Article Journal-Public Economy
December, 2020 Vol.4 No.7 9-20

Tax treatment of dividends and alternative for shareholders. Tax treatment of dividends and alternative for shareholders

Tratamiento fiscal de los dividendos y alternativa para los accionistas. Tax treatment of dividends and alternative for shareholders

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DOI: 10.35429/JPE.2020.7.4.9.20 Received September 10, 2020; Accepted November 18, 2020

Abstract

In simple terms, a shareholder is a person who puts their money at risk by providing it to a business, what we call investment, which, if it generates profits, these are distributed in proportional parts to each partner, called dividends. In this way, the payment of dividends to shareholders represents the fair remuneration to the risk assumed. Dividend income is regulated in the Law on Income Tax and its correlation with the General Law of Commercial Companies, through precise guidelines. However, average business practice does not follow these provisions. Indeed, shareholders have money during the year in amounts on considerable amounts, without following any legal formality; thus facing fiscal and financial consequences. On the one hand, then, there is a reasonable right to remuneration and, on the other hand, compliance with the law. That is why alternatives to the old problem, of the checks without verification, set up as fictitious dividends.

Shareholder, Dividend, Alternative

Resumen

En términos simples, un accionista es una persona que pone en riesgo su dinero aportándolo a un negocio, lo que llamamos inversión, misma que, si genera utilidades, éstas se distribuyen en partes proporcionales a cada socio, llamadas dividendos. De esta manera, el pago de dividendos a los accionistas representa la justa retribución al riesgo asumido. El ingreso por dividendos se encuentra regulado en la Ley del Impuesto sobre la Renta y su correlación con la Ley General de Sociedades Mercantiles, mediante lineamientos precisos. Sin embargo, la práctica empresarial promedio no sigue estas disposiciones. En efecto, los accionistas disponen de dinero durante el año en cantidades en ocasiones considerables, sin seguir formalidad legal alguna; enfrentando de esta manera consecuencias fiscales y financieras. Por un lado se tiene, entonces, el razonable derecho a la retribución y, por otro, el cumplimiento a la ley. Es por ello que deben plantearse alternativas al añejo problema, de los cheques sin comprobación, configurados como dividendos fictos.

Accionista, Dividendo, Alternativa

Citation: BÁRCENAS-PUENTE, José Luis & ANDRADE-OSEGUERA, Miguel Ángel. Tax treatment of dividends and alternative for shareholders. Tax treatment of dividends and alternative for shareholders. Journal-Public Economy. 2020. 4-7: 9-20

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December, 2020 Vol.4 No.7 9-20

Introduction

It is common in business practice, specifically speaking of legal entities, that one or more of the shareholders request money for various personal purposes, throughout the year. This provision of resources is fully justified under the argument that they are owners of a part of the company and deserve this compensation for the capital invested in it.

This argument is irrefutable and this is the reason why this material proposes to expose alternative solutions, since, on the one hand, as business advisers, we have the obligation to solve problems, which in this case refer to the need to have money; but, on the other hand, the verification that such withdrawals or checks must have in accounting. The accounting record that is usually made is to charge the account of various debtors (subaccount, name of the shareholder or of a "person of trust") or charge the aided and invented account "expenses to be verified"; both records are incorrect, fallacious, and will invariably cause financial and fiscal problems.

What are these withdrawals of money to shareholders really? They are dividends. In effect, they are dividends, as contemplated by the Income Tax Law, only that, by not complying with the legal formalities, in professional jargon they are known as “fictional dividends” (fictitious). This material will explore the tax treatment of dividends, in light of the requirements established by the Income Tax Law and the formalities contemplated in the General Law of Commercial Companies; the consequences of carrying out this bad business practice; and alternative solutions are proposed, exploring legal foundations that can help us meet the financial needs of shareholders, without facing financial and tax consequences.

1. Concept of dividend, commercial procedure for its payment and tax treatment

Let's start by reviewing a definition of dividend that is very clear:

"Amount to be distributed among the shareholders of a company, deducted from the profit obtained by the company during each fiscal year. " (Carrasco Iriarte, 2016).

In this way, it is pointed out that this amount comes from the profit obtained by the company during each year, therefore, if we do not close the year yet, it could not be considered a dividend.

What is the legal procedure for the payment of dividends?

As a matter of principle, as said, it is not possible to speak of the decree and subsequent payment of dividends without the existence of profits in the legal entity; Now, once the financial year is closed and favorable results have been determined, it is necessary to make a consensual decision to pay dividends; This is done at an ordinary shareholders' meeting. If we take as a basis the applicable provisions for the public limited company, the most common type of company in our country, the LGSM, has:

Article 178.- The General Assembly of Shareholders is the Supreme Body of the Company; may agree and ratify all the acts and operations thereof and its resolutions will be carried out by the person that it designates, or in the absence of appointment, by the Administrator or by the Board of Directors. The bylaws may provide that the resolutions taken outside of the meeting, by unanimous vote of the shareholders representing all the shares with voting rights or the special category of shares in question, will have, for all the legal effects, the same validity as if they had been adopted in a general or special assembly, respectively, provided they are confirmed in writing. In what is not provided for in the statutes, the provisions of this law will be applicable in what is relevant. ((General Law of Commercial Companies, 2020).

This article designates the assembly as the supreme body of the corporation and the resolutions taken in it must be fulfilled; although it is expected that there may be decisions outside the meeting, in which case the shareholders must unanimously to prove their validity.

“Article 179.- The General Shareholders' Meetings are ordinary and extraordinary. Both will meet at the registered office, and without this requirement they will be void, except in unforeseeable circumstances or force majeure. " (General Law of Commercial Companies, 2020).

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There are ordinary and extraordinary assemblies, due to the matters dealt with in them; They are the first to which we will refer.

"Article 180.- Ordinary assemblies are those that meet to deal with any matter other than those listed in Article 182." (General Law of Commercial Companies, 2020).

That is, by elimination, it is understood that the extraordinary ones are more specific and it exclusively deals with the matters referred to in article 182, which is beyond our subject.

Article 181.- The Ordinary Assembly will meet at least once a year within the four months that follow the closing of the fiscal year and will deal, in addition to the matters included in the agenda, of the following: I. - Discuss, approve or modify the report of the administrators referred to in the general statement of article 172, taking into account the report of the commissioners, and take the measures that it deems appropriate.

II.- Where appropriate, appoint the Administrator or Board of Directors and the Commissioners; III.- Determine the emoluments corresponding to Administrators and Commissioners, when they have not been established in the statutes. (General Law of Commercial Companies, 2020).

This order reveals precisely the issues to be discussed at the ordinary meeting, to be held within the four months following the close of the fiscal year (December + four months = April); first of these matters is the report of the administrators, where the financial statements are located, as indicated in the aforementioned article 172:

Article 172.- Corporations, under the responsibility of their administrators, will present to the Shareholders' Meeting, annually, a report that includes at least:

A. A report from the administrators on the progress of the company in the year, as well as on the policies followed by the administrators and, where appropriate, on the main existing projects.
B. A report in which they state and explain the main accounting and information policies and criteria followed in the preparation of financial information.
C. A statement that shows the financial situation of the company at the closing date of the year.
D. A statement that shows, duly explained and classified, the results of the company during the year.
E. A statement showing the changes in the financial situation during the year.
F. A statement that shows the changes in the items that make up the corporate equity, which occurred during the year.
G. The notes that are necessary to complete or clarify the information provided by the previous statements.

To the above information, the report of the commissioners referred to in section IV of the article will be added. 166. (General Law of Commercial Companies, 2020).

This is the legal framework that dictates the way in which we must proceed to decree and pay dividends; however, the problem is that shareholders need resources during the year and hardly wait until April to hold the meeting. Hence the problem that has arisen.

To complement, the aforementioned section IV of article 166 of the same law, establishes:

Article 166.- The powers and obligations of the commissioners are: (…)

IV. Submit an annual report to the Ordinary General Shareholders 'Meeting regarding the veracity, sufficiency and reasonableness of the information presented by the Board of Directors to the Shareholders' Meeting itself. This report must include, at least:

a) The opinion of the Statutory Auditor on whether the accounting and information policies and criteria followed by the company are adequate and sufficient, taking into account the particular circumstances of the company.

b) The opinion of the Commissioner on whether these policies and criteria have been consistently applied in the information presented by the administrators.

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c) The opinion of the examiner on whether, as a consequence of the foregoing, the information presented by the administrators accurately and sufficiently reflects the financial situation and results of the company. (General Law of Commercial Companies, 2020).

It is then about the opinion that, as a monitoring body, the commissioners must render regarding the veracity, sufficiency and reasonableness of the financial information.

Once we have reviewed the commercial aspect of the payment of dividends, it is necessary to explore its tax treatment, namely:

Article 10. Legal entities that distribute dividends or profits must calculate and pay the tax that corresponds to them, applying the rate established in Article 9 of this Law. For these purposes, the dividends or profits distributed will be added with the tax. on the rent to be paid in the terms of this article. To determine the tax that must be added to dividends or profits, these must be multiplied by the factor of 1.4286 and to the result the rate established in the aforementioned article 9 of this Law will be applied. The tax corresponding to distributed profits referred to in article 78 of this Law, will be calculated in the terms of said precept. (Income tax law, 2020).

In this case, the comments will be included at the end of this quote (article 10 of the LISR), in order to have the complete panorama on this.

Continuing:

In the case of the distribution of dividends or profits through the increase of social shares or the delivery of shares of the same legal person or when they are reinvested in the subscription and payment of the capital increase of the same person within 30 calendar days following their distribution, dividend or profit shall be understood to be received in the calendar year in which the reimbursement is paid by reduction of capital or by liquidation of the legal entity in question, in the terms of article 78 of this Law. You will not be obliged to pay the tax referred to in this article when the dividends or profits come from the net tax profit account established by this Law.

The tax referred to in this article will be paid in addition to the tax for the year referred to in article 9 of this Law, it will have the character of definitive payment and will be found out before the authorized offices, no later than the 17th day of the immediate month. following the one in which the dividends or profits were paid. When the taxpayers referred to in this article distribute dividends or profits and as a consequence pay the tax established in this article, they may credit said tax in accordance with the following:

I. The accreditation may only be made against the income tax for the year that is paid by the legal entity in the year in which the tax referred to in this article is paid. The amount of the tax that cannot be credited in accordance with the preceding paragraph, may be credited up to the next two years against the tax for the year and against the provisional payments thereof. When the tax for the year is less than the amount that had been credited in the provisional payments, only an amount equal to the latter will be considered creditable against the tax for the year. When the taxpayer does not accredit the tax referred to in the fourth paragraph of this article in an exercise, and may have done it in accordance with it, he will lose the right to do so in subsequent years up to the amount in which he could have made it.

II. For the purposes of article 77 of this Law, in the fiscal year in which they credit the tax in accordance with the previous section, taxpayers must reduce the net tax profit calculated in the terms of said precept, the amount that results from dividing the tax credited between the factor 0.4286. For the purposes of this article, the participation of workers in the profits of the companies will not be considered dividends or distributed profits.

The legal entities that distribute the dividends or profits referred to in article 140, sections I and II of this Law, will calculate the tax on said dividends or profits by applying the rate established in article 9 of this Law on them. This tax It will be final. (Income tax law, 2020).

Note that the legal text mentions "calculate and find out" the tax, and not "calculate and pay";

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What is the difference? Throughout the LISR, as well as others, the term “find out” is used, referring to the payment made on behalf of third parties, the person making said payment being a mere withholding agent. Thus, it is called "payment" when it is a self-tax and it is called "whole", when it is a foreign tax, as a result of a withholding (ISR for wages, VAT on fees, etc.). That is why, in this case, the tax that is withheld due to the payment of a dividend is “found out”, as this is an income for the person who receives it. This withholding must be made by adding the income tax it generates to the dividend paid; carrying out, for this, a multiplication. The dividend is multiplied by the factor 1.4286, where is this obtained from? If we start from the fact that to calculate income tax, the dividend plus the income tax generated must be taken as a basis, we have that, at the current income tax rate, 30%:

Part of income that generates tax = 30 Part of income that does not generate tax (difference) = 70; Therefore, 30/70 = 0.428571428; Rounding to the ten thousandth (4 decimal places) = 0.4286; This is the part that represents the income tax of the total income, now, to "add" to it, just add the unit to this result and we have: 0.4286 + 1 = 1.4286, factor that marks the law.

To calculate the tax, this paragraph establishes that the dividend paid must be multiplied by this factor and subsequently by the current rate; which means a costly tax for the taxpayer, since tax is levied on tax; a simple example clearly demonstrates this:

Assume a paid dividend of $ 100,000. 100,000 x 1.4286 = 142,860 x 30% = 42,858 of ISR; Net shareholder payment: 100,000 - 42,858 = 57,142 Effective income tax rate that causes the dividend: 42,858 / 100,000 = 42.86%; Exceeding the 30% that it would cause, if it is an income other than the dividend; derived from this factor.

The same applies to capital reductions, in terms of article 78 of the LISR, that is, not only when dividends are paid as a result of the normal operation of the legal entity, but also when a partner retires and their contributions and / or dividends due are paid to them. In the latter case, it is clarified what proceeds when dividends are reinvested.

This expensive ISR has an exception, which is mentioned in the third paragraph: It will not be paid if the dividends come from the net tax profit account (CUFIN)… definitely that it is imperative to review what it refers to, seeking to adhere to this benefit.

Before analyzing the CUFIN, let us see an example regarding the accreditation of income tax paid for dividends, to which this cited article refers.

Data:

	Dividend or profit not from CUFIN		**1,000,000**
For	Pyramidation Factor	1.4286	1,428,600
For	Article 9 LISR fee		30%
Equal to	Tax to pay		428,580

Table 1

Application of fraction I:

Year 1

Against the tax that is charged in the fiscal year in which the tax corresponding to the dividend is paid.

Next two exercises:

- From provisional payments.
- If the tax for the year is less than the amount of the provisional payments, the credit is only considered to be made up to the tax incurred.

Year 1:

	Case		
	i)	**ii)**	**iii)**
Taxes workout	2,000,000	333,333	0
Rate	30%	30%	30%
Tax charge	600,000	100,000	
Accreditation	428,580	100,000	-
Tax to be credited	0	328,580	428,580

Table 2

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Year 2:

	ii)	iii)
Tax to be credited	328,580	428,580
Provisional payments	500,000	500,000
Tax credited in provisional payments	328,580	428,580
Provisional payments without accreditation	171,420	71,420
Tax caused in the year	300,000	100,000
Tax effectively credited	300,000	100,000
Balance due to (Favor)	-171,420	-71,420

Table 3

Year 3:

	ii)	iii)
Tax to be credited	28,580	328,580
Provisional payments	200,000	400,000
Tax credited in provisional payments	28,580	328,580
Provisional payments without accreditation	171,420	71,420
Tax caused in the year	250,000	200,000
Tax effectively credited	28,580	200,000
Balance due to (Favor)	50,000	-71,420
Tax paid by the dividend, which can no longer be credited	-	128,580

Table 4
(Hernández Campos, 2020)

Fraction II:

Tax credited between the factor of: (0.4286 for 2020) Equal to Amount of section II art. 10 to be subtracted from UFIN

So, if article 10 itself, in its sections I and II, prevents crediting the tax that has been paid (because it does not come from CUFIN), the reader might ask, what is the damage then? It is financial, since, as long as it is credited in the year itself or in the following years, the disbursement (very expensive, by the way), must be done at the time of its receipt, through withholding.

We will leave the comment for later regarding article 140 sections I and II referred to in this article 10, since it is part of the alternative solutions to the problem that arises in this material.

Let's analyze the Net Tax Income Account.

2. Net Tax Income Account (CUFIN)

Article 77. Legal entities will keep a net tax profit account. This account will be added with the net tax profit for each year, as well as with the dividends or profits received from other legal entities resident in Mexico and with the income, dividends or profits subject to preferential tax regimes in the terms of the tenth paragraph of article 177 of this Law, and it will be decreased with the amount of dividends or profits paid, with the distributed profits referred to in article 78 of this Law, when in both cases they come from the balance of said account. For the purposes of this paragraph, dividends or profits in shares or reinvested in the subscription and capital increase of the same person who distributes them are not included, within the 30 calendar days following their distribution. To determine the net tax profit referred to in this paragraph, the amount resulting in the terms of section II of article must be reduced, if applicable. 10 of this Law (Income Tax Law, 2020).

We must not lose sight of the fact that this article 77 is located within the obligations of legal entities (Chapter IX), that is to say that keeping this account is an obligation, in addition to carrying with it the benefit that we already mentioned.

Is it another account in our accounting? What type and nature? What is its movement? In reality, it does not affect the assets, the liabilities or the capital, much less the results; so it should be considered a memorandum account; it is added and decreased (or loaded and credited), with the following:

a) It is added:

– With the UFIN for the year.
– With dividends or profits received from other legal entities resident in Mexico.
– With income, dividends or profits subject to preferential tax regimes.

b) It decreases:

– With dividends or profits paid from CUFIN.
– With the profits distributed by capital reduction, also coming from CUFIN.

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Now, what is the meaning of the balance that this account shows? In other words, what is the purpose of carrying the CUFIN, beyond representing an obligation?

Interpreting and analyzing the additions and decreases, we reached the conclusion that the CUFIN serves to record dividends or profits that have already paid ISR, hence its importance, that is, once we pay a dividend, if there is a sufficient balance in CUFIN, It makes us suppose that he has already paid ISR and that is why the LISR exempts him from the payment.

Continuing with the text of article 77 in comment:

The balance of the account provided for in this article that is held on the last day of each fiscal year, without including the net tax profit thereof, will be updated for the period from the month in which the last update was made and until the last month of the exercise in question.

When dividends or profits are distributed or received after the update provided for in this paragraph, the account balance on the date of distribution or receipt will be updated for the period from the month in which it is made the last update and until the month in which dividends or profits are distributed or received. (Income tax law, 2020).

This paragraph establishes the way to update the CUFIN balance. Now, to calculate the UFIN (net tax profit, not to be confused with CUFIN), this article provides:

For the purposes of the provisions of this article, the net tax profit for the year is considered to be the amount obtained by subtracting the result fiscal year, the income tax paid under the terms of article 9 of this Law, the amount of non-deductible items for the purposes of said tax, except those indicated in sections VIII and IX of article 28 of the aforementioned Law, the participation of the workers in the profits of the companies referred to in section I of article 9 thereof, and the amount determined in accordance with the following paragraph. (…)

When the sum of the income tax paid in the terms of article 9 of this Law, the non-deductible items for income tax purposes, except those indicated in sections VIII and IX of article 28 of this Law, the participation of the workers in the profits of the companies referred to in section I of article 9 of the same, and the amount determined in accordance with the previous paragraph, is greater than the fiscal result of the year, the difference will be reduced from the account balance of net tax profit that is had at the end of the year or, where appropriate, of the net tax profit that is determined in the following years, until it is exhausted. In the latter case, the amount that is decreased will be updated from the last month of the year in which it was determined and until the last month of the year in which it is decreased. (Income tax law, 2020).

Calculation that we can outline as follows:

Taxes workout
(-) ISR for the year
(-) Non-deductible (except provisions for the creation or increase of supplementary reserves for assets or liabilities; reserves for severance pay to personnel and for seniority and employee payment premiums)
(-) PTU
(-) "Negative UFIN" from previous years

This would be the calculation that we would literally extract from the legal text, however, it is worth making the following reflections:

1. If the calculation of the fiscal result already has reduced the PTU, when subtracting it in the calculation of the UFIN, would it be subtracted twice?
2. In the subtraction of the non-deductible ones, which one does it refer to? Only those of article 28 of the LISR? Are those that do not meet tax requirements included?
3. Within this calculation scheme, should the subtraction of the accreditation referred to in section II of article 10 of the LISR be included?

Well, as regards the first reflection, we would be in the presence of a double subtraction, to do it as provided by law. In this case, the SAT Normative Criteria provides:

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36 / ISR / N Net tax profit for the year. In its determination, the participation of the workers in the profits of the company should not be subtracted from the fiscal result of the year. Article 77, third paragraph of the Income Tax Law provides that the net tax profit for the year is considered to be the amount obtained by subtracting the tax result for the year, the income tax paid in the terms of article 9 of such Law, the amount of non-deductible items for the purposes of said tax, except those indicated in article 28, sections VIII and IX of the aforementioned Law, the participation of workers in the profits of the companies referred to in article 9, section I of the same Law, and the amount determined in accordance with the fourth paragraph of the analyzed article.

In this regard, article 9, second paragraph of the Law in question establishes the procedure to determine the fiscal result of the year. In particular, section I of the referred paragraph indicates that, as part of said procedure, the tax profit will be obtained by decreasing the total accumulated income obtained in the year, the deductions authorized by Title II of such Law and the participation of workers in the utilities of companies paid in the fiscal year, in the terms of article 123 of the Political Constitution of the United Mexican States. Therefore, due to the fact that in the fiscal result of the year the participation of the workers in the profits of the companies paid in the year is already reduced, in accordance with article 9, second paragraph of the Income Tax Law, it should not said participation to be subtracted again to determine the net tax profit for the year referred to in article 77, third paragraph of the analyzed Law, because it is one of the exceptions referred to in the aforementioned paragraph. (Compilation of normative criteria of the SAT, 2020).

Before continuing with this analysis, it is necessary to be clear about the nature of these regulatory criteria, for this, we must cite article 35 of the Federal Tax Code (CFF):

Article 35.- The duly empowered tax officials may make known to the various agencies the criteria they must follow regarding the application of tax provisions, without thereby creating obligations for individuals and will only derive rights from them when they are published in the Official Gazette of the Federation. (Fiscal Code of the Federation, 2020).

That is, according to this, such criteria do not represent obligations to individuals, only to employees of government agencies, in this case, SAT; instead, they only constitute rights to taxpayers, in a similar way to administrative rules (called miscellaneous rules) and administrative facilities; both of which will be studied in due course. In conclusion, the correct thing is to adhere to the provisions of the aforementioned criterion, since it is what the tax authority considers appropriate.

Regarding the second reflection, article 117 of the LISR Regulations (RISR) establishes:

"Article 117. The non-deductible items referred to in Article 77 of the Law are those indicated as non-deductible in said Law." (Income tax law, 2020).

In this sense, to build the UFIN calculation scheme, we must only consider the non-deductible items contemplated in article 28 of the LISR, and not those that are also not deductible but whose proof that protects them does not meet tax requirements.

Finally, in this third point of reflection, in adherence to article 10 section II of the LISR in question, the ISR is susceptible of accreditation, sufficient reason to include it in the formula that is being defined.

In summary, according to the revised considerations, the UFIN calculation scheme would be as follows:

Fiscal result (adding PTU, to nullify the effect of a subtraction)

(-) ISR for the year
(-) Non-deductible, of those considered in article 28 of the LISR (except provisions for the creation or increase of complementary reserves for assets or liabilities; reserves for compensation to personnel and for premiums for seniority payments and PTU)
(-) PTU
(-) "Negative UFIN" from previous years
(-) Amount to be credited according to article 10 section II of the LISR

ISSN 2524-2016
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Up to now, there has been talk about the causation of ISR in the payment of dividends to partners or shareholders; mentioning that it is an expensive tax that the legal entity that distributes them must withhold and find out, since they are "pyramid-shaped" multiplying them by a factor before applying the 30% rate; likewise, if these dividends come from the balance of the net tax profit account (CUFIN), there is no obligation to pay ISR, since precisely this account records the profits that have already paid tax; derived from this, the importance of knowing the details of the CUFIN could be appreciated. This account, regulated by article 77 of the LISR, has precise provisions regarding its charges and payments; from whose record the net tax profit for the year (UFIN) should be highlighted, concluding the correct calculation mechanics.

3. Accreditation of the ISR withheld from the individual shareholder

To begin with the analysis of this section, let us now place ourselves on who receives the dividend, the partners or shareholders. These can be natural or legal persons, and in each case the tax effects are different, as follows:

a) If the partner or shareholder is a legal entity, income from dividends cannot be accumulated, as long as they are received from other legal entities resident in Mexico, as established in the last paragraph of article 16 of the LISR, to be reviewed later.

b) If the partner or shareholder is a natural person, the dividend income is cumulative to the others received in the year, according to article 140 of the LISR.

Article 140. Individuals must add to their other income, those received from dividends or profits. Said natural persons may credit, against the tax determined in their annual return, the income tax paid by the company that distributed the dividends or profits, provided that the person making the accreditation referred to in this paragraph considers as accumulative income, in addition to the dividend or profit received, the amount of income tax paid by said company corresponding to the dividend or profit received and also have the proof and the tax receipt referred to in section XI of article 76 of this Law.

Effects, the tax paid by the company will be determined by applying the rate of article 9 of this Law, to the result of multiplying the dividend or profit received by the factor of 1.4286. Notwithstanding the provisions of the preceding paragraph, individuals will be subject to an additional rate of 10% on dividends or profits distributed by legal entities resident in Mexico. The latter will be obliged to withhold the tax when they distribute said dividends. or profits, and they will find out together with the provisional payment of the corresponding period. Payment made pursuant to this paragraph will be final.

In the cases referred to in section III of this article, the tax that the legal person withholds will be found out no later than the date on which the declaration for the corresponding fiscal year is presented or should have been presented. It is understood that the income is received by the owner of the security and, in the case of social shares, the person who appears as the owner of the same. (Income tax law, 2020). To exemplify this accreditation, let's follow the material from Mtro. Edgar Ulises Hernández Campos, colleague from the Colegio de Contadores Públicos de León, AC:

Data:

	Concept	Amounts
	Perceived dividend	875,000
(+)	ISR paid by PM	**375,008**
(=)	Tax base for dividends	1,250,008
	Concept	**Amounts**
	Perceived dividend	875,000
(x)	Factor	1.4286
(=)	Dividend base	1,250,025
(x)	Article 9 LISR fee	30.00%
(=)	ISR paid by PM	**375,008**

Table 5

Accreditation:

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	Concept	Amounts
	Perceived dividend	875,000.00
(+)	ISR paid by PM	**375,007.50**
(=)	Tax base for dividends	1,250,007.50
(-)	Lower limit	1,166,200.01
(=)	Excess over lower limit	83,807.49
(x)	% on excess of lim. lower	34.00%
(=)	Marginal tax	28,494.55
(+)	Fixed fee	304,204.21
(=)	Annual income tax	332,698.76
(-)	ISR paid by PM	375,007.50
(=)	ISR in charge (in favor) of the exercise	(42,308.74)

Table 6
(Hernández Campos, 2020)

It is then one more credit, this time for the individual shareholder who paid ISR by withholding, since his dividend did not come from CUFIN.

4. Alternatives to continue paying shareholders without financial or tax consequences

Until now, it has been said that paying dividends without following the legal procedure (and without them coming from CUFIN, in addition), even with the accreditation mechanisms for those who pay and for those who receive, brings financial consequences, as they represent a disbursement at the time of distribution.

What is the tax consequence?

Article 140 of the LISR itself provides it, in the following lines:

For the purposes of this article, the following are also considered dividends or distributed profits:

I. The interests referred to in articles 85 and 123 of the General Law of Mercantile Societies and the participations in the profit that are paid in favor of bondholders or others, by mercantile companies resident in Mexico or by national credit companies.

II. Loans to partners or shareholders, except for those who meet the following requirements:

a. That they are a normal consequence of the operations of the legal entity.

b. That a term of less than one year is agreed.

c. That the agreed interest is equal to or greater than the rate established by the Federal Income Law for the extension of tax credits.

d. That these agreed conditions are actually met. (Income tax law, 2020).

This article begins by mentioning the withholding established since 2014, of 10% for this income; but even more, the aforementioned fractions establish two of the cases in which some "items" are also considered dividends. The first refers to two articles of the General Law of Mercantile Societies (LGSM), which we must review:

Article 85.- In the social contract it may be stipulated that the partners have the right to receive interest not greater than nine percent per year on their contributions, even when there are no benefits; but only for the period of time necessary for the execution of the works that according to the purpose of the company must precede the beginning of its operations, without in any case said period exceeding three years. These interests must be charged to general expenses. (General Law of Commercial Companies, 2020).

As stipulated, the contributions made by the partners may accrue interests no greater than 9% of these, even without any profits, but without exceeding three years; if exceeded, they are dividends.

Likewise, article 123 of the same law stipulates:

Article 123.- The bylaws may establish that the shares, during a period that does not exceed three years, counted from the date of the respective issue, have the right to interest not greater than nine percent per year. In such case, the amount of this interest must be charged to general expenses. (General Law of Commercial Companies, 2020).

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In reality, it is the second fraction that represents the greatest conflict in business practice in our country; We are talking about those money outflows that shareholders make frequently throughout the year to carry out personal expenses and that the accounting treatment of "loans" is given, commonly charging various debtors or the controversial account "expenses to be verified ". In this case, the aforementioned section II considers such operations as dividends, unless the four established paragraphs are complied with.

Now, the damages caused by this malpractice do not end there, section III of the same article 140 also establishes: (…)

"III. Disbursements that are not deductible in accordance with this Law and benefit the shareholders of legal entities. " (Income tax law, 2020).

In other words, non-deductible expenditures that benefit the shareholders of legal entities are also considered dividends; Obviously this fraction speaks of those money outflows to which we refer, which in no case will have a deductible tax receipt.

This is how this practice causes two negative effects: It is not deductible, since there will never be any proof; and, second, it is a "fictitious" dividend, subject to a "pyramidal" ISR.

What alternatives can be considered so that even continuing with these outflows of money, these items are correctly recorded in accounting and the financial and tax consequences that have been exposed are avoided?

Two alternatives can be considered:

a. Fees to members of the board of directors. That is, modify the articles of incorporation to create the council, if there was a sole administrator (generally contraindicated by many commercial lawyers); in such a way that shareholders are included by assigning them a specific function, whose development is feasible. In this regard, the deduction limits established in section IX of article 27 of the LISR must be taken care of.

b. Deduction for wages. It can be implemented instead of the previous paragraph or in combination, but referred to different people. In theory, any member of the council could be on the payroll as well, as long as it is not the legal representative. For this alternative, care must be taken to comply with labor and social security obligations; perhaps for this reason it may be more expensive than the previous alternative, however, there are benefits such as medical service and benefits.

There will be cases in which even using both options the need for money is not “covered”

For the shareholder, however, making the corresponding calculations and taking care to update them, they can provide a viable, legal and worthy solution to be taken into account.

Conclusions

You can conclude the following:

a. Dividends are the remuneration to which a shareholder is entitled for the capital invested in a legal entity; it is delivered once the fiscal year is closed and profits have been obtained, through the formalities of an ordinary meeting in the month of April of the following year. Fiscally, income is taxed multiplying it by the factor 1.4286 and later by the rate of 30%, which makes it an expensive income tax; however, if the dividend comes from the CUFIN balance, no tax is paid.

b. The net tax profit account (CUFIN) registers the profits that have already paid ISR, is kept in memorandum accounts and is subject to updating.

c. There are ISR accreditation mechanisms when this tax is paid as CUFIN dividends do not come, both for the legal entity that pays them and for the individual shareholder. However, the financial damage persists, since the disbursement must be made at the time of payment.

ISSN 2524-2016
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d. Not following the legal procedure mentioned in subsection a), but making money outflows during the year, without any verification, is classified as a "fictional dividend", in addition to not being deductible. As a legal alternative to this practical problem, the payment to council members or the payment of salaries can be configured, with the necessary fiscal limitations and precautions.

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ISSN 2524-2016
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