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Recent developments in international taxation: Colombia

Introduction

This report highlights some of the most relevant judgments on international tax matters issued by the Colombian Constitutional Court, the Council of State, and the Court of Justice of the Andean Community. It also briefly addresses recent new temporary taxes applicable in Colombia until 31 December 2025, aimed at responding to the crisis in Catatumbo and other areas affected by public order disturbances.

Judgments

Judgment C-488, 2024 – presenting judge: Paola Andrea Meneses Mosquera

This judgment concerns the constitutionality of paragraph 6 of Article 240 of the Colombian Tax Code, as amended by Article 10 of Law 2277 of 2022, which introduces the minimum tax rate (MTR) in Colombia. This allegedly follows the guidelines of Pillar Two of the OECD's base erosion and profit shifting (BEPS) project. In response to the lawsuit filed, the Constitutional Court admitted two of the four claims presented against the challenged provision for constitutional review.

In the first claim, the plaintiffs argued that the provision violates the constitutional principle of contributive capacity (*capacidad contributiva)*, since the formula established to calculate the MTR is based on accounting profits rather than tax profits. According to the plaintiffs, the challenged rule imposes a method for determining income tax liability based on accounting profits, which includes estimated and uncertain accounting income that does not reflect the taxpayers' true contributive capacity. This may lead to situations of double taxation on the same economic event and could result in confiscatory outcomes.

The claim is based on the argument that accounting profits are not a genuine expression of actual enrichment obtained by the taxpayers, nor of their real ability to contribute, as it includes factors that increase the profit value without reflecting an effective and real increase in the taxpayer's wealth. Consequently, the provision incorporates into the income tax base accounting elements that do not correspond to the taxable event, as defined in Article 26 of the Tax Code.

In response to this claim, the Court concluded that the inclusion of the accounting profits factor in the formula established for calculating the MTR does not violate the principle of contributive capacity. This decision was based on the following arguments:

- the Colombian Political Constitution does not set specific guidelines for determining the income tax. The legal nature and elements of this tax have been defined by the Congress. Therefore, the Constitution does not adopt as a mandatory standard the provisions set forth in Article 26 of the Tax Code, which defines the

taxable event for income tax as the receipt of income capable of producing a net increase in wealth;

- although accounting and financial standards are independent of tax regulations – since they follow different objectives and use distinct criteria – Law 1314 of 2009 authorises, in specific cases, the use of accounting standards for tax purposes, with the aim of providing tools to help enforce tax obligations defined by the Congress. In this regard, the Congress is constitutionally granted a broad margin of discretion to determine different methodologies for establishing taxpayers' fiscal obligations; and
- within this context, the Court held that the challenged provision pursues constitutionally legitimate aims, such as preventing tax avoidance and increasing public revenue, which are in the public interest. Therefore, the MTR is potentially suitable for achieving these objectives, as it ensures that taxpayers pay income tax on at least a minimum percentage – 15 per cent – of their adjusted accounting profits.

In this case, the constitutionality review focused exclusively on whether the reference to accounting profits as the basis for calculating the minimum taxation amount is in violation of the Constitution. The Court did not rule on potential issues with the other elements of the formula set out by the Congress. The latter could imply opportunities to present new lawsuits against this tax rule.

The second claim argues that the provision violates the principle of tax equity (*principio de equidad tributaria)* by imposing, without any constitutionally legitimate justification, a more burdensome mechanism for determining the MTR on companies required to consolidate financial statements.

According to the plaintiffs, there is discriminatory treatment between companies required to consolidate financial statements and those that are not. The former are obligated to determine the MTR by including the accounting and financial profits of other companies within the corporate group, which are unrelated to their individual tax information and income tax liability.

In response to the second claim, the Court found that the challenged provision does not violate the principle of tax equity by establishing specific rules for determining the MTR for companies required to consolidate financial statements. Although these companies are subject to a different and more demanding tax obligation than other taxpayers, the provision pursues a constitutionally valid purpose and is both appropriate and suitable for achieving the stated goals of preventing tax avoidance and increasing government revenue.

This decision was rendered despite multiple submissions to the Court by various universities and prestigious tax institutions in the country, well-known tax law experts, the Colombian Institute of Tax Law and even the Attorney-General, supporting the plaintiffs' claims against paragraph 6 of Article 240 of the Colombian Tax Code.

Prejudicial Interpretation, 26 February 2025 – Andean Community Court of Justice – Assessment of the Colombian Wealth Tax under Article 17 of the Andean Community Double Tax Treaty (Decision 578)

In the context of a legal dispute between Colombian taxpayer and the Colombian Tax Authority, which questioned the legality of a proposed modification by the authority to the company's wealth tax return, the Council of State decided to request a prejudicial interpretation of Article 17 of Decision 578 in order to issue a final ruling.

The request for interpretation focused on the following points:

- whether, under Article 17 of Decision 578, shares in a company domiciled in Peru and owned by a company domiciled in Colombia should be subject to wealth tax in the country of residence of the taxpayer, Colombia, or in Peru; and
- whether, under this Decision, the Colombian company was required to prove payment or the filing of the wealth tax return in Peru, and whether failure to do so would entitle Colombia to impose the tax in order to prevent tax evasion.

In this instance, the Court of Justice concluded the following:

1. the same income or asset cannot be taxed simultaneously in two member countries. Only one of them may exercise taxing authority, in accordance with the rules of Decision 578;
2. if, under those rules, a given income or asset is taxable in country A, then only that country may levy the tax. Country B cannot do so simply because country A failed to impose or collect the tax;
3. there is no tax evasion if a country, despite having the authority to tax a given income or asset, chooses not to impose or collect it. This decision does not entitle country B to impose or collect the tax instead; and
4. tax evasion, within the framework of this Decision, does not imply that at least one country must necessarily tax a given income or asset. Rather, it occurs when a taxpayer intentionally avoids paying the tax owed in the member country that has the legal authority to collect it.

Based on this interpretation, the Court clarified that if a Colombian company holds shares in a company domiciled in Peru, that asset is considered to be located in Peru. Therefore, under Article 17, only the Peruvian tax authority has the competence to tax, assess or collect the wealth tax on those shares. If Peru chooses not to tax, or its authority does not assess or collect the tax, this does not grant Colombia the authority to do so in its place.

This interpretation marks a substantial shift from the position previously taken by the same Court regarding Article 17 of Decision 578. In 2014, the Court had held that, in order to avoid double non-taxation, Colombia could impose the wealth tax on assets located in other CAN member countries if those jurisdictions did not apply a wealth tax to such assets.

Judgment 25620, 27 February 2025 – Council of State: Tax Treaty Non-Discrimination clause and the obligation to register technology import agreements with the Tax Authority for deductibility purposes

Through this judgment, the Council of State upheld the legality set forth in ruling No 001454, issued in November 2020. In this ruling, the Tax Authority confirmed that technology import agreements signed by a Colombian taxpayer with tax residents of countries that have a tax treaty with Colombia must still be registered with the Tax Authority for deduction purposes, even if the treaty includes a non-discrimination clause.

The central question was whether this registration requirement, set out in Article 123 of the Colombian Tax Code, applies to agreements executed with tax treaty residents. The plaintiff argued that this obligation violated the non-discrimination clause set forth in the tax treaties with countries like Spain, Mexico and the United Kingdom, since such registration is not required for contracts between Colombian residents.

The Council of State clarified that (1) the Tax Authority's opinion only addressed the requirement to register such agreements, not the deductibility of related expenses nor the broader application of the non-discrimination clause, and (2) the obligation to register is based on Decision 291 of the Andean Community (CAN), a supranational regulation that aims to provide member states with information to assess the costs and benefits of imported technology. Therefore, since the Tax Authority's opinion did not address deductibility or treaty application directly, the plaintiff's claims went beyond the scope of what could be challenged through a simple annulment action.

The Council of State ruled not to annul the Tax Authority's interpretation, as the challenged opinion was limited to confirming the registration requirement and did not touch on the deductibility of expenses or the application of tax treaty provisions.

Judgment 26644, 5 December 2024 – Council of State: deductibility of foreign taxes under certain conditions

Through this judgment, the Council of State partially annulled the interpretation issued by the Tax Authority in ruling No 100208192-218, dated February 2022. In this ruling, the Tax Authority denied the deductibility of taxes paid abroad when the foreign tax credit is not allowed under Article 254 of the Colombian Tax Code.

The Council of State confirmed that Article 254 allows a tax credit only for taxes paid on foreign-source income – as defined in Article 24 of the Tax Code. However, it clarified that when the tax credit is not applicable, foreign taxes can still be deductible as an expense, provided they meet the general legal deductibility requirements set forth in Article 107 of the Colombian Tax Code: necessity, proportionality and clear connection to the income producing activity.

Judgment 26976, 3 April 2025 – Council of State: non-deductibility of administrative expenses paid to a Canadian tax resident when such payments were not subject to withholding income tax

In a dispute between a Colombian taxpayer and the Colombian Tax Authority, the Council of State ruled on the deductibility of administrative expenses paid to a Canadian parent company that were not subject to withholding income tax in Colombia.

Under Article 124 of the Colombian Tax Code, such expenses are only deductible if they were subject to withholding tax. Based on this, the Colombian Tax Authority rejected the deduction, and the Council upheld the decision.

The taxpayer argued that the transaction was covered by transfer pricing rules and that, under Article 7 of the tax treaty executed between Colombia and Canada, such payments were not taxable in Colombia. The taxpayer also invoked the treaty's non-discrimination clause (Article 23(4)), which prohibits less favourable tax treatment of a resident whose capital is owned by a Canadian tax resident compared to one owned by a third-country resident.

The Council of State held that transfer pricing rules do not override other deduction limits, and that disallowing the expense did not violate the non-discrimination tax treaty clause. In this case, the Council of State did not conduct a detailed analysis of how Article 124 interacts with the double tax treaty provisions that exempt certain income – like administrative expenses – from withholding tax.

New temporary taxes to alleviate the internal crisis in some Colombian regions
Decree 175 of 2025, temporarily introduced the following taxes to alleviate the internal crisis in Catatumbo and other regions in Colombia applicable as of 22 February until 31 December 2025:

- 19 per cent VAT on gambling activities operated exclusively through the internet within the Colombian territory or from abroad;
- tax on hydrocarbons and coal extraction activities classified under customs codes 27.01 and 27.09. This tax is levied either on the first sale within the Colombian territory or in the export of the products. The tax rate is 1 per cent calculated on the sales price or on the free on board (FOB) value in the exports; and
- increase in the stamp tax rate from 0 per cent to 1 per cent. This tax is applicable in the execution/subscription of any public or private documents, including securities executed or accepted in Colombia, or executed abroad but enforceable within Colombian territory or generating obligations therein, that establish, modify, extend, assign or terminate obligations, provided the amount exceeds 6,000 *Unidad de Valor Tributario* (UVT) (COP 298m). This tax applies when a public entity, a legal entity or equivalent or an individual merchant (who, in the previous year, had gross income or gross assets exceeding 30,000 UVT (COP 1.493m)), acts as grantor, acceptor or signatory.