

September 18, 2023

MLS BCS, S.A. DE C.V.

**Paseo la Marina, 4107, Zip Code 23453
Cabo San Lucas, Baja California Sur.**

Present.-

BACKGROUND

As a real estate agent, MLS BCS, S.A. de C.V. (MLS) has significantly promoted and adopted escrows as an essential tool to provide certainty and security to all parties involved in real estate transactions, including buyers and sellers. Escrows, as intermediaries, bear the crucial responsibility of ensuring, primarily, the fulfillment of payment obligations by all parties participating in the transactions they manage.

These parties generally include the seller, the buyer, the real estate agent, the notary, and the escrow itself. Like these transactions, the escrow receives the corresponding funds. It proceeds to disburse them once the pre-established conditions for such disbursement have been met. In this context, the disbursement of funds primarily aims to settle the agreed-upon transaction price and to cover related fees and expenses that may arise.

It is important to note that recently, real estate developers have adopted a practice that involves requesting the escrow to transfer the entire transaction price directly to them and then they pay the costs associated with real estate agent fees directly. It is argued that this payment method is necessary to comply with current tax provisions since expenses might be deemed non-deductible for tax purposes.

Because of this practice and considering the importance of escrows in the real estate transaction system, it is imperative to address this issue from a legal and tax perspective to determine if the argument is valid when contrasted with applicable current legislation.

Within this context, we were requested to participate in the legal and tax analysis of the issue at hand to determine if expenses incurred by a taxpayer when payment is made through a payment intermediary are deductible for income tax purposes.

OPINION

Article 27 of the Income Tax Law (LISR) establishes the requirements that authorized deductions must meet for corporate taxpayers. In the case at hand, Section III is of relevance, which states the following:

"Article 27. Authorized deductions under this Title must meet the following requirements:

...

III. They must be supported by a tax receipt, and in cases where the amount exceeds \$2,000.00, payments must be made through electronic fund transfers from accounts opened in the name of the taxpayer with financial institutions forming part of the financial system or entities authorized for this purpose by the Bank of Mexico; nominative checks from the taxpayer's account, credit cards, debit cards, service cards, or electronic wallets authorized by the Tax Administration Service."

This text clearly shows that deductions are legally required to be supported by a tax receipt. For amounts exceeding \$2,000.00, payments must be made through electronic fund transfers from accounts in the taxpayer's name, nominative checks from the taxpayer's account, credit cards, debit cards, service cards, or electronic wallets authorized by the Tax Administration Service.

Furthermore, the Federal Fiscal Code (CFF) sets forth in Article 29-A the requirements that fiscal receipts must meet. Section VII, subsection c) specifies that it should "indicate the payment method, whether in cash, electronic fund transfers, nominative checks, or credit, debit, service, or electronic wallet cards authorized by the Tax Administration Service."

Despite initially appearing to be rigid regarding the need for payments to be made through accounts in the taxpayer's name, tax legislation is aware of economic dynamics and the different needs of taxpayers, which have been incorporated into various regulatory frameworks.

In this regard, for taxpayers who concentrate payments or use payment intermediaries, the Miscellaneous Tax Resolution, applicable for the 2023 fiscal year, provides in Rule 2.7.1.37 the following:

"Payment method using payment intermediaries.

2.7.1.37. For the purposes of articles 29 and 29-A, Section VII, subsection c) of the CFF, as well as articles 27, Section III, and 147, Section IV of the Income Tax Law, concerning what is stated in rules 2.7.1.29 and 2.7.1.32, in cases where taxpayers make payments for consideration using the services of third parties that act as intermediaries, collectors, or receivers of such payments, and these third parties do not inform the issuer of the CFDI about the method of payment, the issuer may indicate in the same document as the payment method "Payment Intermediary," under the "c_FormaPago" catalog indicated in Annex 20.

CFDIs indicating "Payment Intermediary" as the payment method will be considered paid in cash for articles 27, Section III, and 147, Section IV, of the Income Tax Law.

Third parties acting as intermediaries, collectors, or receivers of payments, referred to in the first paragraph of this Rule, must also issue the corresponding CFDI for the cost, charge, or commission they charge for their payment-receiving services."

The Rule mentioned above provides that when the third party does not inform the issuer of the electronic invoice (CFDI) payment method, the issuer may indicate "Payment Intermediary" as the payment method in the CFDIs. The Rule states that if this payment method is shown, it will be considered paid in cash for tax purposes.

A detailed analysis of this regulatory provision reveals that taxpayers can consider expenses deductible, even when compensation has been paid through payment intermediaries, because the Rule explicitly refers to the rules applicable to how the agreed price should be paid, including Section 27, Section III of the LISR. We can infer from a *contrario sensu* reading that if the third party informs the issuer of the CFDI about the payment method, the issuer must reflect that payment method.

In summary, taxpayers who make payments through third parties acting as intermediaries, collectors, or receivers of payments and who inform the CFDI issuers about the payment method (since it will not be considered as paid in cash) meet the deductibility

requirements established in Section 27, Section III of the LISR, in relation to Section 29, Section VII, subsection c) of the CFF.

Additionally, the Tax Administration Service has endorsed this interpretation by issuing Normative Criterion 21/ISR/N "Corporate entities that concentrate their treasury transactions. Exception to the deductibility requirement provided for the allowance of VAT credits," highlighting that the tax authority itself recognizes that transactions between taxpayers may occur in more than one way, making it viable to consider the requirements fulfilled when the regulatory purpose is met:

"In some cases, corporate entities belonging to a group of companies that engage in reciprocal operations have signed agreements to concentrate their treasury transactions through a company within the same group acting as a centralizer, which operates payment processes by canceling accounts receivable against accounts payable between group companies, and consequently, no cash flows are carried out to settle this type of operation.

In this regard, when the situation described in the preceding paragraph occurs, the deductibility requirement provided for in Section 27, Section III of the Income Tax Law is considered fulfilled, and, therefore, the condition for the allowance of VAT credits provided for in Section 5, Section I of the VAT Law is also considered fulfilled."

In this specific case, MLS provides real estate agent services to the Developers with whom they have a business relationship. In this regard, when, because of MLS's intervention, an agreement is reached for the sale of a property owned by a Developer, MLS promotes hiring an escrow agent to ensure the payments agreed upon between the parties involved in the sale. In this sense, the escrow agent is contracted as a third-party providing payment intermediary services.

Based on the above and under current legislation, in our opinion, for the service provided by MLS to the Developer to be deductible, even when its payment is made through the escrow agent, the following requirements must be met:

1. The service provided by MLS must be supported by a CFDI that complies with the requirements of Articles 29 and 29-A of the CFF (Article 27, Section III, LISR).

2. If the agreed-upon amount exceeds \$2,000.00, the payment must not be made in cash or fall under categories that the law or other applicable legislation considers as cash payments (Article 27, Section III, LISR).
3. If, on the date of issuance of the CFDI, the escrow agent has already received payment, the CFDI issued by MLS must reflect the payment method, following the "c_FormaPago" catalog of Annex 20. If the payment has not yet been received, the code 99 "To be defined" may be used. However, once the payment is received, a CFDI must be issued for each of them, incorporating the "Payment Receipt Complement" as established in Rule 2.7.1.32 of the RMF 2023 (Rules 2.7.1.29 and 2.7.1.37, RMF 2023).
4. The party responsible for covering the escrow agent's costs must obtain a receipt that meets the tax requirements and supports the fees, charges, or commissions for the escrow agent's payment-receiving services (Rule 2.7.1.37, RMF 2023).
5. If the fee is not paid in a single payment, the provisions of Rule 2.7.1.32 of the RMF 2023 must be complied with.

SCOPE

This opinion is based on the information that has come to our knowledge and the interpretation of current tax legislation for the year 2023. However, it is important to note that there is a possibility that authorities may apply a different legal interpretation than the one presented in this document.

This opinion is given in Spanish and translated to the English version. In case of doubt, the Spanish version shall prevail.