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Simulated operations. An analysis of their treatment and tax impact

Las operaciones simuladas. Un análisis de su tratamiento e impacto fiscal

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Abstract

According to the Taxpayer Defense Attorney (PRODECON), the issuance and improper use of tax receipts has been a matter of great concern for the Mexican tax authorities, since, at the moment when some taxpayers incur in this bad This practice affects the interests not only of the public treasury, but of society in general as revenue collection is reduced, since it must be remembered that according to article 31, section IV of the Political Constitution of the United Mexican States, "it is the obligation of the governed contribute proportionally and equitably to the public expenses of the Federation, the States, Mexico City and the Municipality in which they reside". The improper use of tax receipts motivated the reform to the Federal Tax Code (CFF), to add article 69-B, which seeks to combat this malpractice of some taxpayers, establishing in said legal system the cases in which the tax authority must consider the presumption of non-existence of operations covered by Vouchers

CFDI, EFO, EDO, Simulation

Resumen

De acuerdo con la Procuraduría de la Defensa del Contribuyente (PRODECON), la emisión y el uso indebido de comprobantes fiscales, ha sido un tema de suma preocupación para las autoridades tributarias mexicanas, ya que, al momento en que algunos contribuyentes incurren en esta mala práctica afectan intereses no sólo del erario público, sino de la sociedad en general al verse reducida la recaudación de ingresos, pues hay que recordar que conforme al artículo 31, fracción IV de la Constitución Política de los Estados Unidos Mexicanos, "es obligación de los gobernados contribuir de manera proporcional y equitativa para los gastos públicos de la Federación, de los Estados, de la Ciudad de México y del Municipio en que residan". El uso indebido de comprobantes fiscales motivó la reforma al Código Fiscal de la Federación (CFF), para adicionar el artículo 69-B, que busca combatir esa mala práctica de algunos contribuyentes, estableciéndose en dicho ordenamiento legal los supuestos en que la autoridad fiscal debe considerar la presunción de inexistencia de operaciones amparadas en Comprobantes Fiscales Digitales por Internet (CFDI's).

CFDI, EFO, EDO, Simulación

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Introduction

The simulation of operations through digital tax receipts (CFDI) is one of the fastest growing operations in Mexico. There are taxpayers who profit from the issuance of digital tax receipts, which are known as ghost companies or simulated operations invoicing companies (EFOS), because they invoice operations, purchases or services that were never actually carried out.

On the other hand, by purchasing those invoices or digital tax receipts issued by an EDO, the acquiring taxpayers or economic entities are becoming companies that deduct simulated operations (EDOS), with the intention of simulating an increase in their operating expenses and thus decrease their taxable base and, consequently, pay less taxes.

Acquiring and deducting a CFDI that covers a simulated operation seems to be an intentional act. However, even when this possibility exists, it is very complicated for companies to know if they have an "EFO" supplier and even more so for those companies that handle a large volume of suppliers.

The benefit of issuing and acquiring CFDIs that cover simulated transactions seems to be very clear. For the issuer, the benefit lies, in the first instance, in the charge for the issuance of the CFDI, which will be determined in proportion to the amount covered by the CFDI issued. And, secondly, the possibility of "laundering" the amount of money covered by the CFDI. On the other hand, the benefit of acquiring a CFDI that covers a simulated transaction lies in the possibility of increasing the acquirer's operating expenses, thus decreasing its taxable base and consequently decreasing its tax burden. In this way, the taxpayer erodes its income tax (ISR) taxable base, even generating losses that would cause it not to pay such tax in several periods. With respect to value added tax (VAT), the aggression to the tax authorities is stronger because it implies that balances in favor are generated, which are offset against the same tax (no tax is paid) or, worse, that a refund is requested for a VAT that does not actually exist.

Detection of simulated transactions by the tax authority

There is no reference as to when the practice of issuing and deducting tax receipts that cover simulated transactions began. However, it was in the 2014 tax reform where amendments were made to the Federal Tax Code incorporating Article 69-B to the Tax Code, which defines a procedure to detect and combat taxpayers who have issued apocryphal tax receipts. Unfortunately, as of today, the detection of an EFO is not possible through the CFDIs issued. Since they comply with the formal elements authorized by the tax authority. This makes it necessary to investigate the existence or, failing that, the simulation of the operation that supports the EFO.

In this order of ideas, it is important to define a "simulated, false or non-existent operation" in order to be able to detect it.

According to the Procuraduría de la Defensa del Contribuyente, a simulated transaction corresponds to the issuance of a CFDI by a company (individual or legal entity) that does not have the assets, personnel, infrastructure or material capacity to provide the services or produce, commercialize or deliver the goods covered by the receipt issued.

Taking as a reference PRODECON's definition of a simulated transaction, the tax authority must corroborate that the issuer of a CFDI that covers a transaction of this type does not have the assets, personnel, infrastructure or material capacity to provide the services or produce, market or deliver the goods covered by such issued voucher. For such purpose and in a first attempt to identify taxpayers that could constitute a potential EFO, the tax authority considers the following characteristics or any combination thereof:

- Recently created companies (2 or 3 years).
- The address stated in the Federal Taxpayers Registry does not show any economic activity or corresponds to small apartments, houses or vacant lots.
- There are no employees, machinery, equipment, inventories, nor is any real productive factor evidently observed.

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- In the same domicile there are two or more taxpayers, some of which are usually their suppliers, who to a great extent have the characteristic that they are not located and that they have the same partners and that they are used as part of the flow to return the money of the simulation.

- They do not declare or declare an insignificant profit margin.

- They are not located at their domicile or they are located, but in the verifications they attend only once and disappear, in addition to the fact that a third party regularly attends.

- They share with several companies an email, partners and legal representative, or there are several emails, but they share a domain.

- The legal representatives or the partners or shareholders do not declare or their income is insignificant.

- The partners or shareholders are young people who do not demonstrate the origin of the capital supposedly invested or, in the case of legal entities, they are recently created, which have a minimum life span.

- The domicile declared by the legal representatives is that of the company itself.

- Most of them invoice intangibles (consulting, training, technical assistance, etc.).

- They make purchases from companies that are recently created.

- The deposits they receive from their clients are withdrawn practically immediately to make supposed payments to intermediate taxpayers also created to simulate the operation and to return the money to the clients in cash or transfer to accounts not linked to accounting in the name of shareholders or third parties, the previous operation can be in several layers.

It is worth mentioning that the actions carried out for the identification of any of the above mentioned characteristics or any combination of them by the tax authority, is not considered as the beginning of the tax verification faculties granted by articles 27 paragraph C and 42 of the Federal Tax Code.

Actions of the tax authority once an alleged EFT taxpayer is identified

Once the alleged EFO taxpayer has been identified, the tax authority, under the powers granted to it by article 42 of the CFF, may carry out any or any combination of the following list of actions:

- Obtain information from the informative declarations of operations with third parties (DIOT) to know links between the EFO taxpayer and the clients and suppliers of the same, to generate the taxpayer rolls by type of misconduct at the national level.

- Derived from cross-checks with the databases it integrates at the national level, it will review audit records, select the most representative matters to define the taxpayers that will be subject to an audit act.

- The review method will be a Home Visit and in the case of taxpayers subject to a tax audit, the procedure established in article 52-A of the Federal Tax Code will be observed. Exceptionally, in the case of taxpayers who are not located, the review method will be a desk review.

- In the case of requests for refund of credit balances, in which the knowledge area detects that the applicants deduct EFOS operations, they must schedule home visits observing the provisions of the ninth and tenth paragraphs of article 22 of the aforementioned Code.

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- The authorities must identify and analyze 100% of the service providers and request the service rendering contracts executed with the provider(s), in order to initiate domiciliary visits to the service providers, placing special emphasis on the intangible suppliers, i.e., those that have rendered services, consultancy, training, technical assistance, preparation of manuals, etc., requesting the contracts or documents that cover the operation, in order to detect the most important ones, which even when they do not meet the characteristics of an EFO, domiciliary visits must be made.

- Questionnaires must be designed to demonstrate the non-existence of the invoiced transactions, which must be recorded in the audit minutes or in the official report of observations, as the case may be.

In an enunciated but not limited manner, the questionnaires should contain the following:

In case of operations of tangible goods:

- Place where the goods are stored
- Name and RFC of the suppliers
- Place where the merchandise is picked up and delivered.
- Name of the carrier, form of payment for the service and supporting documentation.
- Insurance payment and supporting documentation
- Amount of payment of wages, freight, maneuvering, etc.
- Procedures to be carried out to make purchase orders, requesting to specify the means used and the supporting documentation.
- Procedures to be carried out to fulfill customer orders, specifying the means used and the supporting documentation.
- Documents that demonstrate the physical verification of the merchandise.
- Request an explanation of inventory control and supporting documentation.
- Form of payment to suppliers and supporting documentation.
- Request a list of assets, indicating whether they are owned or rented and the supporting documentation.

In the case of provision of services or intangibles:

- For what purpose the service was requested
- By what means and for what reason the supplier(s) were contacted.
- Specify what the service consisted of, how and when it was provided.
- Name(s) and RFC of the person(s) who provided the service.
- Method of payment
- In what way did the service acquired have an impact on the obtainment of income?
- Who benefited from the contracted service
- What benefits did it represent for your company
- Profile of the service providers (academic degree, preparation, training, trades, experience, etc.).

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Tax treatment of a taxpayer identified as an EFO

Once the tax authority detects that a taxpayer has been issuing receipts without having the assets, personnel, infrastructure or material capacity, directly or indirectly, to render the services or produce, commercialize or deliver the goods covered by such receipts, or that such taxpayers are not located, it will be presumed that the transactions covered by such receipts are non-existent. And based on article 69 B of the CFF, it must notify the taxpayers that are in such situation through its tax mailbox, the Tax Administration Service's web page, as well as through publication in the Official Gazette of the Federation, so that such taxpayers may state before the tax authority what is in their best interest and provide the documentation and information that they consider pertinent to disprove the facts that led the authority to notify them. For this purpose, the interested taxpayers will have a term of fifteen days as from the last of the notifications that have been made.

Taxpayers may request through the tax mailbox, on a single occasion, an extension of five days to the term provided in the preceding paragraph, to provide the respective documentation and information, as long as the request for extension is made within such term. The extension requested in these terms will be understood to be granted without the need for a pronouncement by the authority and will begin to be computed as from the day following the expiration of the term set forth in the preceding paragraph.

Once the term to provide the documentation and information and, if applicable, the extension term has expired, the authority, within a term that shall not exceed fifty days, will evaluate the evidence and defenses that have been asserted and will notify its resolution to the respective taxpayers through the tax mailbox.

Within the first twenty days of this term, the authority may require additional documentation and information from the taxpayer, which must be provided within ten days after the notification of the requirement through the tax mailbox becomes effective. In this case, the aforementioned fifty-day period will be suspended as from the effective date of the notification of the summons and will be resumed on the day following the expiration of the ten-day period. Likewise, a list will be published in the Official Gazette of the Federation and on the Tax Administration Service's website, of the taxpayers that have not refuted the facts imputed to them and, therefore, are definitively in the situation referred to in the first paragraph of this article. In no case will this list be published before thirty days after the notification of the resolution.

The effects of the publication of this list will be to consider, with general effects, that the operations contained in the tax vouchers issued by the taxpayer in question do not produce and did not produce any tax effect.

The tax authority will also publish in the Official Gazette of the Federation and on the Tax Administration Service's web page, on a quarterly basis, a list of those taxpayers that manage to disprove the facts attributed to them, derived from the means of defense presented by the taxpayer.

If the authority does not notify the corresponding resolution within fifty days, the presumption with respect to the tax receipts observed, which gave rise to the procedure, will be null and void.

Tax treatment to a taxpayer identified as EDO

Individuals or legal entities that have given any tax effect to the tax receipts issued by a taxpayer identified by the tax authority as an EDO, will have thirty days following the date of such publication to prove before the tax authority that they effectively acquired the goods or received the services covered by such tax receipts, or they will proceed within the same period to correct their tax situation, through the corresponding complementary tax return or returns.

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In the event that the tax authority, in the use of its verification powers, detects that an individual or legal entity did not prove the effective rendering of the service or acquisition of the goods, or did not correct its tax situation, in the terms provided in the preceding paragraph, it will determine the corresponding tax credit or credits. Likewise, the transactions covered by the aforementioned tax receipts will be considered as simulated acts or contracts.

Conclusions

According to figures provided by the SAT, between 2014 and 2020, 8,204 EFOS were identified, which issued 8,827,390 tax vouchers covering simulated transactions for an approximate amount of 1.6 billion pesos, equivalent to $354,512,000.00 pesos of tax evasion (close to1.4% of the national GDP).

Given that the tax evasion in the case of EFOS and EDOS comes from the use of false documents, it can be argued that there is the figure of tax fraud contemplated in article 108 of the CFF with its corresponding penalties. In addition to the above, section IV of article 109 of the same code, equates the simulation of acts to the detriment of the federal tax authorities as tax fraud.

Notwithstanding, the economic impact that the issuance of tax receipts that cover simulated operations has for the federal treasury and the penalties with imprisonment considered for such effect, the issuance and deduction of this type of receipts is slowly decreasing. Proof of this are the 10878 taxpayers that to date have been fully identified as EFOS, and another 143 identified with presumably non-existent operations in the process of tax inspection.

In this sense, and in order to address this problem, the powers of the tax authority must be expanded, updated and make adequate use of technological tools that allow them to quickly identify and process EFOS and EDOs taxpayers for the benefit of their tax collection work.

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