Tax & Estate Planning from Argentina *Part 2*

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We introduce news on questions of tax and estate planning in Argentina in order to understand the current regulatory framework and possible changes in the not-so-distant future. In the previous edition of ALI we reviewed the gift tax in the Province of Buenos Aires and new reporting requirements for foreign trusts. In this edition, we will analyze new developments on double taxation treaties (treaties to avoid double taxation or DTT) in Argentina.

Termination of DTT by the Republic of Argentina

In 2012, Argentina has terminated 3 treaties to avoid double taxation; these treaties were those executed with Switzerland, Spain and Chile.

Double taxation occurs when taxation is imposed to the same contributor for taxes of a similar nature in 2 or more States at the same time, for an identical taxable item and for the same fiscal period.

In the 80s and the 90s, Argentina executed a number of DTTs. In this way, to avoid double taxation with regard to income and wealth, Argentina concluded treaties with Germany, Bolivia, France, Austria, Italy, Chile, Spain, Canada, the United Kingdom, Belgium, Denmark, Netherlands, Norway, Russia and Switzerland, and only in respect to income with Sweden, Australia, Brazil and Mexico.

In general, these treaties offer and had offered great advantages at the time for doing business in Argentina, as they provide predictability to the fiscal capacity of each one of the State contracting parties.

It is important to bear in mind that the termination, in terms of public international law, is the unilateral declaration by means of which a State decides to withdraw its consent out of an international treaty, breaking the obligatory relationship that linked the State through such treaty. This is based on the principle of State sovereignty. In the same way as States can link to others assuming liabilities through treaties, they can dissociate from them through a termination by their mere willingness.

Earlier, back in 2008 – effective as of January 1, 2009 – Argentina terminated the DTT with Austria. According to unofficial information, the Argentine government believed the treaty was used in an abusive way due to the massive use (or abuse) of certain exemptions. In fact, among other provisions, the DTT with Austria established exemptions on income tax, capital gain from sales and tax on personal assets for bonds emitted by the Austrian government, which was widely used by some Argentine taxpayers.

Going back to this year, on January 16, 2012 Argentina terminated the DTT with Switzerland, and on June 29 the DTT with Spain and Chile were terminated as well. In all cases, the Argentine government considered that these DTTs were being used in an abusive way. We will analyze briefly the consequences and the possible reasons for those terminations.

It is worth to note that, on one hand all these DTTs are being renegotiated by the Argentina State (in the case of Chile, renegotiating a DTT closer to the OECD model), and according to press reports, the Argentine government's idea is to have a new negotiated text before these DTTs are no longer enforced.

On the other hand, there are still many current DTTs that offer great opportunities (such as the agreement with the Netherlands, Finland or royalties on software for example), which deserve to be explored and analyzed, and also a recent judicial interpretation can amplify the effects of the DTTs to other countries, as discussed below.

DTT with Switzerland

The DTT between Argentina and Switzerland was enforced January 1, 2001. This DTT followed the model of the OECD to these kind of agreements, and it mainly applied to income tax, minimum presumed income and personal assets in Argentina. The DTT with Switzerland was never ratified by an act of the Congress, but was enforced only provisionally by the exchange of protocol notes between Argentina and Switzerland.

Section 26 of the DTT with Switzerland provided the effects of the termination (to be performed with at least 6 months in advance) and states that the termination shall

have effects (i) regarding withholding taxes on amounts paid to as of January of the calendar year following the date of notice of termination, and (ii) in respect of other taxes on income or capital for fiscal years beginning on or after January 1st inclusive of the following year of the date of notification of the complaint.

This means that retentions on payments maintain their regime until January 1st, 2013 and for tax on income and wealth (earning, minimum presumed earnings and personal assets) the termination will be enforced in the fiscal year beginning on January 1st, 2013. That is to say that if the fiscal year starts in September, the termination will be enforced since September 2013.

The DTT with Switzerland provided great advantages for Swiss companies doing business in Argentina regarding retentions for royalties (trademarks, patents, technical assistance), and personal assets in respect to possession of shareholdings in Argentine companies.

DTT with Chile

The DTT between Argentina and Chile was enforced on December 19, 1985 following the model of the Andean community. Such DTT applied mainly in respect to taxes on earnings, eventual benefits, capitals, net assets, benefits of certain games and contests. The DTT with Chile was ratified by Argentina by Laws No 23.228, 26.232 and 26.623.

In the case of Chile, the reason was also the assumption by the Argentine government that this DTT was being used in an abusive way. In this case, the Argentine government pointed out that there was an annual detriment of about AR$1.000 million for (i) the using of the so-called “platform companies” of investments or business in Chile, and (ii) the holding of bonds issued by the Government of Chile, which are exempt from the payment of personal assets tax.

In regard to the effects of the termination, Section 26 of the DTT with Chile provides that it can be terminated until June 30th of each year, and in that case the DTT will have no more binding effect (i) since January the 1st of the following year for individuals or undivided estates (this is to say January the 1, 2013) and (ii) for companies, since the beginning of the fiscal year following the notification. This means, that if the fiscal year begins on September 1, the DTT will be not applicable as from that date, but in general, most of the companies start their fiscal years on January 1, so the termination will be enforced from January 1, 2013.

DTT with Spain

The DTT between Argentina and Spain was enforced on July 28, 1994. This DTT was based on the OECD for this kind of agreement, and mainly applied in respect to taxes on income, assets and on personal assets in Argentina. The DTT with Spain was ratified by Argentina by Law No. 24.258.

In the case of Spain, the reason was also the perception from the Argentine government that the DTT was being used in an abusive way. In this case, the Argentine government intends to avoid the installation of Holding Foreign Securities Entities (ETVE).

Regarding the effects of the termination, Section 29 of the DTT with Spain states that the DTT can be terminated “with 6 months in advance each calendar year” and then the DTT will have no more binding effects (i) from January the 1st of the following year for taxes at source on amounts paid to non-residents, and (ii) for other taxes, for the fiscal years beginning the following January the 1st after the date of notification of the complaint. This means that on withholdings, the termination is enforced from January 1, 2013 and for all other taxes the complaint takes effect from the beginning of the fiscal years from January 1, 2013, meaning that if the exercise begins on January 1, it will be January 1, 2013, but if the exercise starts on October 1, then the CDI will no longer have effect from October 1, 2013.

In any event, as explained before, there are still many applicable jurisdictions that can be implemented for designing tax-efficient structures. In addition, these 3 terminated DTTs are currently being renegotiated, and it is likely that a new DTT will be concluded soon.

AUTHOR BIOGRAPHY

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