

International Bar Association Annual Conference 2020

Recent Developments in International Taxation

Argentina

Daniela C Rey

Bruchou, Fernández Madero & Lombardi

daniela.rey@bruchou.com

Summary

The most significant international tax developments in Argentina are mainly related to:

- a material tax reform enacted by Law No 27,541 (the ‘2019 Tax Reform Law’ or ‘Law of Social Solidarity and Productive Reactivation in the Framework of the Public Emergency’) that amended, among other key matters, the tax treatment applicable to financial income;
- a new levy on the acquisition of foreign currency (also introduced by the 2019 Tax Reform Law);
- taxation of digital services;
- execution of new treaties to avoid double taxation;
- a Supreme Court case on the application of Argentine general anti-avoidance rules to intercompany transactions; and
- recently enacted (and long-awaited) transfer pricing regulations that specify the documentation and information requirements needed to report transactions conducted with foreign-related parties and with unrelated parties residing in non-cooperative jurisdictions or in low or nil-tax jurisdictions.

Taxation of financial income

Shortly after President Alberto Fernández was sworn into office in December 2019, his administration introduced a major tax reform pursuant to the 2019 Tax Reform Law, reforming yet another major tax overhaul that had recently been implemented by then incumbent President Mauricio Macri through Law 27,430 in December 2017. Among other key matters, the 2019 Tax Reform Law expanded the scope of the exemptions applicable to non-Argentine residents on capital gains derived from the sale of publicly offered securities. The 2019 Tax Reform Law also reinstated exemptions – which were revoked as of tax period 2018 – for financial income obtained by Argentine individuals.

In addition to the already existing exemptions applicable to Argentine sovereign bonds, publicly traded equity securities, negotiable obligations, financial trusts’ debt securities, participations in mutual funds, American depositary receipt (ADRs) and Certificados de depósito Argentinos (CEDEARs), the 2019 Tax Reform Law includes a new catch-all rule that provides that the exemption is applicable to non-Argentine residents on capital gains arising from the sale or disposition of any securities, to the extent they are publicly traded and authorised by the Argentine securities and exchange commission (ie, Comisión Nacional de Valores). This would include, for example, results derived from the sale or disposition of equity participations in Argentine financial trusts, which were not previously covered by the exemption. The application of the expanded exemption requires that the non-Argentine resident does not reside nor channel funds through non-cooperative jurisdictions. A list of non-cooperative jurisdictions was enacted in December 2019, totalling 95 jurisdictions (including certain Latin American countries, such as Bolivia and Paraguay).

New tax on transactions involving the acquisition of foreign currency

The 2019 Tax Reform Law created a new levy (the 'PAIS Tax') on certain currency transactions that require access to the foreign exchange market to acquire foreign currency. The PAIS Tax will be applicable for five fiscal periods.

In general terms, the PAIS Tax is levied on Argentine residents conducting the following transactions: (1) purchase of foreign currency without a specific purpose; (2) purchase of goods or services made abroad and paid for with Argentine credit, debit or purchase cards or by similar payment means (including cash withdrawals or cash advance transactions made abroad, as well as purchases made in foreign currency through portals or websites); (3) purchase of foreign currency to pay for services rendered by non-Argentine residents through Argentine credit, debit or purchase cards or by similar payment means; (4) acquisition of services abroad hired through Argentine travel agencies; and (5) acquisition of ground, air and water transportation services for passengers travelling abroad (except for ground transportation services to neighbouring countries) if payment requires access to the foreign exchange market to acquire foreign currency.

Non-Argentine resident sellers or service providers are not required to collect or submit PAIS Tax to the Argentine tax authorities. Instead, local payment intermediaries (eg, Argentine financial entities, credit card issuers, travel agencies and transportation companies involved) must act as collection agents. The general PAIS Tax rate is 30 per cent, except for digital services subject to a 21 per cent VAT rate, which are subject to a reduced PAIS Tax rate of eight per cent.

Digital services

To date, Argentina has taken no unilateral action at the income tax level to tax digital activities or to expand the tax base to contemplate digital presence. Although there was once a draft project to introduce an income tax withholding on digital services provided by non-Argentine residents and economically used in the country, it was not finally included in the bill submitted in 2017 to the Argentine Congress, presumably because of the expectation that an outcome would be reached on this matter by the Organisation for Economic Co-operation and Development (OECD)/Group of 20 (G20) Inclusive Framework on Base Erosion and Profit Shifting (BEPS) by the end of 2020. However, actions have been recently adopted in the digital services area with respect to VAT to cover business-to-consumer (B2C) transactions.

Despite the little progress verified at the income tax level, Argentine provinces and the City of Buenos Aires have developed several rules under their respective tax codes with respect to the application of gross turnover tax to digital services provided by foreign residents to Argentine recipients. As a general rule, gross turnover tax is levied on gross receipts generated by taxpayers from their regular engagement in business activities within the respective jurisdictions. The lack of a territorial nexus in the conduction of the digital business raised many constitutional concerns (mainly led by Argentine collection agents) with respect to the application of gross turnover tax on services that are conducted entirely abroad.

By the end of 2019, most Argentine provinces included provisions to tax digital services rendered by foreign residents based on the argument that the services' 'effective utilisation' takes place within their respective territories, despite the fact that 'effective utilisation' is a concept that clearly departs from the statutory principles of 'physical presence' that the taxable event shall comply with under the Argentine tax co-participation law. Since the period 2019 and following the path previously traced by the province of Buenos Aires, the province of Córdoba resorted to the novel concept of 'significant digital presence' to apply gross turnover tax to digital services rendered by foreign residents to the extent that certain parameters are satisfied (eg, exceeding a minimum number of users in the jurisdiction concerned). This criterion is evidence of an innovative position to address a matter that is subject to strong debate at the income tax level,

although the said criterion is still subject to challenges at the local level, considering that the ‘significant digital presence’ concept does not overcome the issue concerning the absence of a ‘physical presence’ in the provincial territory.

Tax treaties and the OECD Multilateral Instrument

During 2019, Argentina signed treaties to avoid double taxation with Luxembourg, Japan and Austria, the latter of which had been terminated in 2009 after certain alleged abuses were detected by the Argentine tax authorities. In December 2019, the Argentine and French competent authorities also signed a protocol to amend the already existing treaty to avoid double taxation between Argentina and France. The treaties signed with Luxembourg, Japan and Austria, as well as the amendment protocol with France, have not yet entered into force and are still undergoing the respective domestic ratification procedures.

Treaties to avoid double taxation with China, Turkey and Qatar (signed during 2018) are also pending legislative approval; thus, entry into force shall occur after all domestic procedures are duly complied with.

Argentina was one of the many jurisdictions that signed the OECD Multilateral Instrument (MLI) on 7 June 2017. However, the MLI’s ratification by the Argentine Congress is still pending; thus, updates to the existing Argentine treaty network to include BEPS-related measures have not yet materialised.

Limitations to the use of the economic reality principle

The Argentine Supreme Court overturned the decisions reached by the lower courts and ruled in favour of the taxpayer in an interesting case in which the tax authorities challenged the character of an intercompany loan based on the economic reality principle. This principle (similar to the substance-over-form standard) is a general anti-avoidance rule (GAAR) that has been frequently invoked to re-characterise economic transactions. Pursuant to Argentine tax procedural law, this GAAR shall apply when the forms and legal structures used by taxpayers are manifestly inadequate with respect to their actual economic intention. Because the GAAR is formulated in very broad terms, it has sometimes been applied in circumstances in which the legal structures did not clearly evidence discrepancies with economic substance.

In the precedent *Transportadora de Energía SA* (decision delivered on 26 December 2019), the Argentine Supreme Court rejected the tax authorities’ position challenging the interest and exchange difference deductions conducted by the taxpayer under the loan granted by its controlling shareholder, and emphasised that the GAAR should only be invoked under exceptional circumstances.

The arguments used by the Argentine Supreme Court to rule out a different characterisation of the transaction conducted by the taxpayer may be summarised as follows:

- despite the fact that the prevailing Argentine economic context was not taken into consideration by the tax authorities, the borrower’s partial repayments and capitalisation of principal and interest clearly evidence that the nature of the transaction actually corresponds to that of a loan;
- the fact that the lender controlled 99.99 per cent of the borrower’s capital does not eliminate the competing interest of the Argentine party, considering that the loan transaction complied with arm’s length standards;
- the share capital is not the only aspect that a lender shall consider when entering a loan transaction because, in the case under analysis, the borrower’s net worth was adequate for the transaction to be conducted (in fact, the borrower obtained loans from other non-

related lenders by the time the intercompany loan was celebrated and, moreover, the ratios involved in the intercompany loan did not trigger the application of the then-existing thin capitalisation rules); and

- a mere breach of contract cannot lead to an alteration of a transaction's legal nature; otherwise, the legal nature of any act would be inevitably linked to the uncontrolled development of subsequent events that by no means should reflect the manifestly inadequate structure of a transaction.

The arguments arising out of this precedent are now crucial for Argentine taxpayers, considering that the current economic conditions (aggravated by the Covid-19 extended lockdown period) may bring about similar difficulties regarding complying with contractual obligations.

New transfer pricing regulations

Argentine transfer pricing rules contemplate the filing of a local file, a master file and a country-by-country report. Following the OECD's recommendations on BEPS, the tax reform that took place back in December 2017 introduced significant amendments to the existing transfer pricing regime that required the enactment of new implementing regulations. On 15 May 2020, General Resolution (Administración Federal de Ingresos Públicos – AFIP) 4717 was published in the Official Gazette, setting forth the detailed information and requirements that the transfer pricing documents to be filed with the tax authorities should reflect. Due to the delay in this rule's enactment, exceptional filing deadlines were provided for reports corresponding to past tax periods.

Argentine transfer pricing rules apply to transactions conducted by Argentine corporate residents with foreign-related parties and with unrelated parties residing in non-cooperative jurisdictions or in low or nil-tax jurisdictions. Although a new list of 'non-cooperative jurisdictions' was enacted through Decree No 862/2019, General Resolution (AFIP) 4717 did not include a list of 'low- or nil-tax jurisdictions'; thus, uncertainties still exist as to how to assess if the aggregate corporate tax rate in each foreign jurisdiction is below the 15 per cent threshold to be considered a 'low- or nil-tax jurisdiction'.

General Resolution (AFIP) 4717 also requires specific input on certain import and export operations conducted through foreign intermediaries, and additionally provides key conditions to evaluate compliance with the arm's length standard in cases of intercompany services, intercompany indebtedness and business restructurings within a multinational group.

* * *