

**“GUIDE TO DOING BUSINESS IN
GUATEMALA”**

Updated: September, 2006.

PREFACE

The following document has been designed with the purpose of providing clients and friends the basic and fundamental information concerning the most relevant legal aspects that must be known in order to invest or do business in Guatemala.

Although this document illustrates, among other things, fundamental aspects and legal requirements applied by certain institutions, at no time should this information be interpreted as legal advice or a legal opinion regarding the subjects discussed herein.

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PART ONE LOCAL AND FOREIGN CORPORATIONS, LEGAL APPROACH

Guatemala offers diverse options for investing. Business in the country can be organized as a sole proprietorship, or as a company or corporation with a common corporate purpose. For this purpose, any of the legal structures in Guatemala's Code of Commerce can be adopted.

Also, as we shall see later in this document, foreign investors do meet burdensome requirements to get established in the country as a foreign corporation, through a branch, or as a local corporation.

I. CREATION OF BUSINESS PARTNERSHIPS AND CORPORATIONS IN GUATEMALA

Partnerships and corporations conform legal entities that come into legal existence by the execution of the corresponding contract among two or more persons or entities with a common purpose and for profit. They must adopt one of the legal structures established in Guatemala's Commercial Law. They are entities different from their members.

In Guatemala, corporate status is obtained by following the legal procedure established by law, which begins with the authorization of the articles of incorporations by a Notary Public and ends with the definite registration upon the Commercial Registry. The corporate status is maintained until the date on which the Commercial Registry cancels the registration, after concluding the dissolution and liquidation process.

The legal regulation of all aspects regarding the requirements for the registration of a corporation, different legal structures and their basic legal rules can be found in the Code of Commerce, Decree 2-70 of Congress.

A. Basic requirements for registering a corporation

The articles of incorporation must be authorized by a Notary Public. Expenses to take into account for this purpose are, among others, the Commercial Registry fee (Q. 275.00 + Q. 6.00 per thousand, up to no more

than Q. 25,000.00 at an exchange rate of Q. 8.00 to US\$ 1.00, an equivalent of US\$ 35.00 + US\$ 0.75 per thousand, up to a maximum of US\$ 3,125.00); the Notary Public's fee for authorizing the articles of incorporation and the Fiscal Stamps Tax, among others.

The articles of incorporation must include, at least:

- Place and date of constitution.
- Legal structure adopted.
- Business or corporate name.
- Commercial domicile.
- The corporate purpose.
- Term (usually indefinite).
- Authorized capital and paid capital (at least Q. 5,000.00 of capital effectively paid and deposited in a national bank is required for stock corporations, at an exchange rate of Q. 8.00 for US\$ 1.00, equivalent to US\$ 625.00).
- Corporate bodies, directors and officers.
- Partners' (shareholders) signatures.
- Notary Public's signature and seal.

Capital contributions are subject to legal regulation due to the importance they have for the corporation and for the persons that enter into business with them. Capital contributions can be monetary or in kind. Monetary contributions are paid in currency in the amount, form and term agreed in the articles of incorporation. In kind capital contributions can be made in movables, real estate, etc., as long as they can be given a monetary value. The sole credit of the shareholder is not accepted. In kind contributions must be made according to a fair market value, and if appropriate, also specifically detailed in an inventory. The shareholders are responsible before third parties for the over-evaluation of contributions. When these contributions consist of real estate or identifiable chattel property that is subject to registration with the Property Registry, they must be registered.

To be able to act (acquire rights and assume obligations), the corporation requires a **Legal Representative** who may be a shareholder or not. His appointment must be registered at the Commercial Registry. Liability of corporations as well as their representatives' is regulated in the Civil, Penal and Commerce codes.¹

¹ Article 24 of the Civil Code literally states that: "Legal entities have civil responsibility of the acts of their representatives when exercising their functions they harm a third party or break the law or don't abide by it, regardless of the actions against the authors of the damage." Also, article 171 of the Code of Commerce states that "The administrator will answer before the corporation, before the shareholders and before the creditors of the corporation, for any harm or damage caused by him. If there is more than one administrator, they share the responsibility. Administrators that voted against the agreements that caused the harm are exempt of the responsibility as long as their votes against are consigned in the meeting's record." Finally, article 38 of the Penal Code, when regulating criminal responsibility, states that: "In all related to legal entities, directors, managers, executives,

Regarding the number of shareholders, the law requires the participation of at least two persons or legal entities. There is no legal impediment for shareholders of a Guatemalan corporation to be foreigners (except for a few restrictions concerning concessions for open TV channels, for example).

Once the corporation is registered provisionally (which lasts until all requirements for the definite registration are fulfilled) at the Commercial Registry, and it gets its Taxpayer Identification Number (*Número de Identificación Tributaria* "NIT") before the Tax Authority (*Superintendencia de la Administración Tributaria* "SAT"), the corporation can begin to operate.

B. The merger and transformation of corporations

The Code of Commerce establishes two ways or procedures in order to merge corporations: by a merger proper, or by acquisition. A merger proper takes place when several corporations merge into one and all the former disappear without exception. An acquisition takes place when one entity survives and absorbs the others. In both cases, the merged corporations (except for the absorber) must enter into a dissolution procedure as a previous act to the merger, and the new corporation, acquires the rights and obligations of the dissolved corporations.

The Code of Commerce also provides that corporations created in any specific form, may transform into any other specific kind of corporate form, keeping the same legal personality of the previous one. The transformation may result in:

1. A civil partnership transformed into Business Corporation;
2. The modification of its legal structure;
3. The change of the system of corporate liability;

These are the only cases recognized by Guatemalan legislation pertaining to transformation of corporations. (Article 262 of the Guatemalan Code of Commerce).

C. Dissolution and liquidation of corporations

The existence of the corporation ends by dissolution. For the dissolution to happen, the specified causes provided by the law or in the articles of incorporation must concur. There are two kinds of dissolution: partial and total. Partial dissolution does not imply the extinction of the

representatives, administrators, officers or employees that intervened in the crime, and that without his/her participation it wouldn't have been done, will be held responsible of the crimes and will be sanctioned with the same sanctions mentioned in this code for individual persons."

corporation. It consists only on the separation of one or more partners or shareholders, as the case may be, from the corporation. It can be either by **exclusion** decided by the majority of partners or shareholders or by voluntary **separation** decided by the one who wants to leave the corporation. Total dissolution, terminates with the life of the corporation. Its main effect is to provoke the total liquidation of the legal entity's patrimony.²

Legally speaking, the liquidation of a corporation is the execution of its patrimony to cover the partnership's liabilities and distribute the overage among the partners by means of liquidation quotas, in proportion to the amount of capital corresponding to each partner or in the previously agreed way. The liquidating corporation preserves its legal status during the term of liquidation, which must not exceed a year.

D. Corporate structures

The Guatemalan Code of Commerce contains five different structures which may be adopted. Some of them are personalist, since there is an emphasis made on the persons that integrate the corporation; others belong to the capitalist type, since the individual as such is not relevant to the corporation, only the capital is important.

1. Stock Corporation.

It's a capitalist corporation (what matters here is the capital stock conforming it and not the persons) identified with a denomination, which is nothing else than the name of the corporation, to which you can also add the name of a founding partner or the last names of two or more of them, being mandatory to include in the name, the main activity that the corporation will conduct. The capital is divided and represented by titles called "shares" and the shareholders limit their liabilities up to the total amount of shares subscribed by them.

The Stock Corporation grants full freedom to transmit the capacity of shareholder by share transference, but that freedom may be limited in the articles of incorporation when the corporation extends nominal titles. It's a corporation ruled by majority's will, which gives foundation to social agreements. The capital stock can be defined as the addition of the nominal value of the shares in which it is divided. The capital stock is divided in authorized, subscribed and paid. The authorized capital stock is the sum up to where the corporation is able to issue shares without modifying its authorized capital stock. It may be subscribed totally or partially. The paid capital stock is the minimum that must be paid from the capital already subscribed (25% or no less than Q5,000.00, at an exchange rate of Q8.00 for \$1.00, equivalent to US\$625.00). Shares are credit instruments representing the value corresponding to an aliquot part of the capital stock. Since they are

² Rene Arturo Villegas Lara. Guatemalan Commercial Law. Editorial Universitaria (Publishing Company). Universidad de San Carlos de Guatemala.

considered as personal property by law, they can be object of pledge agreement and usufruct; they admit joint tenancy and they can be claimed.

Besides the shares, to stimulate and recognize the work done by organizing and founding partners, "Founder Bonds" have been established. They are titles that grant founders the right to collect dividends not greater than 10% of the annual net profit for a term not exceeding ten years. This restriction was established to avoid putting founder partners in permanent privileged positions.³

There are also corporations that may be called special, since they are subject to requirements, procedures and authorizations different from the current ones. Among them we have the Investment Corporation, the corporation used as basis for the foundation of a Bank, the Insurance Corporation, the Finance Corporation, the Storage Corporation and the Bond Corporation.

The equivalent to the corporation is the American "Business Corporation"⁴ in which, differently from the Guatemalan Corporation, the total amount of shares may be owned by a single individual.

2. General Partnerships.

It's a business association of the personalist type identified with a firm name in which partners by their social liabilities, respond in a subsidiary, unlimited, joint and collateral way. The idea of including in the firm name the first and last name of one of the partners, or the last names of one or more of them, is to let third parties know totally or partially, who is the individual component of the legal entity. As for the collateral nature, we must understand that it only becomes the main responsibility when the partnership is not able to respond with its assets. As for the unlimited nature, it means that the partner responds even with his personal assets. Among the advantages of the General Partnership we can mention:

- Easy and not so expensive registration.
- Unlimited liability of the partners as guaranty for corporate creditors.
- The personal credit of the partner may contribute to the economical success of the company.
- Flexible administration.
- Non complicated operation.⁵

The General Partnership in the United States of America is a business operated by co-owners where the partners are responsible without limitations of the commercial liabilities acquired. For most American States it is not a

³ Idem.

⁴ Hamilton, Robert W. "The Law of Corporations" in a Nutshell. Fifth Edition. West Group, St. Paul Minnesota 2000; State Bar of Texas "Doing Business in Texas", International Law Section. State Bar of Texas. Editor Larry B. Pascal, 1999.

⁵ Villegas Lara, Rene Arturo. "Guatemalan Mercantile Law". Editorial Universitaria. Universidad de San Carlos de Guatemala.

separate entity from its members, but in the case of a litigious matter it is taken as a sole entity. It has similarities to a general partnership, but it's more like a co-ownership of a business enterprise.⁶

3. Limited Liability Company.

According to the Guatemalan Code of Commerce, it's a company identified with a firm name or denomination which has an original capital stock divided into contributions not transferable to credit instruments and in which partners limit their responsibility by the social liabilities up to the amount of their contributions. This company structure may be useful for entrepreneurs who wish to simplify their organization and limit the partner's responsibility.

The Guatemalan Limited Liability Company is very similar to the American Limited Liability Company.⁷

4. Joint Liability Company.

It is a kind of business association identified with a firm name in which two types of partners coexist with different grades of responsibility. One type of partners, respond to their social liabilities in a subsidiary, unlimited and joint way. The limited partners respond in a limited way, according to the amount of their contribution. The capital stock must be fully paid in order to subscribe the articles of incorporation.

5. Joint Stock Company.

It also has two kinds of partners. Its main feature is that the capital stock is divided and represented by titles called shares. The capital stock may be partially paid when subscribing the articles of incorporation, just as in the Stock Corporation. Its operating way is ruled by the regulations of the Stock Corporation. The law limits the right of voting only to the limited shareholders.

The Joint Stock Company is similar to the American Limited Partnerships,⁸ where two kinds of partners exist; some of them respond unlimitedly by the obligations acquired, and others respond in a limited way.

⁶ Hynes, Dennis J. "Agency, Partnership, and LLC" In a Nutshell. Second Edition. West Group, St. Paul Minnesota. 2001.

⁷ Hamilton, Robert W. "The Law of Corporations" in a Nutshell. Fifth edition. West Group, St. Paul Minnesota 2000. State Bar of Texas "Doing Business in Texas". International Law Section. State Bar of Texas. Editor Larry B. Pascal, 1999.

⁸ Idem.

E. Business associations not formed pursuant to formal legal requirements and de facto business associations.

The Guatemalan Code of Commerce, foreseeing the fact that a company operates transgressing the law and with the purpose to protect third parties, has established the legal effects produced by the business associations not registered at the Commercial Registry, and the de facto business associations where the articles of incorporation weren't subscribed, especially regarding the unlimited, joint responsibility of the partners toward the liabilities acquired.

F. The business enterprise

The Guatemalan Code of Commerce has catalogued it as 'mercantile thing', together with the credit instruments. It's common to confuse the enterprise with the corporation, granting it an institutional character; when actually, the prevalent meaning is an organization. The Code of Commerce in Article 655 defines it as follows:

"It's understood by enterprise the ally of work, material elements and incorporeal values coordinated to offer to the public, with profit purposes, and in a systematic way, goods or services. The business enterprise will be reputed as personal property."

The law addresses as elements to form an enterprise, among others, the establishment, the customers, commercial reputation, trade name, distinctive signs, etc.

II. FOREIGN CORPORATIONS IN GUATEMALA.

Guatemala is an open country for foreign investment. There are no restrictions regarding the destiny given to income obtained within the national territory, except taxes applicable to specific activities.

The Guatemalan legal background promotes investment and includes in its legal organization the regulations that recognize and protect the right to private property, for both Guatemalan and foreign investors. Decree 9-98 of Congress, "Foreign Investment Law", guaranties, among other things, the same treatment and enjoyment of constitutional warranties, both to foreign and local investors. It guarantees the right to participate in any licit economical activity in the country, the right to submit to foreign countries any profit generated in the country, or to make capital transfers out of the country's territory.

As it was mentioned before, a corporation legally established in a foreign country that wishes to invest in Guatemala, can do it by means of the

creation of a business association adopting any of the corporate structures contained in the Code of Commerce, or it can operate through a branch, previous completion of a series of requirements contained in the Code of Commerce.

A. Foreign Corporations Registration at the Commercial Registry.

The Code of Commerce states the following requirements for a legally constituted corporation in a foreign country to establish itself in the country or to have branches in it:

- Verify that it is duly constituted according to the laws of its country of origin.
- Present a certified copy of its articles of incorporation and its statutes, if any.
- Verify that a resolution by its competent organ has been duly adopted for these purposes.
- Constitute proxy in the country entitled to execute all legal acts and business of its line and to legally represent the corporation in and out of trial.
- Constitute an assigned capital for its operations in the country.
- Constitute a guarantee bond in favor of third parties for an amount of no less than US\$50,000.00 in local currency, established by the Commercial Registry and which must remain in force during the term of operation of said corporation in the country, as well as being responsible to respond not only with the assets owned within the Guatemalan territory, but also with the ones owned in foreign countries for all the acts and business executed in the country.
- Submit to the jurisdiction of the local courts, as well as to the country laws.
- Present a statement declaring that neither the corporation nor their representatives or employees will invoke any law regulating the rights and obligations of aliens.
- Declare that the corporation will fulfill all the legal requirements before leaving the country.
- Present a certified copy of its last general balance sheet and profit and loss statement.

All these documents must be presented at the Commercial Registry. They must be certified and authorized by the corresponding authority of their country of origin and legalized by the Guatemalan Consulate or Embassy in that country. They must be translated into Spanish by a legal sworn translator. Finally, they must be notarized by a Guatemalan Notary Public before submitting them to the Commercial Registry for their registration. Having this documentation in order, the Commercial Registry makes a publication in the Official Gazette. If there is no opposition within the following 8 days to the publication, the Commercial Registry verifies the

effectiveness of the capital assigned to the branch. Afterward, the definite registration is made at the Foreign Corporation Registry where a Patent of Commerce is issued to make evident the registration was done.

Any change that occurs to the foreign corporation in its country of origin, like dissolution or bankruptcy, must be notified to the Commercial Registry. Also, before leaving the country or suspending operations in Guatemala, the authorized foreign corporations must obtain an authorization to do so, which will be extended by the Commercial Registry upon presentation of certain documentation.

B. Registration upon Local Tax Authorities

The definite registration of the foreign corporation is an essential requirement for the Tax Administration to record the corporation as taxpayer and assign it a Taxpayer Identification Number (*Número de Identificación Tributaria* "NIT").

Foreign corporations authorized to operate in Guatemala are obliged to pay local taxes, according to specified by tax laws. Income tax, for instance, is calculated in the same manner for local and foreign entities. Profits distributed to foreign shareholders are not object of withholding in any way if they are paid as a result of the profits made from an activity which has paid income tax during the referred accounting period.

Up to now, Guatemala has not subscribed any treaties about double taxation. According to the principle of territoriality, taxes paid in foreign countries are not considered fiscal credit by Guatemalan Tax Legislation.

C. Temporary Operations

The Code of Commerce states that foreign corporations with temporary operation intentions in the country for a term no longer than two years, must previously obtain a special authorization from the Commercial Registry with the following requirements, among others:

- Establish a guarantee bond of no less than US\$50,000.00 in local currency, set by the Commercial Registry.
- Verify that it is duly constituted according to the laws of the country where it was organized.
- Constitute proxy in the country, entitled to perform all legal acts and business of its line and to legally represent the corporation in and out of trial.

D. Operations that do not require authorization

Legally constituted corporations can make certain operations that do not require any authorization:

- Be a part of any proceeding or trial being discussed at the courts of the country or in administrative proceedings.
- Open or keep bank accounts under its name at any of the authorized banks.
- Buy from or sell only to independent trade agents legally established in the country.
- Negotiate orders through agents legally established in the country, if and when orders remain subject to confirmation or acceptance out of the country's territory.
- Grant loans or open credits in favor of entrepreneurs established in the country.
- Issue, endorse or protest credit instruments in the country or to be holder of them.
- Acquire personal property, real estate or real property rights, if and when they are not part of an enterprise or the kind it usually deals with.

III. GUATEMALAN BANKING AND SECURITIES MARKET EXCHANGE SYSTEMS.

A. Banking System.

Guatemala is ruled by a Central Banking System. The Constitution establishes as the main function of the Central Banking System the exercise of vigilance over everything related to money circulation. Article 132 of the Constitution states that:

“It is an exclusive power of the State, to issue and regulate currency, as well as to formulate and put into practice policies tending to create and maintain credit and exchange conditions favorable to the organized development of the national economy. All monetary, banking and financial activities will be organized under the Central Banking System, which exercises vigilance over everything related to circulation of money and the public debt. This system will be directed by the Monetary Board to which the National Bank (*Banco de Guatemala*) belongs to, a self-governed entity with its own patrimony, which will be ruled by its Organic Law and the Monetary Law”.

The Bank of Guatemala has, among others determining its Organic Law, the following functions:

- A) Be the only issuer of national currency;
- B) Try to keep an adequate level of liquidity of the banking system, by the use of the foreseen instruments in its Organic Law;
- C) Endeavor the good performance of the payment system;

- D) Receive in deposit the bank reserves and the legal deposits mentioned in its Organic Law;
- E) To administer the international monetary reserves, in accordance to the general outlines dictated by the Monetary Board; and,
- F) Other functions compatible with its nature of Central Bank assigned by legal mandate.

Private Banking is now regulated by the Banks and Financial Groups Law, Decree 19-2002 of Congress. This law is fundamentally oriented to propitiate the stability of the financial system, to allow a major effectiveness in the canalization of savings, to enforce the payment system and to increase the solvency and solidity of the financial system. For this purpose a general, flexible and agile background should be established for the functioning of the financial groups, which should allow the consolidated supervision, favoring risk management and the agile and organized way out of banks with problems.⁹

B. Securities Market System

The lack of an organized and specialized market in which, through professional intermediaries, transactions of credit instruments admitted to estimates would be made and their prices would be determined by the free gambling of the supply and demand, motivated a group of Guatemalans in 1986 to fill that gap existing in the financial sector of the country. So, by the end of 1987, by means of Agreement 99-87, the Ministry of Economy authorized the operation of the National Securities Market (*Bolsa de Valores Nacional*), which formally established the Securities Market in Guatemala.

The Commodities Exchange and Trade Market Law, Decree 34-96 of Congress, in force since December 23, 1996, seeks to promote the Nation's economic development, by means of national and foreign capital investment governed by modern regulations, which allow the transparent, efficient and dynamic development of the Securities Market.¹⁰

|PART TWO GUATEMALAN TAX SYSTEM

The topic about taxes is one of the most dynamic in the social legal field of any country; the purpose of assessing certain activities is to pay the

⁹ Information taken from the Banco de Guatemala's website, www.banguat.gob.gt

¹⁰ Information taken from the website of the Bolsa de Valores Nacional, Sociedad Anónima. (Stock Market) www.bvnsa.com.gt

public spending; covering the needs of the government, and it is right here where the weakness of any country is. In other words, there can be many formal limits to restrict the power of the government in creating taxes, but it turns difficult to establish a material limit, since the “needs” of the government may become limitless.

As we will see hereinafter, the Constitution of Guatemala contains principles of a tributary character constituted as the juridical sustenance to limit an eventual arbitrary activity of the government referring taxes.

In the Guatemalan tributary system, the topic about taxes becomes more relevant since our country has historically been characterized for its low capacity to collect, due to many factors, such as a strong anti-fiscal culture arising from the lack of credibility in government institutions, as well as the well-known existence of the “informal or underground economy”. In addition to this, we can add the incapability of the tax collection institutions for making a uniform, constant and stable supervision of all categories of taxpayers.

All these aspects have as a result that every incoming government is more creative than its predecessor when it comes to looking for a new and immediate source of income to cover their expenses, being the most accessible, the creation of new taxes.

Since 1991, Decree 6-91 of Congress, Tributary Code, enters in force. It contains substantive concepts regarding tributary legislation, as well as a procedures section where the main tributary administrative procedures are described. It also contains the obligations of taxpayers, and the administrative infractions and sanctions to which he could be subject to in case of breach. Trough this Decree, the Guatemalan government is empowered to examine, rectify, adjust and demand payments, fines and sanctions imposed to taxpayers. It establishes a period of 4 years for the extinguishing of the tributary obligations if the taxpayer is registered at the Tax Administration, and 8 years if he is not.¹¹

Guatemala has a widespread constitutional order control for the ordinary courts to take cognizance of petitions such as Appeal for Legal Protection and Unconstitutionality in Concrete Case, and also with a centralized constitutional order control, where the Court of Constitutionality, an independent and supreme tribunal in constitutional matters, hears the level of appeal of the petitions aforementioned, about the General Unconstitutionality presented against Congress Laws, Regulations and any provision in general, considered to somehow transgress the constitutional order. In more than one occasion precedents have been set pertaining tributary matters, in constitutional issues, as well as judicial or administrative, which have contributed to set a limit on any abuse in this subject with such delicate implications.

¹¹ Decree 03-04 of the Congress of the Republic introduced amendments to the Tributary Code, some of them, contain unconstitutionality defects so they are suspended by order of the Court of Constitutionality until sentence definitely solves out the existence or nonexistence of said defects. (Accumulated files 112 and 122-2004)

A. GENERAL TAX PRINCIPLES

The Constitution of Guatemala establishes as tributary principles the following:

A. Rule of Law

It states that the power to create taxes corresponds exclusively¹² to the Congress. The formal limit is configured this way. It states who can create tributary charges based on the needs of the government, which, as we mentioned before, can be considered by some, unlimited.

The Guatemalan Constitution declares that the Congress has exclusive authority of enacting ordinary and extraordinary taxes, local excise taxes and special contributions, in accordance to the government's needs and according to tributary equity and justice, as well as to determine the collection basis among the following:

1. Generating fact of tributary relation (alleged abstract foreseen in the legal regulations to form the tax, that, when it actually happens, the tributary obligation arises).
2. Exemptions (total or partial dispensation from compliance of a tributary liability, granted by law to taxpayers, when the cases established by law are verified. The exemption excludes, for specific reasons, those whom the encumbrance reaches according to law).
 3. The taxpayer and the common responsibility (taxpayer is the one obliged to the satisfaction of the tributary obligation, either as taxpayer or as responsible).
 4. Tax base and tax rate (the tax base is the amount over which the tax rate or deduction percentage will be applied to).
 5. Deductions, discounts, reductions and surcharges.
 6. Tributary infractions and sanctions.

Also, the Constitution states that all regulations found in an inferior rank to the law that contradict or distort the regulations regarding the tax collection basis are void *ipso jure*; and that the regulations (coming from the Executive Power) will not be able to amend collection basis and will remain exclusively ruling administrative tax charge and to establish the procedures to facilitate its collection.

B. Payment Capacity Principle

¹² The Court of Constitutionality has stated several times already the following criteria regarding tariff: "Tariffs are classic taxes, and as such, it is obvious that its only source constitutes the Governing Body which according to the Constitution of the Republic is the legitimated to create, amend or derogate ordinary and extraordinary taxes, as provided in articles 171 c) and 239...". Sentences files 293-87, 977-2001 and 1589-2002.

Through the payment capacity principle, there is a material limit of the tributary power of the government. The Constitution states that the tax system must be fair and just, and tax laws must adequate to this principle,¹³ which appears on article 243 of the Constitution. This article also contemplates the prohibition to confiscatory taxes and to double or multiple internal taxation.¹⁴

II. INCOME TAX

Income Tax Law, Decree 26-92, states that Income Tax affects any income obtained by any individual or legal entity, local or foreign, domiciled or not in the country, as well as any entity, patrimony, effects specified by said law, coming from capital investment, work or a combination of both, fundamentally in Guatemalan territory.

The general principle of the income tax considers rent of Guatemalan source every income generated by capitals, assets, services and rights of any nature invested or used in the country, or income that has its origin in activities of any kind done in Guatemala.

As you can see, Guatemala applies the so-called principle of **the source**, meaning that rents coming from productive activities in Guatemala are tax imposed.¹⁵ The tax imposed rent is the Guatemalan source. The rents obtained by taxpayers out of the country are not considered Guatemalan source income.

Income Tax has been always characterized in containing multiple exemptions and compensable credits; it is a tax calculated to locals and foreigners the same way. Profits distributed to foreign shareholders are not subject to retention of Income Tax, if and when they are paid from profits obtained after the payment of the tax aforementioned.

Decree 18-04 of Congress introduced substantial amendments to the Income Tax Law entering a new taxation system: payment of 5% over gross income as definite payment. This new system applies automatically, except for taxpayers who opt for the traditional system of the 31% to individuals or legal entities that enroll in business activities, as well as to individual or legal entities not involved in business activities. The resulting tax from applying

¹³ Related to this principle, the Court of Constitutionality has stated that taxes must affect proportionally the capacity of payment of taxpayers. Fees must be progressive and also contemplated in the tax base deputation, excluding encumbrance, the necessary expenses to produce the rent. Gazette No.37, page 45, fileNo.167-95; Gazette No.41, page 14, file 889-95.

¹⁴ In sentence of 05-10-00, File No.829-98, Gazette No.56 of the Court of Constitutionality it's stated that: 'article 243 imposes to the State the obligation of eliminating the cases of double or multiple tax in a progressive way to avoid harming the treasury. This progressive way allows two actions: First, definite elimination of one of the coexisting taxes. Second, the amendment of these taxes making them less burdening. Then it is obvious that it is not admissible to make a tax more burdening, because that increase would not tend to progressive elimination but to aggravate the tax burden, and it will constitute a clear breach of the aforementioned obligation of the State...'

¹⁵ Granados, Tuncho. "The Income Tax and Incidental Rights. Ediciones Fiscales, S.A. Guatemala, 1999.

5% to gross income can be paid to the tax authorities by means of the definite retention system or directly to the tax authorities. Not all persons can opt for this 5% system. Those who are involved in dependent work relationships must pay according to the 31% system, which allows certain deductions reported as expenses.

In the **optional system** contained in article 72 of the Income Tax Law, the Income Tax percentage of 31% is for individuals and legal entities who engage in business activities and for individuals who don't engage in any commercial activities; for individuals who engage exclusively in dependent work relationships, the rate varies from a 15% up to a 31%, depending on their income.

The fiscal year for the payment of Income Tax starts on January 1 and ends on December 31, and must coincide with the accounting exercise of the taxpayer.

Besides the general rule, the aforementioned law also considers as **Guatemalan sources of rent**, the following:

- Salaries, Christmas bonuses, other bonuses and honorary fees
- Expert advice
- Per diem allowances
- Exports of goods and services
- Fees
- Rents coming from lotteries and similar
- Insurance premiums granted to foreign companies
- Royalties
- Payments to members of boards acting in foreign countries
- Payments to members of ships' or airplanes' crews
- Rents coming from public shows
- Rents coming from the production, distribution and rent of movies, videos, compact discs or similar, including cable television
- Rents and commissions obtained from agencies or branches, domiciled or not in Guatemala.
- Transportation of load or persons, no matter where the tickets or freight charges were issued or paid.
- Rents, interests and profits of capital coming from operations with third parties from the legally constituted cooperatives in the country.
- Indemnifications or pensions perceived from cause of death or incapacity produced by accidents or illnesses, when they continue to be perceived during licenses.
- Rents obtained by the government and its decentralized and autonomous entities, as well as municipalities in case of legal entities formed with mixed capitals.

According to Guatemalan legislation, the following rents **are not burdened** by Income Tax:

- Amounts received as heritages, legacies and donations.
- Rents obtained by the government and its institutions, except mixed capital corporations.
- Rents obtained by universities.
- Rents obtained by non-lucrative associations or foundations for the purposes specified by law, if and when their total income comes from donations or ordinary or extraordinary allotments, and those are destined exclusively for the purposes of its creation.
- Rents obtained by religious institutions, if and when they are destined exclusively for the purposes of their creation.
- Interests and commissions from loans contracted in foreign countries by the government, municipalities and their entities.
- Indemnifications or pensions received as Social Security benefit.
- Severance payments either from private or public entities.
- Payments from the diplomatic corps, consular and other official representatives of the Guatemalan Government in foreign countries.
- Payments for technical services given to the Government or official institutions, when such are paid by foreign governments or international institutions, or funds coming from donations.
- Dividends and profit participations obtained by individual and legal entities domiciled in the country, if and when taxpayers have already completed corresponding payment of tax according the law.

A. Individuals not residing in Guatemala

The tax applicable to rents coming from Guatemalan sources from individuals or legal entities not residing in the country are the following:

- 0% in dividends and utilities paid or credited by companies or others established in Guatemala, if and when the paying company has paid its corresponding income tax.
- 10% over payments or credits on account of interests, dividends, participations in utilities, profits and other benefits paid or credited by corporations or establishments domiciled in the country; payments or credits on account of per diem allowances, commissions, bonuses and other benefits subject to tax payment, including salaries and compensations; and rents paid to sportsmen and theater, television and other any other kind of actors or artists of any kind of show. Exceptions are made for dividends, utility participations, profits and other benefits, when it is accredited that taxpayers who distribute said benefits have effectively paid the corresponding tax according to the law.
- 31% over payments or credits on account for fees, royalties and other retributions for the use of patents and trademarks of factories, as well as for scientific, economical, technical or financial advice, paid to companies or legal entities.
- 31% over payments or credits on account of any other rent from a Guatemalan source, not contemplated in the previous clauses.

Payment of said tax is made through retention made by the foreigner's agent or representative, or by the individuals or legal entities that contract directly with them.

B. Expenses deductible from Income Tax

With the amendment introduced to the Income Tax Law through Decree 18-04 of Congress, only the persons who opt for the 31% system have the option of deducting certain costs and expenses from their gross income, with the purpose of determining the taxable income to which the 31% rate will be applied to.

The general rule is that ***costs and expenses necessary to produce burdened rents are deductible from Income Tax.***

Every expense must be supported by corresponding legal documentation; meaning, by authorized invoices, special invoices, non-domiciled persons' invoices, import policies, receipts upon salary payments, etc.

When analyzing the deductibility of an expense, some special situations established by law must be observed, such as limits on amounts, maximum percentages and the obligation of making retentions, among others.

Within the most important expenses and costs that the Income Tax Law considers deductible from individuals or legal entities, patrimonies, non-commercial individuals or legal entities that opt for the 31% system, we can mention:

- Costs of production and sale of merchandise and services.
- Expenses on transport, fuels and moving cause.
- Costs and expenses needed for farming development.
- Any kind of salaries paid to workers; Christmas and Annual Bonus,¹⁶ employer's quotas paid to IGSS (the Social Security Institute), IRTRA (Private Employee's Recreational Institute) and INTECAP (Technical Training Institute).¹⁷
- Indemnifications paid for termination of work relation.
- Life, Accident and Medical Insurance Premiums; fire, theft, robbery, earthquake and other risks.
- Rent of real estate used to produce income.
- Interests over financial credits and expenses directly associated to such credits obtained from banks and financial entities legally

¹⁶ The Christmas bonus (Decree 76-78) and the mid-term bonus (Decree 42-92) are labor considerations; they are calculated at an ordinary monthly salary per year worked.

¹⁷ Guatemalan Social Security Institute, Employees' Recreational Institution, Technical Training Institute, respectively.

authorized to operate in the country and supervised by the Superintendency of Banks.

- Loss of effects duly verified.
- Depreciations and amortizations necessary to compensate the wearing out, deterioration or exhaustion of assets or rights.
- Uncollectible debt.
- Donations for an amount that cannot exceed Q. 500,000.00 a year.¹⁸
- Fees and equivalents paid for professional services, technical, financial or any kind of advice, given in the country or coming from foreign countries.
- General and selling expenses, including packing and crating.
- Provable travel expenses used in or out of the country.
- Royalties for the use of trademarks or patents of invention, paid to residents or non-residents, if and when corresponding retention was made.
- Advertising and propaganda expenses duly proven.
- Exchange losses due to buying of foreign currency for operations destined to generate taxable income.

Personal deductions that individuals working in dependent relationships can make, as well as individuals not involved in business (practitioners) who opt for this system, are, among others:

¹⁹

- A total of Q. 36,000.00 (at an exchange rate of Q.8.00 for US\$1 a total of US\$4,500.00) a year without need to prove anything.
- Quotas paid to Bar Associations, bond premiums, social security contributions; non-dotal life insurance premiums from personal accidents, medical hospital expenses, among others.
- Alimony established by a Family Court.
- Donations not larger than Q. 500,000.00 (at an exchange rate of Q.8.00 for US\$1 a total of US\$62,500.00).
- Revenues exempt by law from the payment of this tax.

C. Non-deductible costs and expenses

¹⁸ On April 22, 2004, there was a publication of a Sentence of the Court of Constitutionality where it was declared that such deduction limit does not apply for donations given in favor of universities and scientific and cultural entities. This was because the Political Constitution of Guatemala in its article 88 does not provide a limit for the deduction of donations given in favor of such institutions. (Accumulated files, 1226-2001, 1492-2001 and 401-2002)

¹⁹ One of the taxable profits that these taxpayers counted on, consisted of applying as credit (subtract from Income Tax to pay) the Value Added Tax paid (12%) during the fiscal year; on May 24, 2004, was published a Sentence of the Court of Constitutionality where it was stated the partial Unconstitutionality of article 37 A of the Income Tax reducing from 100% to 50% the *right of credit on account* of the Income Tax that individuals in relation of dependency and professionals had, for a sum up to the equivalent of the tariff of the Value Added Tax paid. The Court of Constitutionality finally concluded that said diminution was inobservant to the limit constitutionally imposed, relative to the tributary equity and justice, which as well had a lack of reasonability between the purpose (to avoid reduction of collection) and the means used.

There is no general rule to specify which expenses and costs are not deductible. Law states a series of situations; among them we can underline the following:

- Costs and expenses not supported by corresponding legal documentation, or not corresponding to the annual taxable period that is being liquidated.
- Costs and expenses not originated from the business, activities or operations that give place to taxable income.
- Interests exceeding the limit authorized by law.
- Value of permanent improvements made to capitalizable fixed assets' goods.
- Total insurance premiums or any other kind of insurance that generates reimbursement, refund or exchange of any nature to the beneficiary or to the person who contracts the insurance.
- Expenses and depreciations on goods used either by practitioners or individuals, being able to deduct only the corresponding proportion used to obtain taxable income.

Decree 20-2006 of Congress, in force since August 1st 2006, contains new taxation mechanisms as well as material amendments to several Tax Laws, being that one of the most relevant ones is the obligation to make, through any of the products offered by the national banking system, any payment exceeding Q50,000.00 (aprox. US\$ 6,500.00); this requirement is necessary in order for the tax authorities to recognize said payment as a deductible expense from the Income Tax or as a tax credit for the VAT.

D. Other deductions

The Income Tax Law foresees other kinds of special deductions that can be made:

- A) *Reinvestment of utilities*: In the past, both individuals and legal entities could deduct up to 5% of the total utilities off their annual tax period, coming from taxable income that were reinvested in the acquisition of plant, machinery and equipment or training programs for employees.²⁰
- B) *Operation losses*: during the first five years of their constitution, new companies or their owners could deduct operation losses from their net income.²¹

²⁰ Such benefit was derogated by means of the amendments to the Income Tax Law contained in Decree 18-2004 of the Congress of the Republic.

²¹ Before one of the Amendments to the Income Tax Law contained in Decree 44-2000, the compensation for losses in previous exercise was applied to every company for up to four fiscal periods. With the amendment introduced by Decree 18-04 of the Congress of the Republic, said fiscal benefit was totally derogated, so from June 2004 no company can compensate its losses.

E. Capital gains and losses

Capital gains and losses result from the negotiation of goods or rights that are not in the usual line of work of the person or legal entity. The tax to pay is 10% of the earnings from the negotiation, for taxpayers under the 5% system; for taxpayers under the 31% system, it will be paid according to what regime states.

Loss of capital can only be compensated with capital gains.

F. Overpayments

Taxpayers or any persons, who overpaid their taxes, may request this amount to be credited to the quarterly payment or the annual declaration, or ask for reimbursement within the 90 working days following closure of corresponding fiscal year.

G. Special cases

The following are special cases where the Income Tax is determined by applying a percentage of the income obtained from activities that took place out of Guatemala.

- Insurance, reinsurance and re-bonding. In case of companies domiciled in foreign countries that obtain income on insurance, reinsurance, recession and re-bonding premiums, the taxable income is equivalent to 10% of the respective gross income from such concepts. 31% retention must be applied to the resulting taxable income for tax payment.
- **Motion Pictures and analogues.** Taxable income is the 60% of the gross value that owners of production, distribution or broker companies domiciled in foreign countries obtain for the use of motion pictures in Guatemala. Retention of 31% must be applied to the taxable income as tax payment.
- **International News.** It is assumed that the taxable income is equal to the 60% of the gross income obtained by corporations domiciled in foreign countries that provide the international news to Guatemalan companies. The applicable percentage to taxable income is 31%.
- **Freight companies not domiciled in Guatemala.** They must pay a definite Income Tax equivalent to 5% of the gross income from Guatemalan freight and passenger transportation.

H. Tax on Commercial and Farming Establishments

The Tax on Commercial and Farming Establishments (*Impuesto sobre Empresas Mercantiles y Agropecuarias*) (IEMA) was a tax for individuals or legal entities, owners of mercantile or agrarian corporations, domiciled or located in Guatemalan territory. It was recently created, arising from the need to establish mechanisms to ensure the government received payment of a minimum Income Tax that was not being collected due to tax evasion, especially by those individuals or legal entities who reported fiscal losses year by year.

That is how IEMA came to be. At the beginning it was projected to last only five years, and through amendment of Decree 88-2000 it gained indefinite force.

It had to be paid quarterly. The tax base is constituted by a quarter of the amount of the total net assets resulting from subtracting the total of assets, depreciations and amortizations accumulated, uncollectible credits, etc. The tax was of 3.5%, if the total net asset value was taken as a basis or 2.5% if the value of the gross income of the immediate last annual definite liquidation period of Income tax was taken as a basis.

By the end of the fiscal year, what was paid on this tax was creditable to the payment of Income Tax. The law offered various ways to do this.²²

At present time, the Extraordinary and Temporary Tax in support of Peace Agreements, Decree 19-04 of Congress (*Impuesto Extraordinario y Temporal de Apoyo a los Acuerdos de Paz* "IETAAP") was created to substitute IEMA. This tax has fundamentally the same mechanism as IEMA, and it aims to have limited force of three and a half years.

III. VALUE ADDED TAX

²² Through Sentence of Files 1766-2001 and 181-2002, published in the Official Gazette on February 2, 2004, the Court of Constitutionality declared unconstitutional the main articles of said law, leaving it practically without effect stating, among others, the following legal points> ‘...which constitutes a limit for the exercise of the Legislative Organ, the observance of the principles of tributary legality, equity and justice, capability of payment and prohibition of confiscatory and establishment of double or multiple internal tax policies, which constitute parameters to be observed at the moment when the Legislative Organ proceeds to order ordinary and extraordinary taxes... as well as to determine the basis for collection.. through article 3, a violation to the principle of tributary equity and justice is formed, because it forces individuals or legal entities, owners of mercantile and farming corporations operating under a special tax system, to pay the tax without said payment can be object of compensation or credit with the payment another tax which also burdens the patrimony. Also transgresses provisions in article 243 yet it becomes unfair and unjust that taxpayers who have chosen special fiscal systems do not have the possibility of credit as the rest do... The article 7 transgresses the article 243 of the Political Constitution of the Republic of Guatemala, yet the tax base may be calculated over a quarter of the gross income, taking as a reference parameter the Income Tax declaration, and if no income has been reported, the tax base is calculated over the total net asset; said calculation formula is not a parameter to determine the actual capacity of payment of a tax; and for these same reasons, the article 9 which structures the determination of the tax by means of a percentage which takes as base the value of the total net asset of said companies or the value of the gross income obtained through them, is also unconstitutional.’

The Value Added Tax (*Impuesto al Valor Agregado* "IVA") can be defined as a multiphase tax occurring in different stages, affecting production in all its phases; it burdens the added value of every transfer. Its object is to burden consumption; the IVA payer does not support the charge of the tax.

The final consumer, on the other hand, has nothing to do in the tributary relation, but it is precisely on him where the tax rebounds. That is why this tax has a credit and debit system with the purpose of not affecting the parties who are not the final consumer.

Decree 20-2006 of Congress, introduces material amendments on the form to collect the VAT. It creates a new withholding regime by which the designated tax payers are obligated to withhold certain percentage of the total amount to be paid for services of goods they acquire, which shall later be paid to the tax authorities. This means that instead of paying the whole amount of an invoice (which includes the 12% VAT in the price) they issue a withholding receipt. This new withholding regime is created for the purpose of ensuring the correct payment of the VAT and its collection by the tax authorities. It contemplates several mechanisms, exceptions and formal obligations, which implementation is programmed to be progressive. This Decree also refers to the creation of a specific registry to allow for a rigorous control of all printing enterprises offering the service of printing invoices and other documents used for the support of all assessed transactions.

A. Taxable and exempt operations

The following transactions are burdened by IVA, with an actual percentage of 12% over the taxable income, which, in sales, will be the price of the operation, and in services, their price. The IVA declaration is presented monthly.

- The selling or bartering of personal property or real property rights constituted over them.²³
- Rendering of services in Guatemalan territory.
- Rent of movables and real estate.
- Allotments of movables and real estate, unless they are made when distributing the hereditary estate or terminating co-proprietorship.
- Taking of movables by a taxpayer or by the owner, partner, director or employee of the company for his personal use and consumption.
- Destruction or loss or any event implying something missing in inventory, unless when dealing with perishable goods or any misfortune.
- The selling or bartering of real estate.
- Absolute gifts of movables and real estate.

Among the general exemptions we can mention the following transactions that are not burdened by IVA:

²³ The rendering of services

- **Importations of movables** made by cooperatives, federations and confederations; individuals and legal entities in a temporary importation regime. **Travelers** that enter those goods as luggage, house effects of Guatemalan diplomats returning to the country; missions and foreign diplomats, among others.
- Exportations of goods and services.
- Transferal of ownership of movables and real estate in the following cases: a) contributions to civil or commercial entities; Decree 20-2006 of Congress establishes that when a real state has been previously contributed to an entity which main business is the real state development, this exemption will not be applicable; b) mergers of corporations; c) Inheritances, legacies and donations.
- Services provided by institutions under the vigilance of the Banks' Superintendency. Regarding the insurance and bond institutions, only re-insurance and re-bonding operations are exempt.
- The making, issuing, circulation or transference of credit instruments, and any kind of shares, except memorandum invoices when they are issued, accepted and negotiated by acts burdened by IVA law.
- The constitution of trusts and the restitution of the trusted goods to the trustee.
- Contributions and donations made to associations, foundations and educational, cultural, social service and religious non-lucrative institutions.
- Retail sales of meat, fruits, vegetables and basic grains to final consumers in marketplaces in villages and municipalities.
- Services provided by associations, foundations and educational, social assistance and religious non-lucrative institutions.
- The selling of assets of banks of financial corporations with a regulatory plan or a Board of Exclusion of Assets and Liabilities approved by the Banks' Superintendency, when transferring to other banks with previous authorization of the Monetary Board.²⁴
- Buying and selling, as well as the cancellation of import taxes and tariffs of generic and alternative natural medicines; and antiretroviral medicines.

Among the specific exemptions we find that the tax on operations of sales or services should not be charged to the following persons:

- Educational Centers, public and private.
- Universities.
- Autonomous Sports Confederation of Guatemala and the Guatemalan Olympic Committee.
- Guatemalan Institute of Social Security.
- Diplomatic and consular missions accredited before the Guatemalan government.
- International organizations that according to previously subscribed agreements have been granted tax exemptions.

²⁴ These are institutions created by the Banks Law, Decree 19-2002 that are applied to banks with liquidity problems.

The aforementioned persons are also exempt of the tax generated by acts imposed by this law.

B. Determination

In importations, the tax is calculated by applying 12% to the value resulting from adding to the imported merchandise CIF price the amount of the tariff and the rest of the surcharges charged regarding the importation.

In other cases, the tax results from the difference between the Fiscal Credit and de Fiscal Debit.

Fiscal Credit is the sum of the tax charged to the taxpayer in importations and purchases of local goods and services directly related to their production, distribution and sale process.

On the other hand, Fiscal Debit is the sum of the charged tax by the taxpayer in the operations subject to IVA charge done in the same period.

The **tax to pay** is the difference between the generated total Fiscal Debits and Credits.

C. Value Added Tax surplus

Two situations can arise monthly:

1. Fiscal Credit (tax charged to the taxpayer) smaller than the Fiscal Debit (tax charged by the taxpayer). This is the common scenario. The taxpayer must pay the Local Tax Authorities that difference.
2. Fiscal Credit larger than the Fiscal Debit. In this case, the difference must be compensated to the taxpayer with future tax periods until it is depleted.

D. Value Added Reimbursement

Persons dedicated to exportations have the right to ask for cash reimbursements from the Fiscal Credit in their favor. The reimbursement is made by due monthly periods and it has to be requested to the Tax Authority.

The Fiscal Credit exporters can regain is the result of the tax that they have been charged through invoices of purchased goods and services destined to their commercial activity or paid by them in the importation of goods. This right of cash reimbursement comes from the moment the exporters can't charge this tax to anyone, since they don't sell in the country, because, like it was mentioned before, IVA is a tax on consumption and it must be paid by the final consumer.

In general terms, Decree 20-2006 establishes amendments to the VAT Law which contemplates more rigorous and explicit requirements in order for the tax payers to be able to use the generated tax credit. These requirements are focused on the formalities to be met when printing and issuing invoices, the way to book the expenses, the permissible deductions and the procedures to be carried out before the tax authorities.

IV. DOCUMENTARY STAMP TAX LAW

The purpose of this tax is to encumber documented acts and contracts. It's a strictly documentary tax, therefore the inexistence of the document brings along the inexistence of the obligation.

Documentary Stamp Tax and the Value Added Tax exclude themselves.

A. Imposed acts and contracts

The general rule is that the amount of this tax is of 3% of the value tendered in the document concerning the following acts and contracts:

- Civil and Mercantile contracts.
- Documents issued abroad to have an effect in Guatemala.
- Public and/or private documents with the purpose of vouching for payment in goods or money.
- Receipts issued by insurance or bond companies in concept of paid primes or the corresponding bond payments or policies of any kind of insurance or bond.
- Receipts of payments of lottery and raffle prizes.
- Receipts of payment of fund withdrawals from companies or businesses for their owners' non provable personal or travel expenses.
- Documents accrediting payment of commissions on behalf of the government regarding tax collection, purchase of fiscal species and any other commission.
- Receipts, pay statements or other documents backing the payment of dividends and utilities in money or in kind, payments or credits in accountable or electronic accounts, even if there is no payment document issued. Dividends paid or credited by share coupons are also encumbered with the tax.²⁵

Added to the 3%, the law provides a list of specific fees for certain documents where the amount to pay is already determined by law.

B. Exempt documents and acts

²⁵ This generating fact was added to the Documentary Stamp Tax Law by Decree 80-2000 of Congress, ruling since January 1, 2001.

- All contracts and documents that have acts imposed with IVA.
- Receipts of payment of salaries, Christmas Bonuses, travel expenses, among others, for personal services provided in dependent relationships in the private and public sectors.
- Receipts of payments of scholarships.
- Checks and deposit certificates.
- Credit instruments and any other credit documents issued in other countries to be paid in Guatemala, or issued in Guatemala to be paid in any other country.
- Contributions to corporations' capital stock.
- Loans coming from foreign countries.
- Creation, issuing and circulation of bonuses, collateral trust bonds, debentures, mortgage bonds and credit instruments where banks and entities subject to the Superintendency of Banks interfere.
- Creation, issuing, circulation, negotiation and cancellation of any kind of credit instrument, debentures, mortgage bonds, their coupons and interests.
- Amounts paid for total or partial liquidation of life insurance policies.
- Judicial and administrative acts.
- Foreign commercial invoices and importation and exportation policies.
- Exportation of merchandise and products.
- Bank credits.
- Credits and financing granted among individuals or legal entities and the documents to back them up.
- Contracts and operations of re-insurance and re-bonding.
- Constitution, transformation, modification and dissolution of corporations, and increases of capital stock.

Said law states that bank operations, financial corporations, General Storage Warehouses, insurance companies, re-insurance companies and Securities Markets are exempt.

V. IMPORT DUTIES, TRADE AGREEMENTS AND CUSTOMS SYSTEM

A. Central American Common Market (CACM)

The Central American Common Market, created in 1960 through the General Covenant of Central American Economic Integration, establishes a common market and customs union between Guatemala, Honduras, Nicaragua, El Salvador and Costa Rica. Its main objective is to avoid disloyal commercial practices and to reduce intraregional tariffs.

B. North Triangle - Mexico Trade Agreement

This is an Agreement between Mexico and Guatemala, El Salvador and Honduras in force since March 16, 2001. Allowing a rise in commerce and investment; intensifying of preferences granted to commerce and goods of origin; Intellectual Property protection; creation of antidumping policies and agreements regarding customs are among the benefits accomplished.²⁶

C. Trade Agreements with The Dominican Republic, Chile and Panama

Central America has negotiated Free Trade Agreements with The Dominican Republic and Chile; the free trade agreement with Panama has concluded the phase where the text of the treaty is done, pending entering in force.

D. Dominican Republic - Central American Free Trade Agreement (DR-CAFTA)

In January 2004 negotiations for the Free Trade Agreement between the United States of America and Dominican Republic, Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica were closed. This Agreement entered into force in Guatemala in July 2006, amendments to several laws were implemented by the Decree 11-2006 of Congress in order to comply with all the obligations assumed by the state of Guatemala by means of this Agreement. The most important amendments were made to the followings subject matters: intellectual property, copyright, arbitration, government procurement, telecommunications, financial services and criminal law.

E. Import Duties

Through Decree-Law 123-84, ratified by Government Agreement 771-85, Guatemala becomes part of the Central American Convention on the Tariff and Customs Regime (*Convenio sobre el Régimen Arancelario y Aduanero Centroamericano "CRAAC"*).

One of the authorities created by this Convention is the Central American Tariff and Customs Council, that, according to article 7 paragraph c) of the Convention, is in charge of approving tariff rights and their modifications.

The Central American Importation schedule is formed by the Central American Schedule System (*Sistema Arancelario Centroamericano "SAC"*) and the corresponding Importation Schedule Rights (*Derechos Arancelarios de la Importación "DAI"*).

The numeric code of SAC is represented by eight digits that identify: the first two, the chapter; the next two, the entry; the third pair, the sub-entry; and the last two, the paragraphs.

²⁶ KPMG "Investment in Guatemala", 2001.

The merchandise's identification is always done with the eight digits of this numeric code.

The Central American schedule, to the day, has harmonized approximately 77% of the amounts in the tariff universe.²⁷

Importations of products manufactured out of Central America to any Central American country must pay the Value Added Tax (IVA) and the Importations Schedule Rights (DAI). If the goods were to be imported to another Central American country, they are subject to making the same payments (IVA and DAI).

On the other side, the transference of merchandise originated in Central American countries is exempt of the payment of DAI, but not of IVA.

F. Customs Legislation

At present, the Central American Uniform Customs Code and its Regulations (*Código Aduanero Uniforme Centroamericano y su Reglamento "CAUCA Y RECAUCA"*) are in force regarding customs legislation.

The legal basis of the Central American Customs Union is built on the General Covenant of Central American Economic Integration, ruling since 1960, subscribed and ratified by all the countries of the area.

The Customs Union's main purpose is to constitute the Central American territory as one external frontier, eliminating all the internal borders, with common rules for all the member States, and a Common Customs Administration where all the countries apply the same customs dispositions and procedures to obtain free transit of merchandise between the nations of the Customs Union regardless of their origin. This process is not finished yet.

VI. SPECIFIC TAXES

A. Tax on Petroleum and its Derivates Law (Decree 38-92)

Decree 38-92 establishes a tax on crude petroleum and fuels derived from petroleum imported or national, processed in the country and distributed in national territory.

This law is imposed on the following acts:

1. Conveyance under any title of the encumbered products (crude petroleum and fuels derived from petroleum).
2. Use, disposition or consumption of the encumbered products coming from the processing plants or distributing companies.

²⁷ Data obtained from the Economic Integration Secretary (Secretaría de Integración Económica) (SIECA).

The calculating base to apply the tax is fixed according to de American gallon of 3,785 liters at room temperature.

The tax rates (ruling since April 15, 2003) are:

| | |
|---------------------|---|
| Superior Gasoline: | Q. 4.70 (Equivalent to US\$0.58 approx.). |
| Regular Gasoline: | Q. 4.60 (Equivalent to US\$0.57 approx.). |
| Aviation Gasoline: | Q. 4.70 (Equivalent to US\$0.58 approx.). |
| Diesel and gas oil: | Q. 1.30 (Equivalent to US\$0.16 approx.). |

If any of these fuels is going to be used to generate electricity in thermoelectric plants from the National Electric System, the law foresees some exemptions.

The tax is also imposed on products like kerosene, kerosene for reaction motors, Nafta and Gas blend of petroleum (propane, butane, methane and similar gases) in a heap and in carburetion; all with Q. 0.50 per gallon (equivalent to US\$0.06).

The tax rates that encumber Fuel Oil (Bunker C) Crude Petroleum as fuel, other fuels derived from petroleum and asphalts have been modified and added to this law by Decree 11-2003 of Congress imposing a tax between Q. 0.50 and Q. 4.00 (US\$0.06 and US\$0.50) per gallon, nonetheless, the Constitutional Court declared the unconstitutionality of the article that modified the imposed tax rate.²⁸

On the other side, this law also foresees exemptions for institutions and agencies that have complete exemptions by constitutional mandate; public or private international institutions operating in the country in social causes or supporting the government and economic and social development, as long as the respective legally approved covenants or contracts say so. The Executive Power, by a Government Agreement issued through the Ministry of Public Finances, will grant the tax exemptions to the beneficiaries.

This tax is not imposed on national crude petroleum, or imported reconstituted crude petroleum processed by the refineries installed in the country. It is also not imposed on finished products or in national crude petroleum later exported.²⁹

²⁸ Through the Sentence of August 6, 2003, of File 684-2003, the Constitutional Court determined that there were various events in the case of petroleum (importation, distribution and sale) that originated different tax obligations, being a case of **multiple taxation**, contradicting the Constitution which orders to progressively eliminate these cases, declaring the unconstitutionality of article 7 of Decree 11-2003 that increased the tax load in certain petroleum products.

²⁹ On December 16, 2004 the Official Gazette published the Decision of File 361-2003 where the Constitutional Court declared where applicable the unconstitutionality of the article of said law that comprised the generating fact of the tax; this way, the law was left practically without application; nonetheless, a day after, December 17, 2004, Ministry Agreement 0601-2004 was published in the Official Gazette which orders the publication of decision 132-2004 (Council of Economy Ministers of Central America) and that comprises modifications to importation tariff rights, that were left encumbered with tariffs up to 40% (before, tariff rights on most of the products derived from petroleum were of "0" and in few cases, they were encumbered with a 10% of tariff rights). This

B. Taxes on the distribution of soft drinks and other beverages, including alcoholic beverages

Different laws have ruled in the beverages' sphere. With the legal force of Decree 21-04 of Congress, "Tax on the Distribution of Alcoholic Distilled Beverages, Beer and other Fermented Beverages", the decrees that ruled the subject, that had lost legal force because of different unconstitutionality declarations by the Constitutional Court, were repealed. For a better understanding of the constitutional rulings mentioned here, we will illustrate and explain the repealed decrees.

1. Tax on wine, hard cider, Vermouth wines, sparkling wine and other fermented beverages (Decree 07-2002)

Decree 7-2002 includes a specific tax imposed on the national distribution of wines, hard ciders, Vermouth wines, sparkling wines and other fermented beverages produced in the country or imported.

The tax is generated on the date the products leave the warehouses or places where they are stored belonging to the makers or registered importers for their distribution in national territory.

In the case of individuals or legal entities that are not producers or importers that sporadically import for their own consumption, the tax is generated in the moment of the importation or when the products enter the country.

For the purpose of applying the tax, the unit measurement is the liter or its equivalent.

The taxable period is monthly.

The base used for imposing the tax is made of the quantity in liters coming from national production or importations that are distributed in the national territory by a passive subject, during a month.

The following are some of the exemptions:

- Importations of the products imposed by this law made by International Organizations which have been granted tax exemptions according to the covenants subscribed between the Guatemalan Government and these agencies.
- Exportations or re-exportations of the products imposed by this law.

modification to DAI had the purpose of "compensating" the lack of income that the Government could have suffered by a specific tax.

The passive subjects of this tax (manufacturer and importer) must register in the Tax Authority (SAT) as manufacturer or importer, as taxpayers.

Article 11 of this law has the specific fees per liter for each product, making reference to fractions and tariff entries of the Central American Schedule System (SAC) for the description of the products.³⁰

2. Tax on the Distribution of Beer and other Beverages made by the Fermentation of Cereals (Decree 08-2002).

The first and second articles of this Decree approve an specific tax imposed on the distribution in national territory of beer and other beverages from fermented cereals, from national production or from importations.

Article four states that the generating fact of this tax happens when such beverages leave the warehouse or storage places of the manufacturers or importers registered for their distribution in national territory; for persons that make sporadic importations or for their own use, the tax is generated in the moment of the importation or when the products enter the country through the entry customs.³¹

This Decree also states that the unit measurement for applying this tax is the liter or its equivalent; its imposing period is monthly.³²

³⁰ Through the Sentence of the accumulated files 451, 453, 603, 8181-2003 and 1806-2003, the Constitutional Court declared the unconstitutionality of articles 3, 5 and 11 of the aforementioned Decree, declaring, among other things, the following: “the plaintiff states that article 3 violates the principle of annuity and unity of budget regulated in article 237 when destining in a perpetual and indefinite way by a different law from the one approving the budget, a total sum of the Government’s income, equivalent to the amount gathered, to strengthen the financing of the expenses of preventive and curative health of the Health Ministry. This Court in Sentence 688-97 said that it is not possible to order by an ordinary law any percentage of the budget destined to a specific end, that’s why article 3 actually violates article 237 of the Constitution... The plaintiff indicates that articles 5 and 11 violate the Capacity of Payment Principle (243) since they use as base to impose the tax the volume (liter as measurement unit) without taking into account the capacity of contribution of the consumer encumbering equally products of different prices generating a dramatic disproportion between the amount of the operation and the tax paid. This Court thinks that when using as base for the tax the **“volume of the encumbered product”**, meaning, the liter as a unit measure, there is an actual violation of the payment capacity principle and tributary equity and justice, since such principle consists in the just distribution of the tax loads with the purpose of being closer to the economic capacity of the taxpayers, through the creation of taxes closer to the payment capacity that has to be greater in order for the sacrifice to be equal. In this case, it is impossible to set amounts that make this principles effective taking into account as the only imposing base the volume of the encumbered product (weigh, measurement, quantity, etc.) since regularly the measurement is not and indicator by itself of the contributing capacity of the passive subject (the distributor) since the encumbered products don’t have the same cost or commercial value. (Article 5, first and third paragraphs and article 11 in the words **“by liter”** violating articles 239 and 243).

³¹ Articles 1, 2 and 4 of Decree 8-2002 are suspended by the Constitutional Court because of the proceedings of a General Partial Unconstitutionality. (File 629-2003 Published in the Official Gazette May 6, 2003).

³² Article 5 of the aforementioned Decree is suspended by the Constitutional Court because of the proceedings of a General Partial Unconstitutionality (File 1770-2003 published in the Official Gazette November 4, 2003),

These are some of the exemptions:

- Importations of the products imposed by this law made by International Organizations that have been granted tax exemptions, according to covenants subscribed between Guatemala's Government and such agencies.
- Exportations or re-exportations of the products imposed by this law.

At present, the fee of this tax is suspended by a decision from the Constitutionality Court.³³

This tax is paid at the end of each month.

3. Tax on the distribution of soft drinks, isotonic or sports beverages, juices or fruit nectars, yoghurts, concentrates or powder preparations for making beverages and bottled water (Decree 9-2002).

Decree 9-2002 contains a specific tax imposed on the distribution in the national territory of any kind of beverages, juices, nectars, yoghurts, concentrates or powder preparations and bottled water, from national production or imported.

The tax is generated on the date the products leave the warehouse or place where they are stored of the manufacturers or importers registered for distribution in the national territory.

In the case of individuals or legal entities that are not manufacturers or importers that make sporadic importations for their own consumption, the tax is generated in the moment of the importation or when the products enter the country.

For the application of this tax, the measurement unit is the liter or its equivalent.

The imposing period is monthly.

The base used for imposing the tax is constituted by the quantity in liters, from national production or imported, that are distributed in Guatemalan territory by a passive subject, during a month.

These are some of the exemptions:

- Importations of the products imposed by this law made by International Organizations that have been granted tax exemptions

³³ The Constitutional Court has decreed the provisional suspensión of article 11, which contains the fee of the tax through decisions Published in the Official Gazette May 6 and November 4, 2003, Files 629-2003 and 1770-2003, respectively.

according to covenants subscribed between the Guatemalan Government and the agencies.

- Exportations or re-exportations of the products imposed by this law.

Persons that are passive subjects of this tax (manufacturers and importers) must register as taxpayers at the Tax Authority (SAT) as manufacturers or importers.

Article 10 of this law names the specific fees per liter for each product, making reference to fractions and tariff entries from SAC regarding the description of these products; among these tariffs we have:

- Sodas with or without sugar, with or without carbonic gas, as well as syrups and/or concentrates used to make sodas: fee Q. 0.18 per liter.
- Isotonic or sports beverages (tariff fraction 2202.90.90): fee Q. 0.12 per liter.
- Natural fruit juices or nectars and artificial juices (tariff fraction 2202.90.90) fee Q. 0.10 per liter.
- Any kind of yoghurt beverages (tariff fraction 0403.10.00) fee Q. 0.10 per liter.
- *Abolished by the Constitutional Court.*³⁴
- Natural bottled water, referred to in tariff entry 2201, in presentations of up to four liters. The tax on natural bottled water in presentations of more than four liters for home use is not included. Fee Q. 0.18.

The tax must be paid at the end of each month.

4. Tax on the distribution of distilled alcoholic beverages, mixed alcoholic beverages and alcohol for industrial purposes (Decree 10-2002).

³⁴ Letter E) wanted to encumber with an specific fee by liter the concentrates or powder preparations referred to in tariff fraction 2106.90.90; the Constitutional Court established that this rule violates the equality principle, since it pretended to encumber equally (10 cents per liter of yielding) to all products or concentrates or powder preparations, without distinction among the different types of products included in the referred tariff fraction of the Central American Tariff System, which contemplates different qualities of products of preparations. In this sentence the Court affirms that "... the equality principle.. imposes that equal situations situations be treated legally equal, but for this to be truly effective it is also imposed in different situations treated differently, according to its differences... This Court has expressed before that the equality principle makes reference to the universality of the law but it doesn't prohibit or oppose to such principle, the fact that the legislator contemplates the need or convenience of classifying and differencing different situations and give them a diverse treatment as long as the difference has a reasonable justification according to the value system the Constitution embraces...". The Court considered that the legality principle was also violated, which, among other things, establishes that every tax and its collecting base must be in the law, and when reference is made to a "tariff fraction" that makes reference to "other products not expressed or included in other parts", this fact generates absolute lack of security and precision in the determination of the encumbered products, not complying or contradicting the legality principle. For all these reasons, the Constitutional Court declared de unconstitutionality of letter E). (Sentence files 404-2002 and 492-2002 published in the Official Gazette August 20, 2003).

Decree 10-2002 has a specific tax imposed on the distribution in national territory of distilled alcoholic beverages, mixed alcoholic beverages and alcohol for industrial purposes.

The income perceived by the application of this tax will be destined specifically for strengthening the financing and expenses of preventive and curative health programs from the Ministry of Health and Social Security.

The tax is generated on the date the products leave the warehouses or storage places of the manufacturers or the importers registered for their distribution in the national territory.

In the case of individuals or legal entities that are not manufacturers or importers who make sporadic importations for their own consumption, the tax is generated in the moment of the importation or when the products enter the country.

For applying the tax, the unit measurement is the liter or its equivalent.

It must be paid monthly.

The base used to impose the tax is constituted by the amount in liters, from national production or imported, that are distributed in national territory by a passive subject, during a month.

These are some of the exemptions:

- Importations of the products imposed by this law made by International Organizations that have been granted tax exemptions according to covenants subscribed between the Guatemalan Government and such Agencies.
- Exportations or re-exportations of the products imposed by this law.

Persons that are passive subjects of this tax (manufacturers and importers) must register as taxpayers at the Tax Authority (SAT) as manufacturers or importers.

Article 11 of this law has the specific fees per liter for each product, making reference to fractions and tariff entries from SAC for the description of the products.

This tax must be paid at the end of each month.³⁵

5. Tax on the distribution of distilled alcoholic beverages, beer and other fermented beverages (Decree 21-04).

³⁵ Through Sentence of file 641-2003, the Constitutional Court declared the unconstitutionality of articles 3, 5 and 11 of the referred Decree, for the same reasons and identical arguments used in the Sentence that declares de unconstitutionality of articles 3, 5 and 11 of Decree 7-2002.

This law was published in July 2004 and it is a substitute of the aforementioned laws that, as it was mentioned before, were not ruling because of unconstitutionality declared by the Constitutional Court.

This new law is imposed, once again, on the **distribution** of beer, sparkling wines, Vermouth wines, hard ciders, distilled alcoholic beverages, mixed alcoholic beverages and other fermented beverages made by the manufacturers or importers in Guatemalan territory.

As for the imposing base (amount on which the fee of the tax will be imposed), the method *ad mesuram* (liter) was substituted by the method *ad valorem* (selling price suggested to the public). This means that the fee of the tax must be applied on the selling price suggested to the consumer of the specific product.

C. LAW ON TOBACCO AND ITS PRODUCTS (DECREE 61-75)

This law's purpose is to regulate everything referring to planting, cultivating, transit, manufacturing, commerce, consumption, importation and exportation of tobacco and its products.

Any person can plant and cultivate tobacco; nonetheless, notice has to be given to the Tax Authority. Such activities are controlled by the Ministry of Public Finances.

Any person or legal entity can also manufacture products from tobacco. Manufacturing cigarettes in a special machine must be previously authorized by the Ministry of Public Finances, by petition of the interested party and filling all the registration requirements of the Commercial Registry.

Regarding the taxes, cigarettes manufactured by machines cause a conveyance tax equivalent to 100% of the selling factory price. Machine made cigarettes' manufacturers must use invoices where the selling factory prices without the tax are already printed, putting the tax amount separately.

Importers of machine made cigarettes are responsible of paying a tax of 100%.

Handmade cigarettes are not imposed by this tax.

Cigars, mixtures and chips from Guatemalan, Central American or foreign production, pay taxes by documentary stamps, provided by the Tax Authorities, which are adhered to the cigar or to the package of chips. These products are imposed with the percentages established by the law, which may vary from Q. 0.125 cents to Q. 4.00.

Regarding the advertising of the products and the specifications of the packages, the Guatemalan Health Code and some other regulations must be taken into account.

D. TAX ON THE CIRCULATION OF LAND, MARITIME AND AQUATIC VEHICLES (DECREE 70-94)

This law establishes a **yearly tax** imposed on the circulation of land, maritime and aquatic vehicles that move in national territory, national waters and air space belonging to the nation. It has a classification of the different kinds of vehicles, the earmark of the collected tax, rates and bases applicable to these rates.

Through Decree 44-2000 it was determined that the tax to pay can't be less than Q. 110.00 (Equivalent to US\$13.75), in all cases.

Besides the applicable rate, this law also has a series of legal regulations with **specific taxes** according to the type of vehicle (rental, transportation of persons, etc.) which range from Q. 150.00 to Q. 600.00 (US\$18.75 to US\$75.00), in the case of land vehicles, from Q. 600.00 to Q. 7,000.00 (US\$75 to US\$875.00) in the case of aquatic vehicles; and from Q. 2.00 (US\$0.25) per rough kilogram and Q.40,000.00 (US\$5,000.00) in the case of aircrafts.

These are some of the persons exempt from the payment of the referred tax:

- Government Institutions and the Social Security Institute.
- Universidad de San Carlos de Guatemala (the Government's Public University) and the rest of universities when using official license plates.
- Diplomatic Missions and their foreign officers that use license plates with the initials "CD" (*Diplomatic Corps*).
- Consular Missions and their officers with license plates with the initials "CC" (*Consular Corps*).
- Fire departments when using official license plates with the initial "O".
- Handicapped persons as consequence of war injuries.
- Cooperation and assistance projects and programs given by other states, International Organizations and foreign Non Governmental Organizations that have subscribed agreements by conduct of the Foreign Ministry or operational contracts with government entities and Non Governmental Organizations that are exempt of total payment of taxes by legal regulation.
- Owners of bicycles, tricycles without motor, hand carts, animal carts and row boats.

The Tax Registry of Vehicles is created by this law, under supervision of the Superintendency of Tributary Administration, whose main purpose is

to keep a registration of every vehicle circulating, sailing or flying in Guatemalan territory.

The **license plate** is the visible identification of the only and permanent registration of vehicles.

The tax on the circulation of vehicles is liquidated in one only yearly payment; it can't be paid in installments. The tax must be paid between January 1 and May 31 of every year, following the procedure and in the offices or banks determined by the Ministry of Public Finances.

In the case of **imported vehicles** not registered in the Tax Registry of Vehicles (*Registro Fiscal de Vehículos*), the tax payment must be done in the five working days following the determining of the tax by the SAT. To register and determine the tax, the person importing the vehicle must present an affidavit during the thirty days following the entrance of the vehicle to the country.

Only when the President of Guatemala, by constitutional mandate, has the discretionary power to exonerate taxpayers from fines and surcharges, the Tax on Circulation of Vehicles Law, states that fines established by said law can't be reduced, exonerated or abated by the SAT or by the Ministry of Public Finances. It also states that any provision made to create, suppress or modify the amounts of the tax on circulation of vehicles and all the tributary obligations related to it, as well as exemptions, must be done as a manifest reform to the law. Creation, suspension or modification of the tributary rights and obligations of this law by administrative circulars, resolutions or agreements, is prohibited.

PART THREE

RELEVANT ASPECTS AND LEGISLATION RELATED WITH FOREIGN INVESTMENTS IN GUATEMALA

I. LABOR LAW

In Guatemala, Labor Law is considered a tutelary right of the employees, which grants a minimum of social guarantees that cannot be waived, made to protect employees. Such minimum guarantees are developed through ordinary legislation, individual contracting and labor union contracting, and employment agreements, among others.

The following are among the most important aspects of the Guatemalan labor legislation:

A. Wages

Wages can be pacted the following way:

- a) Time unit (monthly, biweekly, weekly, daily or per hour).
- b) Work unit (by piece, task, by the lump, or by fixed price).
- c) By participation in utilities, sales or charges made by the employer; but in no case should the worker assume the risks of the employer's losses.

Minimum wage for agricultural and non-agricultural activities is set yearly by agreements of the National Labor Office (*Ministerio de Trabajo y Previsión Social*), following the procedure established in Guatemala's labor legislation.

B. Vacations

Guatemala's Constitution establishes as a minimum nontransferable right of all employees a 15 working days vacation period per worked year. Vacations are not exchangeable for money, unless the employee with a right to enjoy them did not, for any cause. Employees can't accumulate vacation periods year by year with the purpose of having a longer vacation period afterwards. If an employee ends his work contract, he can ask for payment of all vacation periods he didn't enjoy in the last five years.

Labor law states that all employees must enjoy the complete, uninterrupted vacation period, meaning that the employer can't ask an employee to suspend it.

C. Shifts and overtime

According to law, work shifts are the following:

- a) **Day Shift:** It's all the work done in a day between six in the morning and six in the evening. It can't exceed eight daily hours or forty-four hours in a seven day working week, equivalent to forty-eight hours for salary effects.
- b) **Night Shift:** It's all the work done between six in the evening of one day to six in the morning of the next day. It can't exceed six hours a day or thirty-six hours in a seven day working week.
- c) **Mixed Shift:** It's all the work done in a period of time that includes hours from the day shift and the night shift. It can't exceed seven hours a day or forty-two hours in a seven day working week.

It's important to mention that all the work done outside of a shift constitutes **overtime** and it must be paid as such.

Ordinary shifts and overtime can't exceed twelve hours in a day. An overtime premium of 1.5 times the employee's regular rate must be paid for each hour worked outside the ordinary shifts.

The following persons are not subject to work shifts:

- a) The representatives of the employer;
- b) Employees working without immediate superior supervision;
- c) Employees working in surveillance where only their presence is required;
- d) Employees working outside of the company;
- e) Employees whose job can't be done in shifts because of its nature.

Nonetheless, all this persons can't be persuaded into working more than twelve hours a day, and if they do, the employer must pay them overtime.

D. Christmas Bonus, Annual Bonus, and Productivity Incentive Bonuses

The employer must pay his employees a Christmas Bonus on the second week of December of every year, equivalent to a month's salary, calculated on the average ordinary salaries earned by the employee during December 1 of the previous year through November 30 of the year in which the payment must be done. If the employee didn't work the whole period, the payment must be done proportionately to the time worked.

The Annual Bonus (*Bono 14*) must be paid by the employer on the second week of July of every year, equal to a month's salary, according to Decree 42-92 of Congress, called "Annual Bonus for workers of the Private and Public Sectors".

Also, the employer must pay his employees an Productivity Incentive Bonus of Q. 250.00 (equivalent to US\$ 31.25) every month, according to Decree 37-2001 of Congress, with the object of stimulating and increasing employee's productivity.

E. Deductions from the salary

Income Tax: If the employee earns more than Q. 36,000.00 a year (US\$ 4,500.00), the employer must withhold the corresponding Income Tax.

Guatemalan Social Security Institute fee: From the total of salaries paid by the employer he must pay as an employer contribution 10% of the total of salaries and 4.5% of the employee's salary, as his contribution to Social Security. This amount is deducted from the employee's salary.

Foreign Employees: It is prohibited to Guatemalan employers to employ less than 90% of Guatemalans and to pay them less than 85% of the total of salaries. This is not applicable to managing directors, managers, directors, administrators, superintendents and general chiefs of companies. There is no maximum number of foreigners for these positions since this does not affect the aforementioned percentages.

Every foreigner that wishes to work in Guatemala must get a Work Permit before the Labor Ministry. He must also arrange his migratory situation applying for a Temporary Residence. After two years, he can apply for the Permanent Residence.

F. Additional benefits required by law

- a) **Employees' Recreation Institute** (*Instituto de Recreación de los Trabajadores*) (IRTRA): The employer must make a monthly contribution to IRTRA of 1% of the total of salaries paid to his employees.
- b) **Training Technical Institute** (*Instituto Técnico de Capacitación*) (INTECAP): The employer must make a monthly contribution to INTECAP of 1% of the total of salaries paid to his employees.

II. FREE CURRENCY NEGOTIATION LAW

Decree 94-2000 of Congress establishes the liberty of disposing, having, hiring, remitting, transferring, purchasing, selling, charging, and paying in any currency.

Having and handling deposits or accounts in foreign currency as well as having, exporting, importing, purchasing and selling in gold coins or bars, is also allowed.

The coin and means of payment in any act or business transaction of monetary content used in Guatemala is the **quetzal** (Q. 1.00 is equivalent to approximately US\$8.00), unless the contracting parties conventionally or expressly decide otherwise.

III. FOREIGN INVESTMENT LAW

Decree 9-98 of Congress, Foreign Investment Law, confirms the principal that national and foreign investment must be treated equally. It also abolishes all regulations against the aforementioned principal.

Basically, it guarantees equal treatment and enjoyment of constitutional rights to foreign and local investors, in the sense that different restrictions from the ones local investors enjoy will not be imposed on foreign investors in the subjects of private property, expropriation and importation.

It guarantees the right to participate in any licit economical activity in the country, the right to remit out of Guatemala any utility generated in the country, or to make transferences of capital out of the national territory, among other things.

IV. INTELLECTUAL PROPERTY

Intellectual Property is the way the government protects the result of man's creative effort and some of the activities with the object of divulging those creations. Depending on the field the protected creations belong to, Intellectual Property is classified in two large branches: copyright law and industrial property.

A. Copyright Law

Copyright Law, Decree 33-98 of Congress, has the purpose of protecting the rights of the authors of literary and artistic work, of interpreting or executing artists, producers of phonograms, and radio transmission institutions.

This law states that work published in foreign countries is also protected in Guatemala; this, in compliance of international covenants and treaties approved and ratified by Guatemala.

Enjoying and exercising copyrights recognized by Decree 33-98 are not subject to registering formalities. Art work created for industrial purposes is also protected by the referred law concerning its artistic content.

Civil and Mercantile judicial actions regarding the aforementioned law consist on an oral trial where the Judge hears the infractions to the Copyright Law and the precautory measures tending to prevent any infraction. Alternate conflict solution is also admitted by conciliation and arbitration.

B. Industrial Property

Decree 57-2000 of Congress regulates everything regarding Industrial Property. Article one states that the purpose of this law is to protect, stimulate and encourage intellectual creativity to be applied particularly in the field of industry and commerce, related to the acquisition, maintenance and protection of distinctive marks, invention patents, utility models and industrial designs, as well as protection of trade secrets and everything related to the fight against unfair competition.

Industrial Property can be defined as the gathering of regulations that protect the creations that can be applied in the industrial and commercial fields; inventions, trademarks, trade names, geographical indications, drawings and industrial models are among these creations. It also includes protection to unfair competition, including those acts that violate trade secrets.

Decree 57-2000 also regulates the judicial actions tending to protect Intellectual Property rights from threats or violations. Article 182 states that in civil and mercantile trials concerning this law must be held in an oral proceeding. Alternate measures of conflict resolution as conciliation and arbitration are also allowed. This decree has precautionary measures tending to prevent infractions or violations to this law.

The Guatemalan Penal Code has a series of offences related to Intellectual Property with prison terms between 1 and 4 year and fines between Q. 1,000.00 and Q. 500,000.00 (at an exchange rate of Q. 8.00 for 1US\$ this fines will be between US\$125 and US\$62,5000).

V. CONSUMER PROTECTION LAW

Consumer Protection Law, Decree 006-2003 of Congress, with effect from March 2003, has the purpose of promoting, divulging and defending consumers' rights establishing infractions, sanctions and applicable proceedings in this subject. This law grants a minimum of compulsory rights and guarantees of social interest and of public peace.

It is applicable to all legal acts between contractors and consumers in Guatemalan territory. Acts ruled by specific law, as public services, will only submit to this law as an alternative.

These are some of the obligations of contractors according to the Consumer Protection Law:

- Respect life, health and security of the consumer.
- Provide basic information, veracious, sufficient, clear and convenient regarding the goods and services. (If they are new, used, prices, characteristics, quantity, etc.).

- Keep the prices used to make sales, promotions or publicity of the products.
- Compensate, repair, refund or exchange products for breach of contract.
- Use Spanish on specifications of imported products that have them in a foreign language and identify the importer.
- Take responsibility for the quality of the products and services, for the authenticity of the brands and slogans, for the veracity of the commercial propaganda of the product, its contents and expiration.

The list is much longer, but for legal effects, these regulations must be interpreted as a code of conduct and not as obligations that can be demanded eventually.

Consumer Protection Law creates the Office of Attention and Assistance to the Consumer (*Dirección de Atención y Asistencia al Consumidor*) (DIACO), as part of the Ministry of Economy. Its main duties are Imposing sanctions such as fines (additional to the civil responsibility that could exist) for violation to its regulations, up to an amount equivalent to 75 minimum wages (approximately US\$9,500), as long as it doesn't surpass 100% of the value of the product or service.

The enforcement of any sanction or decision made by DIACO can be appealed before the Ministry of Economy, and, as a last resource, it can be reviewed by a judge in a contentious-administrative proceeding.

This law also foresees the creation of Consumer Associations, to represent consumers' needs as a group. They must register at the Civil Registry and their legal status is different from their associates.

Regarding complaints presented by consumers, DIACO can act as a negotiator or arbitrator. During the first hearing or at any time, the parties can voluntarily submit to a Consumption Arbitration, following the procedure established by the Guatemalan Arbitration Law.

Hence, it can be said that the Guatemalan Consumer Protection Law is basically a confirmation of legal and institutional regulations already included in other Guatemalan laws.

VI. IMMIGRATION LAW

According to Decree 95-98 of Congress any foreigner may be granted a Guatemalan Residence.

The migratory categories of foreigners entering the country are:

- A) **Non residents, Tourists or Visitors:** Transients are persons who stay in the country no longer than 72 hours. Tourists or visitors are the aliens that enter the country with legal purposes, without the object of immigration or residence, for reasons that do not imply gratuity, and for a period no longer than 90 days, that can be elongated only once for an equal period. During their stay in the country, tourists or visitors cannot be employed by the government of private persons or entities or establish themselves with commercial purposes.
- B) **Residents: Temporary Residents** are aliens that are authorized to stay in the country for 2 years with the purpose of engaging in any legal activity temporarily. This stay can be elongated by equal periods. Temporary residents can be employed in any paying job or invest in the country as long as the funds come from licit activities. Aliens that wish to obtain their Temporary Residence from their country of origin or from the country where they are legally residing must apply for it personally. **Permanent Residents** are aliens that according to Guatemalan legislation can opt for this category (investors, retired persons, rentiers and their spouses and under age children and temporary residents, among others) that constitute their domicile in Guatemala.

Aliens married to Guatemalans for more than one year can acquire the category of permanent residents by having contracted marriage.

Aliens that obtain temporary or permanent residence, that wish to be employed must do so in legal activities and they must obtain an authorization of the National Employment Office (*Ministerio de Trabajo y Previsión Social*).

To enter national territory, aliens must present a valid traveling document and the corresponding visa, unless it is not required due to International Treaties, Agreements or Covenants where Guatemala participated. The Foreign Affairs Ministry can authorize agreements of visa suppression to persons from other countries by simple exchange of letters, except temporary, permanent and student visas.

Visas can be **simple** (valid for one entry and exit from Guatemalan territory) or **multiple** (valid to enter and exit Guatemala freely for an undefined number of times).

There are also **business visas** that can be granted by Guatemalan Consulates duly accredited in other countries and by the General Migration Office (*Dirección General de Migración*) to foreigners that are acting individually or representing a duly accredited foreign entity with commercial means, traveling for legal business purposes. These visas are valid for 180 days that can be elongated only once by the same number of days.

VII. MINING LAW

This subject is regulated by Decree 48-97 of Congress. The Guatemalan Constitution establishes that the sub-surface of the earth, the places under the earth's surface where hydrocarburates and minerals are found in their natural state, as well as any other organic or inorganic substance of the sub-surface of the earth belongs to the country.

Any person or legal entity, local or foreign can hold mining rights; anyone with intentions of working in the development of the mines must sign a contract with the Guatemalan Government to obtain such rights on determined territory. The government grants **recognition, exploration and exploitation licenses**. Exploitation licenses are granted for 25 years that can be elongated for an equal period.

The purpose of the Mining Law, Decree 48-97, is to rule all activity of recognition, exploration and exploitation of mining operations, except the ones related to petroleum and liquid and gaseous hydrogen carburates, which are subject to regulation contained in the Hydrogen Carburates Law, Decree 109-83 and the Law of Commercialization of Hydrogen Carburates, Decree 109-97.

The Ministry of Mines and Energy is the Government's institution in charge of formulating and coordinating government policies, plans and programs in the mining sector and of handling and solving all administrative issues related to the mining subject.

The person or legal entity with a mining right can import machinery, equipment, spare parts, accessories, materials and explosives used in their mining operations, free of tariff rates and rights.

VIII. ENVIRONMENTAL PROTECTION LAW

Decree 68-89 of Congress' purpose is to watch the maintenance of the ecologic balance and the quality of the environment to improve the quality of life of the country's inhabitants. It aims to protect the environment, natural and cultural resources engaging the government, municipalities and the inhabitants of the national territory to encourage social, economical, scientific and technologic development to prevent the environment's pollution and to keep the ecological balance. To achieve these purposes, the use and taking advantage of fauna, flora, earth and under its surface and water must be rationalized.

The Ministry of the Environment and Natural Resources is the government's institution in charge of the application of this law.

For the purposes of this law, the environment is conformed by air, water, rocks and minerals, soil, animals and plants, audiovisual elements and natural and cultural resources.

This Decree forbids bringing into the country contaminating products and materials also banned in their country of origin, as well as multiple substances, residues, radioactive materials and waste that can infect, contaminate or degrade the environment.

An **Environmental Impact Study** is required before every project, work, industry or any other activity with characteristics that can harm natural resources renewable or not, the environment, or that introduces malignant or notorious modifications to the landscape, the natural resources and the national patrimony. It must be done by a specialized technician approved by the National Environment Commission (*Comisión Nacional del Medio Ambiente*) (CONAMA). If this requirement is not fulfilled, the law establishes a fine between Q. 5,000.00 and Q. 100,000.00 (approximately US\$625 and US\$12,500) and the closure of the business until the fines are paid.

Any person can report before the authorities any act or omission that generates pollution and the detriment or loss of natural resources or that affects the levels of quality of life.

IX. DUTY FREE ZONES LAW

Decree 65-89 of Congress regulates the Duty Free Zones. This law's objective is to promote and regulate the establishment of Duty Free Zones. Article 2 of said law states that Duty Free Zones are the portions of delimited land, planned and designed, subject to a special customs regime. This special customs regime is regulated by this Decree.

The objective of this law is for persons or legal entities to establish themselves with the purpose of engaging in production or commercialization of goods for exportation or re-exportation, as well as for granting services related to international commerce.

Duty Free Zones can be public or private; they can be established in any part of the country with the authorization of the Ministry of Economy so the consumer (persons or legal entities) can operate legally. They require an **administrative entity**, which has to be a legal entity authorized by a Notary Public. Duty Free Zones are guarded and controlled by the customs authority.

Consumers can be **industrial** when they produce or ensemble goods for exportation outside the national customs territory, re-exportation, or research and technical development. **Service Consumers** are the ones that offer services related to international commerce; and **Commercial Consumers** are dedicated to the commercialization of merchandise destined to be exported outside the national customs territory, as well as re-exportation without changing the products' characteristics or alter their origin.

Exportation from a Duty Free Zones to any Central American area is subject to tariffs as if they were products coming from a country outside of Central America.

Consumers authorized to operate in a Duty Free Zones have the following tax benefits:

- Exoneration of taxes, tariff rights and charges applicable to the importation to a Duty Free Zones of machinery, equipment, tools, raw materials and in general, all merchandise used in the production of goods and granting services.
- Total exoneration of Income Tax caused by rents coming exclusively from activities as Industrial Consumer or Duty Free Zones services, for 12 years in the case of Industrial and Service Consumers and 5 years for Commercial Consumers. Industrial or Service Consumers domiciled outside of the country that operate in Guatemala won't have this exoneration if in their country of origin fiscal credit is granted by Income Tax paid in Guatemala.
- Exoneration of the Value Added Tax (IVA) in the transferal of merchandise done inside and among Duty Free Zones.

This law also defines as **rents exempt**, dividends or utilities distributed by the Administrative Authorities or Consumers of Duty Free Zones, persons or legal entities domiciled in Guatemala.

Temporary exportation from a Duty Free Zones to Central American territory and vice versa is allowed when its purpose is perfecting, transforming, creating or repairing the merchandise and for a period no longer than 6 months.

Article 41 of said law states that the following activities can't be produced or commercialized nor developed in a Duty Free Zones:

- Exploitation of gas and petroleum.
- Fishing or raising sea species or species from inland waters.
- Leisure centers and hotels.
- Wood pieces and planks.
- Cane sugar, refined or non-refined and molasses.
- Coffee, cardamom, cotton, fresh banana and sesame seeds.
- Natural Indian-rubber.
- Breeding, raising and feeding cattle.
- Mining in the extraction phase.
- Merchandise that can cause pollution.
- Processing and handling explosives and radioactive materials.
- Breeding, cultivating and processing species of flora and fauna protected or prohibited by covenants or specific legislation.
- Packaging, tuning or labeling of products on which Guatemala is subject to allotment.

X. LAW ON THE PROMOTION AND DEVELOPMENT OF THE EXPORT AND DRAWBACK ACTIVITIES

Decree 29-89 is another law with the purpose of promoting merchandise production activities destined to be exported to countries out of Central America.

Exportation of coffee in any way; cardamom in cherry, parchment and gold; sesame seed with its bark; fresh bananas; fine and ordinary breeds of cattle; fresh bovine meat, refrigerated or frozen; refined sugar from cane, unrefined and molasses; raw cotton; raw petroleum without refining and wood pieces and planks, do not benefit from this law.

The law establishes different regimes through which persons and legal entities can obtain tax benefits in this law that can consist on exoneration from raw material importation taxes, exoneration from Income Tax on utilities coming from the exportation, etc.

To enjoy the benefits granted by this law, an application must be submitted to the Industrial Politics Direction of the Ministry of Economy, enclosing a technical-economical study subscribed by an active Economist or Industrial Engineer, fulfilling the requirements and information required by this institution.³⁶

³⁶ Through Decree 38-04 of Congress, several articles of this law were reformed, most of them with conceptual content, as well as some referring to fiscal incentives.