

INFO**TAX** - April 2018







INFOTAX - April 2018 Constitutionality of presumptive dividends' regime



- Through Judgment No. 141/2018 of March 5, 2018, the Supreme Court of Justice confirmed the constitutionality of section 170 of Act No. 19.438, which introduced sections 12 bis and 12 ter to the Title 8 of the Compilation of Tax Office 1996 ("Texto Ordenado 1996") (Non-Resident Income Tax)(IRNR), stating the presumptive dividends' regime. Such regime taxes the accumulated profits, with more than three fiscal years, not distributed by entities who are taxpayers of Corporate Income Tax (IRAE), as of July 1, 2007 and which were not distributed to their shareholders.
- The Supreme Court rejected the claim for unconstitutionality against said rule, understanding that:
 - the **ability-to-pay principle** ("capacidad contributiva") was not affected, due to the existence of accumulated and not distributed profits which are the real evidence of wealth that the rule intends to tax. In this sense, the referred rule only stated an anticipation of the taxable event.

^(*) Same rule was introduced within the Personal Income Tax provisions (IRPF) (section 164 of Act No. 19.438, which introduced sections 16 bis and 16 ter to the Title 7 of the Compilation of Tax Office 1996).



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- the **non-retroactivity principle** was not affected, due to the tax applies in relation to the accumulated profits existing at the moment of the rule's entry-into-force, and therefore, taxes an actual asset, included and recognized in the entities' accountability and which is revealing of wealth and ability-to-pay.
- the **equality principle** was not affected, due to after the rule's entry-into-force all the taxpayers are treated in the same manner: if they have accumulated results, within the time provisions as set forth in the rule, then the tax over presumptive dividends is due. In addition, the Court highlighted that the existence of certain deductions which are allowed do not entail a breach of the equality principle, since it is only a legislative policy intended to contemplate and grant a privilege to taxpayers who made certain investments.
- As a conclusion, entities and shareholders should take into account the validity and constitutionality of the presumptive dividends' regime.

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