of the main arguments raised against the constitutionality of the IETU was that it was contrary to the principle of proportionality because it does not allow deductions from gross income of certain expenses, such as payments for salaries and other payments to employees, specified kinds of interest payments, and royalty payments made to related parties. The Supreme Court considered that in the case of the IETU, the disallowance of such deductions was not contrary to the principle of tax proportionality.¹⁰ In reaching its conclusion, the Supreme Court considered that the target of the IETU was the gross income from the sale of goods, performance of services, or from renting prop-

6. *Impuesto Empresarial a Tasa Única*.

7. Manuel Carballo, *Revista la Corte 40 Mil Juicios de Amparo Contra IETU*, EL SOL DE MEX., Jan. 27, 2010, <http://www.oem.com.mx/laprensa/notas/n1494717.htm>.

8. Press Release, Mexican Supreme Court, *Constitucional, la Ley del Impuesto Empresarial a Tasa Única* [Constitutional, IETU] (Feb. 9, 2010), available at <http://www.scjn.gob.mx/MEDIOSPUB/NOTICIAS/2010/Paginas/09-Febrero-2010.aspx>.

9. *Impuesto Empresarial a Tasa Única*, Pleno de la Suprema Corte de Justicia [Supreme Court], *Semanario Judicial de la Federación y su Gaceta, Novena Época*, tomo XXXII, Agosto de 2010, Tesis P./J. 84/2010, Página 10 (Mex.).

10. *Id.* at 217.

erty.¹¹ The tax is thus imposed on gross income, and accordingly the allowance of deductions is not mandatory.

The ruling of the Supreme Court holding that the IETU is a tax imposed on the gross receipts of the taxpayer, as to which there is no mandatory requirement that deductions be contemplated (as opposed to a tax on net income, as to which provision for deduction of expenses incurred for the production of income would be mandatory), has increased the concern of tax practitioners with respect to whether the IETU is recognizable for the purposes of U.S. federal tax law as an income tax, the payment of which can be credited against U.S. federal income tax liabilities. The issue present in U.S. federal tax law from the initial imposition of the IETU has been whether it fulfills the United States Internal Revenue Code requirement that, as a condition to taking credit against U.S. federal tax liability, a foreign tax have the character of an "income tax" imposed on "net income."¹²

In this respect, it is important to underline that under U.S. federal law, a foreign levy must have the character of "an income tax in the U.S. sense,"¹³ which means that it must be imposed on "net income."¹⁴ To achieve such a characterization, U.S. federal tax regulations provide that certain deductions should be allowed.¹⁵ Although the United States Internal Revenue Service has taken the position that taxpayers may credit against their U.S. federal income tax liabilities the IETU paid in Mexico, until the Internal Revenue Service issues further guidance in view of the recent ruling of Mexico's Supreme Court,¹⁶ the guidance to date is not confirmed as a definitive resolution of whether the IETU is a tax eligible to be credited against U.S. federal income tax liabilities.

B. NEW TAX TREATIES¹⁷

During 2010, a tax treaty with Barbados¹⁸ and a renegotiated tax treaty with Germany¹⁹ became effective. Further, a protocol to the tax treaty with the Netherlands entered into

11. *Id.* at 239-40. Further, the Supreme Court considered that the IETU is not contrary to the principle of tax "legality" (under which the elements of a tax have to be established by a law in the formal sense), because the law defines the object of the tax, i.e., the gross income derived from the sale of goods, the performance of services or provide the temporal use of goods. *Id.*

12. Ricardo Gonzáles & Mauricio Martínez, *Mexican Supreme Court Rules Flat Tax is Constitutional*, 39 TAX MGMT INT'L J. 264 (2010).

13. *See* Treas. Reg. § 1.901-2(a)(ii) (1960).

14. *Id.* § 1.901-2(b)(1).

15. *See id.* § 1.901-2(b)(4).

16. I.R.S. Notice 2008-3, 2008 I.R.B. 2, available at http://www.irs.gov/irb/2008-02_IRB/ar12.html.

17. *See generally* Current List of Tax Treaties Entered into by Mexico (Sept. 2010), ftp://ftp2.sat.gob.mx/asistencia_servicio_fnp/publicaciones/legislacion10/cuadro09092010.pdf.

18. Decreto de Promulgación del Convenio entre el Gobierno de los Estados Unidos Mexicanos y el Gobierno de Barbados para Evitar la Doble Imposición y Prevenir la Evasión Fiscal en Materia de Impuestos Sobre la Renta [Decree to promulgate the tax treaty with Barbados], Diario Oficial de la Federación [DO], 15 de Enero de 2009 (Mex.), available at ftp://ftp2.sat.gob.mx/asistencia_servicio_fnp/publicaciones/legislacion09/Barbados.pdf.

19. Decreto de Promulgación del Acuerdo Entre los Estados Unidos Mexicanos y la República Federal de Alemania para Evitar la Doble Imposición y la Evasión Fiscal en Materia de Impuestos Sobre la Renta y Sobre el Patrimonio [Decree to promulgate a renegotiated tax treaty with Germany], Diario Oficial de la Federación [DO], 15 de Diciembre de 2009 (Mex.), available at ftp://ftp2.sat.gob.mx/asistencia_servicio_fnp/publicaciones/legislacion10/alemania20100120.pdf.

force.²⁰ Finally, Mexico entered into an exchange of information agreement with Bermuda.²¹

C. TAX CHANGES FOR 2011

For 2011, the Mexican Congress is not expected to make significant changes to the tax regime.²² Some of the few tax increases forecast are for the special tax imposed on the sales of cigarettes (from ten to thirty-five Mexican cents per cigarette)²³ and energy drinks²⁴ (taxed at twenty-five percent).²⁵

Another relevant modification for 2011 is a tax benefit for companies employing persons who are first joining the labor market (the so-called “first employment stimulus”). The benefit provides for an additional deduction with respect to payments for new jobs that are created and given to persons that have not been previously employed.²⁶

III. Labor Law Reform

Those who practice labor law in Mexico recognize that the current legal regime pertaining to labor in Mexico must be reformed to update it to increasing global competition. Several attempts relating to the need to reform the Federal Labor Law proved unsuccessful in the past. Federal representatives and most of the Mexican political parties have been reluctant to engage in serious discussions to present a serious, comprehensive reform proposal for Mexico’s labor relations.

On March 18, 2010, the legislative group of the National Action Party (*Partido de Acción Nacional*, or “PAN” in Spanish), presented a legislative initiative to reform Mexico’s labor laws. The law fell short of meeting the expectations of many persons, but was at least a

20. Decreto de Promulgación del Protocolo que Modifica el Convenio Entre los Estados Unidos Mexicanos y el Reino de los Países Bajos para Evitar la Doble Imposición e Impedir la Evasión Fiscal en Materia de Impuestos Sobre la Renta [Decree to promulgate the protocol that modifies the tax treaty with the Netherlands], *Diario Oficial de la Federación* [DO], 29 de Diciembre de 2009 (Mex.), available at ftp://ftp2.sat.gob.mx/asistencia_servicio_ftp/publicaciones/legislacion10/alemania20100120.pdf.

21. Decreto de Promulgación del Acuerdo Entre el Gobierno de los Estados Unidos Mexicanos y el Gobierno de Bermudas Sobre el Intercambio de Información en Materia Tributaria [Decree to promulgate the agreement between Mexico and Bermuda on the exchange of information in tax matters], *Diario Oficial de la Federación* [DO], 9 de Septiembre de 2010 (Mex.), available at ftp://ftp2.sat.gob.mx/asistencia_servicio_ftp/publicaciones/legislacion10/Bermudas09092010.pdf.

22. Luis Rojas, *Mexico Plans No Tax Changes with 2011 Budget*, REUTERS, Sept. 6, 2010, <http://www.reuters.com/article/idUSN0622394420100907>.

23. Dictámenes de Primera Lectura, sobre la Ley del Impuesto Especial Sobre Producción y Servicios [Opinions on first reading, on the Law of the special tax on production and services], *Gaceta del Senado*, 26 de Octubre de 2010 (Mex.), available at <http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=5877&lg=61>.

24. Dictámenes de Primera Lectura, sobre la Ley del Impuesto Especial Sobre Producción y Servicios [Opinions on first reading, on the Law of the special tax on production and services], *Gaceta del Senado*, 26 de Octubre de 2010 (Mex.), available at <http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=5872&lg=61>.

25. Adam Thomson, *Mexico Raises Deficit in 2011 Budget*, FIN. TIMES, Oct. 20, 2010, <http://www.ft.com/cms/s/0/4343c820-dc6e-11df-a0b9-00144feabdc0.html>.

26. Dictámenes de Primera Lectura, sobre la Ley del Impuesto Sobre la Renta [Opinions on First Reading, on the Law of Tax on Income], *Gaceta del Senado*, 26 de Octubre de 2010, arts. 229-38 (Mex.), available at <http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=5873&lg=61>.

first step after reportedly having been discussed and agreed upon by the leading unions, employees, employers, non-governmental organizations, political parties, and various action groups. The proposed legislation—for the first time in forty years—appears to have a decent chance of enacting reforms in labor law. The bill is said to be in the legislative agenda and therefore to be discussed in the now current legislative period.

Highlights of the contemplated reform would include extending a worker's probationary period from one to six months, extending a training period from three to six months, and allowing hourly shifts with pay according to hours worked and not only on a daily rate. Workplace promotions under the new law would be based on productivity rather than seniority. Payment of back pay would be limited to six months rather than the indefinite period now permitted under Mexican law. In labor disputes where a plaintiff employee prevails, a two percent interest rate would apply after six months on non-liquidated amounts awarded to the employee. There would not be any mandatory reinstatement for employees who had less than three years on the job.

Other provisions in the proposed legislation include a prohibition on employers from asking female employees to provide proof that they were not pregnant as a condition to be hired or to remain on the job. There would also be sanctions for sexual harassment in the workplace. And it would be a crime to hire child workers under the age of fourteen.

If enacted, the new law would allow tele-work from home or other places using electronic means. The new law would also obligate unions to disclose financial data to their members and eliminate the obligation on employers to deduct union dues from employee payrolls.