

ITBMS applicable to restaurants

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The restaurants are defined by the Dictionary of the Royal Academy of the Spanish Language as follows: "Restaurant: Public establishment where meals and drinks are served, by price, to be consumed in the same place."

Being a commercial activity with a great boom in our country, then we will proceed to make a brief review of the most important aspects related to the application and determination of ITBMS in the development of the economic activity of restaurants.

Taxed Fact

It is important to highlight that the sale of food in commercial premises in which alcoholic beverages are not sold or consumed, is considered exempt service of the ITBMS (bakeries, sweetshops, etc.). However, in the case of restaurants, the services they provide to their clientele are covered by the ITBMS when alcoholic beverages are sold or consumed within this type of establishment, since the latter is an activity that is taxed by the Law with the ITBMS.

Based on the foregoing, it is important to point out that there are different types of restaurants according to the type of service they provide to their customers, which directly affects the application of the ITBMS on the commercial activity they develop. In this regard we can mention the following:

a. Restaurants that are dedicated solely to the sale of food and don't sell alcoholic beverages to their customers:

This type of restaurant is exempt from the application of the ITBMS under the provisions of letter k of article 10 of Executive Decree 84 of 2005. Within this scenario we find fast food restaurants, inns, coffee shops and similar establishments.

b. Restaurants that sell food and alcoholic beverages for their customers' consumption:

These restaurants are subject to the application of the ITBMS in the exercise of their commercial activities, in view of the fact that the sale of alcoholic beverages is an activity defined by the Law as an encumbered fact that makes the establis-

hment a taxpayer of ITBMS.

c. Establishments that sell food and alcoholic beverages in closed containers.

As an example of the present scenario, we find convenience stores (gas stations) and supermarkets, which offer their customers the possibility of consuming food within the premises, as well as purchasing alcoholic beverages in closed containers for consumption outside commercial premises. In this sense, when dealing with the sale of alcoholic beverages of an event taxed with the ITBMS, said establishments are taxed with the ITBMS in the exercise of their commercial activities.

In the case of supermarkets, the DGI has stated that although they develop their operations in a commercial establishment, they have

a place for the sale or provision of food service (cafeterias) in which they don't sell or consume alcoholic beverages, separate from the place where they sell alcoholic beverages in closed containers and other goods belonging to the purchase and sale of a supermarket.

In this way we find that a fundamental aspect for determination of the obligation to pay ITBMS in case of restaurants lies in sale of alcoholic beverages, since it is an activity subject to the ITBMS and that if exercised by the commercial premises it becomes a taxpayer.

Taxable Base

Based on the foregoing, in the event that a commercial establishment (restaurant) is dedicated to the sale of food and alcoholic beverages as part of the services provided to its customers, it must calculate the tax payable based on the total of the invoicing caused (literal i) of article 9 of Executive Decree 84 of 2005).

Applicable rate

However, there is often a question mark regarding the ITBMS rate applicable to the billing of restaurants that are simultaneously engaged in the sale of food and alcoholic beverages within the services they provide to their customers, given that the general rate of ITBMS is of 7%, however, in the case of the sale of alcoholic beverages, the applicable rate is 10%.

On this point it is important to point out that there are precedents from the General Directorate of Revenues of the MEF, in which it has been reiterated that for this type of operations the applicable ITBMS rate is 7% of the total billing, even when alcoholic beverages and cigarettes are sold or consumed in the provision of the service.

Rationale: (Instructions of ITBMS issued by the DGI, Note No. 201-01-1956 of February 22, 2011, Note No. 201-01-475 of May 7, 2009, literal i) of Article 9 and literal k of the Article 10 of Executive Decree 84 of 2005).

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