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FLASH REPORT

LAW IMPOSING SPECIAL CONTRIBUTIONS BASED ON EXTRAORDINARY PRICES ON THE INTERNATIONAL HYDROCARBON MARKET

The Law Imposing Special Contributions Based on Extraordinary Prices on the International Hydrocarbon Market was published in Official Gazette No. 38,910, dated April 15, 2008.

According to Article 1 of the Law, this special contribution must be paid by those who export **or transport** abroad liquid hydrocarbons, both natural and improved, and derived products when, in relation to any month, the average price of Brent crude oil goes above seventy United States dollars per barrel. The provision states that the People's Power Ministry for Energy and Petroleum will be in charge of setting —by means of a resolution— the technical methodology to determine the aforementioned average.

The rate is fifty percent (50%) of the difference between the monthly average and the threshold price of seventy United States dollars per barrel. When the average monthly price goes above one hundred dollars, the contribution will be sixty percent (60%) of the difference in excess of the threshold price of one hundred dollars.

The monthly amount of the special contribution will be calculated by multiplying the per-barrel amount times the monthly volumes of hydrocarbons, either natural or improved, and derived products exported or transported abroad. Those volumes of natural or improved liquid hydrocarbons and derived products that have been imported for blending or transformation in this country may be deducted.

Contributions made to the FONDEN [National Development Fund, in Spanish] by the hydrocarbon operating companies will be deductible from the special contribution, pursuant to the provisions of the Law Governing the Central Bank of Venezuela. (Article 5).

We cannot fail to mention that this provision goes to prove —in our opinion— the unconstitutionality and illegality of Article 19 of the Law Imposing Taxes on Financial Transactions when it sets forth that such tax is not part of taxpayers' deductible expenses since, in this new tax such a deduction is allowed and this —again in our opinion— constitutes discrimination among taxpayers.

The Law authorizes the National Executive to exonerate, fully or in part, certain exports within the framework of economic policy and international cooperation (Article 2).

This tax will be calculated by the People's Power Ministry for Energy and Petroleum every month, in foreign currency, and it must be paid to the FONDEN. The funds collected will be destined by the National Executive to the execution of infrastructure, production and social development projects, and to strengthening Communal Power (Article 3 and 7).

The amounts paid for this contribution will be deductible as costs for income tax calculation purposes (Article 6).

We find it interesting that the Law calls this tax a "special contribution." Indeed the word tax is a general classification, and the specific items are the imposts, fees and contributions (Article 11 of the Tax Code). The main characteristic of taxes is that the amount due is not paid in relation to an activity particularly affecting or benefiting the taxpayer but rather, in a general manner, to contribute to bear public burdens and, in addition, taxes take into account the taxpayer's paying capability.

Fees are a type of tax paid in exchange for a service or the performance of an activity in favor of the taxpayer, as, for example, the fees paid to record a document. The purpose of fees is to finance that service. Special contributions are established to finance activities that produce a benefit to given group of people. The example is usually given of contributions for improvements, where the taxpayer is benefited from an increase in the value of his assets as a result of public works or the establishment or enhancement of public services.

Please note that in the case of fees and special contributions it may happen that situations are levied that do not necessarily indicate taxpaying capability. In these two categories, the principle of the Unity of Treasury is breached since the proceeds of the collection are specifically aimed at financing the service or the activities that benefit the person or group of persons.

In the case at hand, the specific taxpayers are not being taxed because they are receiving any service or benefiting from any Government activity. In addition, the proceeds from the collection are not aimed at a specific end but are, in general terms, rather aimed at the performance of administrative and social activities. Thus, in our opinion, this is not a special contribution: it is a tax.

This difference is not unimportant. Since it is not a special contribution, the proceeds should not be deposited in the FONDEN but in the National Treasury, and no expense should be made with charge to these funds that has not been provided for in the Budget Act; this is in compliance with the constitutional requirement of Unity of the Treasury and the principles of efficiency, solvency, transparency, responsibility and fiscal balance that must govern the handling of public funds (Articles 311, 314 and 315 of the Constitution of the Bolivarian Republic of Venezuela).

One other aspect that comes to our attention is that the Law leaves it to the People's Power Ministry for Energy and Petroleum to set, via a resolution, the technical methodology to determine the average price of Brent crude; in other words, the Law delegates to the

Executive the determination of one element of the taxable basis for the tax, which in our opinion constitutes a clear violation of tax legality.

Lastly, we must point out that the Law became effective on the date of publication in the Official Gazette.

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