

The Reduction of Capital: A Legal Figure That Creates Legal Uncertainty for Third Parties in the Mexican Tax Legislation

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The phases of legal documentary research, which work on the basis of a logical structure, begin with the justification of the topic to be investigated, its delimitation, and as part of the legal process the preparation of provisional solutions through the presentation of a hypothesis. The legal deficiencies that Mexican law still presents in commercial matters make it necessary to analyze what will happen to third parties involved in commercial transactions, especially that will happen with their investments, which depend on the decision making of the person legal entity with which they carry out operations, leading to a lack of security. The tax regulation for the reduction of capital and its effects in front of third parties, to 10 years of having made research PhD of this figure was raised as a future line of research, for that reason that from the figure of the institution reference is made.

Keywords: reduction, legal security, social capital, creditors, evasion

Justification

Globalization has caused in the last three decades that the world economy forces public and private institutions to establish within their development plans economic-governmental policies on the part of the heads of executive power, the economic models of social development normally they are framed in its political constitution, such is the case of Mexico that is provided for in Article 25 of the Political Constitution, and is the basis for the different free trade agreements, where the borders have remained only in territorial delimitations of each country, that is, they have become virtual; This also includes legislation, since free trade agreements are the basis in the event of disputes between countries.

A free trade agreement aims to allow the mobility of capital for direct and indirect investment related to the economic growth of the signatory countries.

That is why the legal instrument of the combination of companies, presents a special situation in relation to its stockholders' equity, and one of the figures for reimbursement to partners is the reduction of capital, and the legislation can be said to continue to be a weak regulation in the Commercial Code, with an article in the Income Tax Law where only Article 78 and in one paragraph treats the figure in question most recent case due to its immediate impact is the merger of televisé de Mexico with Univision of the United States.

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What has been stated up to here indicates that an instrument used in recent years, where the legal-accounting methodology with little history on the subject, and where the first texts were written only in 1970, then the documentary research technique is applied the same as in all sciences, in order to determine the modifications to the various laws that are linked to the figure under study.

It can be inferred, without it being an absolute truth, because the information regarding capital management is the foundation of the company's material existence and therefore the investor's assets.

When conducting corporate planning, one starts from the essence of strengthening the legal-financial area, in this approach, when thinking about the figure of capital reduction, its observation is essential, especially in restructuring, since not observing it causes that the company perform actions such as:

- (a) Evade taxes by not reporting income because the variant is technically implicit in the legal process and,
- (b) A capital restructuring that is not very transparent for the tax authorities and the users of the information.

Theoretical Support

The problem raised for this article has been rarely treated, very brief in the commercial acts, and the tax repercussions, it only occupies Article 78 in the Income Tax Law in force in Mexico, therefore it is null, so it is three concepts with the same treatment, which although reduce the share capital, yet are totally different, with effects on the behavior with the obligations for third parties, partners, and the same company; also because the legal effects of each of the figures are in this same direction.

However, the development of the empirical method whose bases are of a sociological nature does not exceed legal knowledge, except in the study of logic, a study or investigation must always be proven to have effects, hence in legal matters they must be considered as instruments complementary (Héctor, 2003).

From the analysis of the publications, serious studies were directed in Spain, Italy, and Germany at the time, however they are laws with different realities, so only the procedural aspect is what we were able to apply, not what they refer. In Mexico from this point of view, the studies are not on the problem of legal insufficiencies and limitations of the General Law of Mercantile Companies, Law of Titles and credit operations, and Income Tax, which generates an object of study, to Vázquez del Mercado (2001), in a simple way, without commenting on the additional formalities.

The treatment of the tax matter is simple without any analysis, since it has only been contemplated to develop a methodology related to the calculation of taxes that affect, where three figures are technically different such as: the reimbursement of contributions, the amortization of shares, and the reduction of capital.

From the analysis of Article 163 of the Law that regulates public-limited companies and in the reduction of capital, which presents irregularities that at this moment have already become efficient in Spain, this allows the authority to control the operations for said concept, but these insufficiencies are applicable even in Mexico due to the slow evolution in the legislation that regulates it.

In United States since 1998, the studies that were made are based on the problems in small companies in its capital. It can therefore rise late in something that seems convenient for the company, which is why the policies are based on the accounting balance, with a focus on the quality of capital, particularly on equity and quality, absolutely in the quantification that regulates the capital itself (current Issue in regulatory capital, March 2006); however, subsequent studies are exclusive in terms of banking institutions (Alvarez Ochoa, 2007).

In general, no wording was founded that the various laws regulate basic general, commercial, and corporate aspects (Gomez Cotero, 2004), or, in the acquisition of businesses (Guerrero Sevilla & Minaburo Villar, 2006).

The discrepancy between tax and commercial laws has been studied since 1993 by the Mexican Institute of Public Accountants, but it was not standardized with foreign regulations to seek convergence, but the adjustments have only been in the tax code regarding business combinations, but without eliminating a treatment to three different figures.

When making an international review of the problem of capital reduction on whether the determination of legal is insufficient in its regulation, from the work of Alvarez Ochoa (2007), a new study was not found, this can infer that despite globalization and using the figure as reimbursement in commercial companies, it seems to be unimportant but it is not because when analyzing the balances presented in official publications they present important results, one of them was determined by Rosario Escribano Gamir (1998) that he investigated, but his object of study was focused on third parties and what modifications the Spanish Corporations Law should have, that is, a proposal for improvement; a second study carried out by Rafael Manzano Arenas (1999) presents scope but not a solution to the problems of information, accountability, and only makes an individual analysis of each norm, then makes an analysis of the increases and the principal reduction.

In Italy, the most important reform occurred in 2001, whose solution was to incorporate into the Civil Code the penalty for those who misuse the figure, with fines of up to four million lire (Alvarez Ochoa, 2007).

The use of the figure worldwide is so attractive that at the XX congress (2007) of the Latin American Society of Strategies, Dr. Anibal Alfonso Neto explained that in the first four months in Brazil, 109 mergers and divisions were conducted, therefore scarce control and commercialization through the combination of companies (Alvarez Ochoa, 2007).

Therefore, it is important for the regulation in the countries to avoid tax avoidance and tax evasion when using the capital reduction.

(a) Not finding out taxes due to tax avoidance by taking advantage of the legal insufficiencies of its regulation and poor drafting of the regulations in the tax aspect and,

(b) Assimilate it to a distribution of dividends without knowing the legal and fiscal effects.

In both cases, the fiscal cost for the company would be considerable, because in the first case it would imply expenses in fiscal defense and in the second, 42.86% of the amount that has been reimbursed on average.

Problem Statement

The legal figure of capital reduction in companies constituted as commercial companies, has special obligations in relation to the control of their social capital, but at the moment of establishing a procedure for their partners, laws converge such as Income Tax, General of Commercial Companies, and that of the Stock Market, where aspects and effects of the application related to the reduction of capital are regulated, for general cases, however its application when carrying it out presents insufficiencies or legal discrepancies, the consequences are the following:

(a) The legal relationship with the company creditors and its effects due to the acts conducted during the life of the entity in accordance with commercial legislation, the value of its share capital as established by the Financial Information Standards (NIF) in the national and international framework, adding in this regard the Income Tax.

(b) The application of the profits pending distribution by agreement of the assembly body that must decree them.

(c) The right of minorities granted by commercial legislation with the reform of the Securities Market Law, by being able to incorporate small entities.

(d) Amortization of shares at market and/or book value. This favors that mercantile companies, by reducing the capital.

This problem established in the previous paragraph is derived from the inefficiency of federal laws, by the district of application and the constitutional conformation of our country.

The legal insufficiencies within the legal figure of the reduction of capital between the commercial, fiscal, and accounting aspects, lead to whoever uses it has legal uncertainty as a partner, the above since it presents a series of effects towards the interior of the companies with the partial elimination of the corporate veil towards the partners, so that the protection of third parties involved with the commercial operations of the companies (suppliers and creditors) becomes essential, especially in terms of information.

Faced with such legal uncertainty about the elimination of the corporate veil practically through treaties and local legislation, the figure of the reduction of capital is part of or contributes to a significant extent, but this does not mean that the figure vanishes, on the contrary, in the extent that legal discrepancies are an important point to consider, if one starts from the site of Posner itself (Roemer, 2003) there are no imperfect laws, there are laws that present irregularities, the tax avoidance processes that are created with the appearance of these figures.

The simple question is: Given the lack of regulation in commercial and tax laws in Mexico, there are legal certainty problems for businessmen in view of the non-differentiation for tax purposes of the reduction of capital, reimbursement, and amortization of shares with the third parties involved in the operations carried out.

Theoretical Framework

The reduction of capital is a part of the accounting capital of a company, the conceptual framework, and the legal framework, in recent decades in the face of constant modernization, especially since with treaties such as the TMEC trade barriers are minimized, for years Asia and especially China and South Korea present important growth rates, being the basis of this development the fact that the countries have strong small and medium-sized companies, as the basis of their development; and commercial regulation gives certainty to third parties involved.

An important development was in the 1990s the event of Perestroika and the long-awaited European block, where its laws, accounting standards, and the way of monitoring and establishing its means of taxation were adjusted, thus in Italy fraudulent capital reductions were punished in a pecuniary and corporal way, that is to say, the legal insufficiencies were corrected in order to protect in the first instance the minority partners of the companies and third parties, but the reform was comprehensive, for example in Spain in the 1990s with the government of Felipe Gonz ález, the civil code, commercial code, the Corporations Law were modified, and in 2004 the commercial bankruptcy law ended, so that the insufficiencies detected in the accounting, commercial, civil, and fiscal regulations can be significant contributions for subsequent studies, all this is because in the sense of the object of study it is new in Mexico.

An analysis of legal insufficiencies, as a theoretical-legal framework, implies that institutions are efficient, hence the need to have efficient institutions (North, 1990), which also have the support of having legislation that truly protects the rights of ownership (Ayala Espino, 1986), provide an idea of progression and decision-making in those who invest, and not that out of every 10 projects that start eight disappear (CNN Expansi ón Internet, June 27, 2007), due to the lack of clarity in the legislation, bureaucracy, so correcting helps to “escalate” the problem.

The first foundation provides a perspective if the appropriate modifications are made to the legal institutions, those that impart justice, and those that regulate the acts of commerce and taxes. The investigations carried out on the reduction of capital treated in the state of the art, emphasize the need to protect the minority shareholder, give accounts and, above all, protect the third parties involved, among which the workers, the creditors, the providers, and the state are in the first place, thus the results agree with the base research for this article, where these points are highlighted.

It is essential to take into account that it is not enough not to legislate comprehensively in the laws that coincide and that in the legal framework it was developed in a profound way, as well as the national and international accounting regulations; However, the variants that the use of the figure can take, with an analysis in the legal framework, are not the only irregularities that were sought to prove, some visibly contrary to the legislation, but the affirmation is that the majority generate tax avoidance. An example would be the reduction of capital to zero, with an immediate increase in capital for the same amount, thus avoiding the disposal of shares and therefore no tax is paid on the profits obtained.

The proposed modifications must be made in accordance with the security project of those involved in commercial operations, in the sense of recognizing the different edges that the reduction of capital presents, to avoid tax avoidance and with this the taxes that affect in this figure, however, the sense is that the operations and the conceptual framework are placed both in the legislation that regulates it and the Financial Information Standards (NIFS), for the accounting aspect, it must even be integrated textually in the regulatory commercial part of contracts the commercial code, which are related to each other.

However, one of the reforms that are part of the result of the investigation and the proposal for the vanguard, linked to the globalization processes, the different positions maintained by the equivalent legislations, that is, the scope must be based on the global village (attract productive investments to the country) for which it is necessary to modernize, since the global and institutional context of the current commercial model is considered as a point of specialization within corporate law, valid for the duration of the economic integration process.

There is still a lot to legislate, the immediate impact will be even more efficient laws and institutions that engage in its application, remembering the phrase of Albert Einstein "Concern for man and his destiny must always be the main objective of all efforts technicians, as well as the big unresolved problems..." (Alvarez Ochoa, 2007).

As the legislation is more efficient and there is legal certainty, tax avoidance will be significantly eliminated, tax collection will be improved, and the institutions will be more efficient, these are the Stock Market, the Tax Administration Service (SAT), the Audit Directorate of each State, and the governments of the three levels, with less management of the resources that come from taxes.

Given the problem in the previous study carried out from 2005 to 2007 (Alvarez Ochoa, 2007), it continues to be a pioneering issue in Mexico, within positive law, legal insufficiencies continue to be the engine for tax avoidance but it also does not comply with the protection of third parties by the person who performs it and with this action taxes are allowed to be paid to the public treasury.

The legal insufficiencies are rarely addressed, with the creation of certain figures such as the Simplified Stock Company and the Investment Promotion Stock Companies and the Stock Market Promotion Companies, little improves the dynamics of the points dealt with on tax evasion and avoidance, but the main object of this investigation is not regulated, since third parties continue to remain in uncertainty.

Another is done when accounting and legal issues suddenly converge, therefore establishing a harmonization in the methods to reach specific conclusions with investigative divergences.

The design of the investigation is based on a jus positivist epistemological approach, and I only contemplate the effect of legal insufficiencies in terms of capital reduction, and its effects on the relationship of the third parties involved such as creditors and employees, as well as the state itself before the obligation framed in Article 31 Section IV of the Political Constitution of the United Mexican States.

The empirical identification of the effects in the study of civil, commercial, and fiscal laws, the basis of this article, allows us to establish inferences that, without becoming value judgments, the legal insufficiencies in terms of regulation of capital reduction, allow us to establish that the lack of an adequate standard for current processes creates legal uncertainty, allow legal avoidance and evasion in a real way, and those who carry out the inspection process lack the tools to sanction such acts, because the constitutional framework prohibits them or is not even regulated.

There is a lack of protection for creditors in general, releasing in a certain way those with collateral main and secondary hypothesis.

Proposal

Modify the General Law of Mercantile Companies and the Civil Code.

Reasoning

“At present there is no differentiation and distinction between the previous debts and the new ones, even more so creditors with real guarantee are protected, which leaves those who do not comply with the time and guarantee requirements defenseless.” (Alvarez Ochoa, 2007).

Of this, in 10 years the necessary reform to comply with said events has not been completed, therefore the importance of making the modifications in order not to lose the patrimony by investors and rights by creditors and workers; Although it is true, two reforms have been carried out, one in 2014 and another in 2016 as well as 2018 and even then there are inefficiencies.

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