

RECENT CHANGES TO THE CUSTOMS LEGAL FRAMEWORK RELATIVE TO THE MAQUILADORA INDUSTRY

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As of April 28 of this year, the Foreign Trade Rulings for the year 2000 (“the Rulings”) were published in the Diario Oficial. In general terms, the new Rulings repeat and confirm the vast majority of last year’s provisions. Below we briefly discuss the main modifications and relevant changes that will have an impact on the maquiladora industry and PITEX companies in the year 2000.

1. Virtual return of temporal imported merchandise by maquiladoras or PITEX companies

The Rulings re-enacted the provision that allowed to virtually return (in export as well as in definitive import) temporal imported merchandise by maquiladoras and PITEX companies, in cases where the permanency deadline has expired, provided they have possession of the good and these are not containers or trailer boxes. We consider this grants legal certainty to the companies that fall under these circumstances. Nevertheless, it is worthwhile mentioning that only merchandise that has entered the national territory under a temporal regime before January 1, 1999 may be subject to this regularization.

For the above purposes, the Rulings specify that when issuing the definitive import *pedimento* in the virtual operation, import duties, value added tax and antidumping duties must be paid. Taxes and duties must be updated and their surcharges calculated from the date in which the merchandise was temporal imported until the date in which payment is made. A fine should also be paid for the extemporaneous return.

In order to proceed with this merchandise regularization, other requirements provided in the Rulings must also be met. In cases where Customs has initiated its verification authority, regularization does not proceed. This provision is established under Rule 3.16.2 of the Rulings.

2. Sales of materials to the maquiladora industry

The Rulings clarify that the selling of merchandise from “trading companies of materials for the maquiladora industry” to maquiladoras is subject to the value added tax. The seller must transfer the VAT in terms of Chapter II of the Value Added Tax Law. This provision is established under Rule 3.19.3 of the Rulings.

3. Transformation, manufacturing or repair by third parties, of merchandise temporarily imported by maquiladoras and PITEC companies

Another new provision in the Rulings is the one that specifies that the Notice that maquiladoras and PITEC companies must present to the effect that transformation, manufacturing or repair of temporarily imported merchandise is made by third parties, should be presented previous to the merchandise’s transfer to the third party. Rule 3.19.4 of the Rulings.

4. Machinery property of maquiladoras and PITEC

Rule 3.19.25 provide the possibility for maquiladoras or PITEC companies who would have temporarily imported machinery of their property, to sale such machinery to resident companies in Mexico having more of 90 percent of their income from leasing operations, provided the requirements established in the Rulings are complied. Among these requirements is the one that orders that machinery should be returned or its import regime changed before the permanency deadline expires.

In this case, the Rulings determine that the company acquiring the machinery must give it in financial or pure leasing to the selling maquiladora or PITEX company, for the purpose of continuing its use under the export program. Likewise, the acquiring company would be jointly responsible of the taxes and duties that may occur.

With this provision, maquiladoras and PITEX companies are again entitled to operate under a financial mechanism that had been previously derogated.

5. NAFTA Article 303 application

As it is well known, NAFTA's Article 303 establishes that Member countries may not waive, reimburse or reduce the import duties in relation to a good imported to its territory provided it is subsequently exported to the territory of any of the other Member countries. To comply the above, Mexico made adjustments to the Maquiladora and PITEX Decrees at the end of 1988. In order to compensate the loss of export program benefits, the Mexican government announced several Sectorial Promotion Programs on May 9, 2000, that established preferential duties for registered companies, of 0, 3 or 5 percent *ad valorem*.

Maquiladoras and PITEX that import materials and machinery from countries outside the NAFTA territory, for the export of goods to the U.S. and Canada must register in the Programs due that this mechanism starts to operate on November 1, 2000. Thus, maquiladoras and PITEX will continue to operate under the export program (temporally importing materials and exporting goods), notwithstanding, they must cover the corresponding duties before 60 days from exportation that results from the difference between the amount of the duties of the imported materials and the lesser of two duties: (i) amount of the duties of the imported materials or (ii) amount of the duties paid at importation of the finished good into the U.S. or Canada.

In relation to antidumping duties, maquiladoras and PITEX companies must request SECOFI to eliminate the antidumping duties for the imported materials during the annual or sunset reviews to be opened in this year.

6. Fiscal regime for the year 2000

Although it is not a new amendment, the Fiscal Rulings for the year 2000 (published as of March 6, 2000) ratifies the amendments of December 28, 1999. Pursuant to Rule 3.32 of the Fiscal Rulings, maquiladoras are not considered as permanent establishments for income tax purposes, provided transfer pricing provisions contained in the Income Tax Law are met. Maquiladoras choosing this benefit must declare a minimum fiscal profit based under a pre-established factor. Said factor will be applied to 6.9 percent of the value's assets or to 6.5 percent of the total amount of its costs and operation expenses. The taxes will be paid over the highest quantity between both options.

Companies that deem so properly, may in place of the above, request the fiscal authority a transfer pricing agreement to determine its fiscal profit by complying to the provisions of the Income Tax Law, and incorporating a return of investment over the assets property of the foreign resident used in the maquiladora.