

•• Argentina

The image features a solid dark blue background. In the upper left corner, the text "•• Argentina" is displayed in a white, sans-serif font. The word "Argentina" is preceded by two small white circles. The right side of the image is dominated by several sweeping, curved lines that originate from the bottom left and extend towards the top right. These lines are rendered in various shades of light blue and white, creating a sense of motion and depth. The lines overlap and curve, resembling a stylized, abstract representation of a landscape or a dynamic graphic element.

# •• Argentina

## General

### 1. What are recent tax developments in your country which are relevant for M&A deals?

On September 23, 2013, the income tax law was amended. According to the amended law, the distribution of dividends is subject to income tax at a rate of 10%, unless the dividends are distributed to Argentine corporate entities. In addition, the amended law establishes that the sale, exchange or other form of disposition of shares and other securities is subject to a capital gain tax of 15% for Argentine resident individuals and foreign beneficiaries.

However, as of now many aspects of such tax regulations remain unclear and, pursuant to certain announcements made by Argentine tax authorities, they are subject to further rulemaking and interpretation. In this regard, as of today no regulations have been issued regarding the mechanism to pay the Argentine capital gains tax when the sale of shares of an Argentine company exclusively involves non-Argentine parties.

### 2. What is the general approach of your jurisdiction regarding the implementation of OECD BEPS actions (action Plan 6 specifically) and, if applicable, the amendments to the EU Parent-Subsidiary Directive?

Argentina has signed the OECD declaration on BEPS, the OECD multilateral convention on mutual administrative matters, OECD declaration on automatic exchange of information (early adopter), and the multilateral competent authority agreement.

No significant legislative changes have been adopted to date in direct response to the OECD's work. However, Argentina has taken steps to address perceived international tax avoidance through domestic measures.

BEPS measures are not new in Argentina. During the last years the Argentine tax authorities challenged tax-motivated transactions and structures on the basis of 'substance over form' principle as construed in case law. In addition an Argentine government commission was created to review the country's tax treaty network to determine whether there was potential for abuse and new tax information reporting requirements were created, among other measures.

### 3. What are the main differences among acquisitions made through a share deal versus an asset deal in your country?

- a. Share deal
- b. Asset deal

## From a buyer's perspective

### Share deals

The procedure is simple. There is no substantial tax cost.

The tax losses of the Argentinean company are transferred to the buyer. Also, the tax credits arising from taxes other than income tax remain in the company and, consequently, are 'transferred' to the buyer.

The Argentine company's liabilities remain in the company and, consequently, are 'acquired' by the buyer.

If the Argentine company's shares are purchased by an Argentine company, the acquisition cost of the shares cannot be depreciated for income tax purposes. In addition, the Argentine company cannot apply tax adjustment for inflation.

The purchaser keeps the depreciation terms of the seller's assets

## Asset deals

The procedure is complex. The tax losses of the seller's company are not transferred to the buyer except if the transfer is of a going concern under a tax-free reorganisation.

The business's 'non-assessed tax and social security liabilities' are not transferred from the seller to the buyer if the appropriate notification to the Federal Tax Authority (AFIP as per its acronym in Spanish) is made prior to the transfer of the assets and, if the AFIP does not take any action afterwards, within a certain period of time.

The seller's unpaid 'assessed tax and social security liabilities' are transferred to the buyer.

The buyer depreciates the acquisition cost of the portion of the purchase price corresponding to the fixed assets. However, the portion of the purchase price that exceeds the purchase price of the fixed assets and inventories is considered goodwill of the buyer and is not subject to tax depreciation in Argentina.

## From a seller's perspective

### Share deals

The sale of SA shares or SRL quotas by Argentine companies, Argentine Individuals and/or foreign individuals or companies is subject to income tax (see section 14).

Although the tax debts are transferred to the buyer, the directors of the Argentinean company who were in charge during the period of such tax debt would remain jointly and severally liable if the Argentinean company does not pay the tax debt claimed by the AFIP. The procedure is simple

### Asset deals

The sale of assets is subject to taxation. The tax impact for the seller is made up of income tax, VAT on the transfer of certain assets (VAT is usually not an economic cost for Argentinean taxpayers), tax on debits and credits in Argentinean bank accounts, turnover tax (generally fixed assets are exempt from this tax) and stamp tax on certain agreements.

The seller's tax losses are not transferred to the buyer, except if the transfer is of a going concern under a tax-free reorganisation.

The seller always remains liable for tax debts related to the assets.

The procedure is complex.

## Buy-side

### 4. What strategies are in place, if any, to step up the value of the tangible and intangible assets in case of share deals?

In principle, there are no special provisions in Argentina's income tax law that provides a step-up in the value of the underlying assets in share deals.

However, each case should be analysed separately. For example, a step-up could be applicable in a purchase of assets.

### 5. What are the particular rules of depreciation of goodwill in your country?

As a general rule, Argentina's income tax law does not allow the deduction of intangibles such as goodwill, trademarks and similar assets.

However, depreciation of intangible assets with limited economic useful life — such as concessions, patents and licenses — can be deducted for income tax purposes.

## 6. Are there any limitations to the deductibility of interest on borrowings?

### General considerations

There is no special limitation to the deductibility on interest of borrowings between Argentinean parties. In such cases, general rules of expenses deduction apply to the deductibility of interest payments.

General rules of expenses deduction also apply in the case of loans granted by foreign entities. In these cases, thin capitalisation rules may apply.

### Thin capitalisation rules

Thin capitalisation rules apply to interest paid to foreign-related banks or financial entities (non-located in a low-tax jurisdiction). Thin capitalisation rules also apply to foreign-related parties when the withholding rate on interest is different than the statutory 35% — this is the case for tax rate reductions under a Double Taxation Treaty (DTT). However most double taxation treaties include a non-discrimination clause under which thin capitalisation rules do not apply to interest payments made to the treaty's other party.

In cases where thin capitalisation rules apply, the total amount of interest-bearing liabilities cannot exceed two times the net worth of the Argentinean borrower at the end of the fiscal period. The portion of interest that exceeds the thin capitalisation rules (if any) is not deductible for income tax purposes and is treated as dividends.

### Transfer pricing rules

Argentina's income tax law also provides transfer pricing provisions under which any payment to a non-Argentinean related party made by an Argentinean taxpayer is deductible.

Deductions can only be made to the extent that the terms and conditions agreed upon with the related party, deriving in the payment, are in accordance with the 'arm's length principle' in Section 14 of the income tax law. This provision basically holds that any transaction between related parties must be regarded as entered into between independent parties. This is the case insofar as the consideration and conditions are consistent with normal market practices between independent parties.

As evidence of compliance with the arm's length standard, local taxpayers must prepare and submit a transfer pricing study (that includes comparability and economic analyses). Such transfer pricing studies must contain the functions, activities and risks borne by each party in the transaction and an explanation of the transfer pricing method used. Failure to submit the transfer pricing study and informative returns is subject to severe penalties.

Local taxpayers carrying out transactions with non-resident related parties are also required to maintain additional documentation, which must demonstrate the correct determination of the prices or profit margins that are declared in the informative returns and the acceptability of the comparability criteria used in determining such prices.

As a result, these transactions are subject to the Argentinean transfer pricing rules. Please note that, in accordance with Section 15 of the income tax law, transactions made by Argentinean entities, among others, with companies domiciled, registered or located in low-tax or null-tax jurisdictions listed in its regulatory decree (related with the Argentine entities or not) will not be considered adjusted to the arm's length principle and, therefore, will be subject to the transfer pricing rules.

In view of the Argentinean transfer pricing provisions; the interest payments in the cases mentioned above should follow the arm's length principle in order to allow the Argentinean party its full deduction for income tax purposes.

### Test debt/equity

Over the past years, the AFIP has been focusing on the deduction of interest associated with loans granted by foreign lenders under certain conditions. Based on a series of circumstances such as, among others, the lack of proper documentation, the absence of usual indemnity and guarantee agreements and interest rates that do not correspond with market standards, the AFIP has been presuming that the aim of certain loans under scrutiny were designed to erode the tax basis of the local borrower. This has resulted in denied deduction of interest payments and exchange differences.

## Evidence to prove the existence of loan agreements

If the existence of the loan were not proved, the registered liabilities could be considered an 'unjustified wealth increase' (subject to taxes accordingly) and the deduction of interest and exchange differences for income tax purposes could be challenged. In order to avoid any challenges from the AFIP, certain formalities and facts are relevant or advisable to prove the existence of loan agreements.

## 7. What are usual strategies to push-down the debt on acquisitions?

Usual strategies to push down debt on acquisitions include a leveraged buyout of the target company. Under this scenario the AFIP does not allow Argentinean entities to deduct interest payments if the proceeds of the loan are applied to the acquisition of an Argentinean company's shares. This is based on the fact that dividends or distribution of profits received by Argentinean entities from other Argentinean entities are not subject to income tax and, therefore, such interest is not related to the company's taxable income.

In this regard, the AFIP has issued administrative precedents in the last years that have not allowed such interest deductions. There is also a precedent from Argentina's Federal Tax Court holding the AFIP's position, which was subsequently confirmed by the Federal Court of Appeals (and the Federal Supreme Court for formal reasons).

It could be argued that such interest payments should be deductible because:

- ❖ Dividends are already taxed at the distributing company's level, following the 'integration system' adopted by Argentina.
- ❖ Upon latest amendments of the income tax law, the distribution of dividends to Argentine individuals or foreign individuals or companies is subject to income tax at a rate of 10%.
- ❖ Dividends are further subject to the so-called 'equalisation tax' when distributed to shareholders
- ❖ Future capital gains arising from the sale of Argentinean shares by Argentinean companies, Argentine individuals and foreign companies or individuals is subject to income tax

In case the Argentinean entity finances the acquisition by issuing private bonds with public offering, this provides a strong case to sustain the interest deduction. Private bond law states that the interest payments are fully deductible for income tax purposes if certain requirements are met. AFIP does not allow for such interest deduction either. However, there is a precedent from Argentina's Federal Tax Court allowing the deduction of interest in this case, which has also been confirmed by the Federal Court of Appeals (and the Federal Supreme Court for formal reasons).

The second part of the leveraged buyout is the merger between the buyer entity and target entity. In order to perform a merger under the tax-free reorganisation regime certain requirements must be met. Two of the main requirements hold that both entities should have maintained for at least 12 months before the date of reorganisation the same or related activities and that the continuing entity must maintain the same or related activities as the previous entities for at least 2 years as from the date of the reorganisation. Due to certain precedents of the Federal Supreme Court, the AFIP has recently admitted, in rulings, the tax free merger conducted between a holding entity and an operative entity of the same economic group even when the aforementioned requirements were not complied. Also, if certain conditions are met, the tax-free reorganisation could be possible in this alternative scenario.

## 8. Are losses of the target company(ies) available after an acquisition is made?

In share deals, the target company's tax losses are transferred to the buyer.

Also, under the scenario of a tax-free reorganisation, tax losses can be transferred from one company to another, provided that certain requirements are met (see section 13). Argentina's income tax law provides for three types of tax-free reorganisation: mergers, spin-offs and transfers within the same economic group.

## 9. Is there any indirect tax on transfer of shares (stamp duty, transfer tax, etc.)?

### Federal Taxes

Tax on debits and credits is levied on debits and credits on Argentine bank accounts and other transactions that are used for substituting the use of checking bank accounts. The general rate is 0.6%, however there are increased rates of 1.2% and reduced rates of 0.075%. Thus, if Argentine bank accounts are used for the payment of the transfer of the shares, this transaction would be subject to tax at a rate of 0.6% applicable on each credit or debit on Argentine bank accounts. Part of this could be used as a credit against income tax and/or minimum presumed income tax (MPIT), and the remaining amount is deductible for income tax purposes.

No other indirect tax (such as VAT) applies on transfer of shares.

### Provincial taxes

#### Gross turnover tax.

Gross turnover tax could be applicable to Argentine residents on the transfer of shares to the extent such activity is conducted on a regular basis within an Argentine province or within the City of Buenos Aires. However, please note that in certain jurisdictions (e.g. City of Buenos Aires) exemptions may apply.

#### Stamp tax

The stamp tax could be applicable in the jurisdiction in which the transaction documents are executed but, in addition, it may also apply in the jurisdiction in which the transaction has effects. Please note that documents executed abroad may also be subject to stamp tax to the extent its effects take place in an Argentine province or in the City of Buenos Aires.

However, exemptions could apply in certain jurisdictions for the transfer of shares of Argentine companies. Also, there are some alternatives, depending on the transaction, to enter into agreements that are not subject to the stamp tax.

#### Free transmission of goods tax

The provinces of Buenos Aires and Entre Ríos establish a tax on free transmission of assets, including inheritance, legacies, donations, etc. Hence, free transmission of shares could be subject to this tax on said jurisdictions.

## 10. Are there any restrictions on the deductibility of acquisition costs?

According to AFIP's position costs incurred on the acquisition of an Argentinean company's shares (e.g. interests from loans, legal fees, advisory fees, etc.) are not deductible for income tax purposes (see section 7) on the grounds that such expenses are not necessary for the obtainment, maintenance and conservation of taxable income.

However as we mentioned in section 7 it could be argued the deductibility of such expenses.

Also, although is not free from doubt, it could be argued that legal or advisory fees should be included as part of the acquisition cost of the shares. Under said scenario, such expenses would not be deductible for income tax purposes. Nevertheless in case of a future sale of the shares the sale price would be compensated against a higher acquisition cost.

## 11. Can VAT (if applicable) be recovered on acquisition costs?

In general, Argentine VAT is levied on three different classes of transactions, namely: the sale of tangible personal property within Argentina; the definitive import of tangible personal property and services into Argentina; and the provision of services within Argentina.

In this regard, the provision of advisory or legal services for the acquisition of an Argentine company would be subject to VAT as they will be "economically used" in Argentina. Hence, VAT paid for the aforementioned transactions will constitute a VAT credit to be compensated only against its VAT debits (i.e. against its output VAT).

If VAT credits for the rendering of the services cannot be compensated they should be included as part of the acquisition cost of the shares.

## 12. Are there any particular issues to consider in the acquisition by foreign companies? (for example non-resident taxation rules/substance rules and tax efficient exit routes)

There are no particular issues in the acquisition of Argentine shares by foreign companies. However please note the following:

- ❖ The sale of shares of an Argentine company is subject to income tax in Argentina
- ❖ Due to inflation and devaluation scenario in Argentina any capital gain from the sale of shares of an Argentine company could be high since the acquisition cost of the shares is historical and should be determined in local currency at the moment of the purchase.
- ❖ Indirect sale of Argentine shares is not subject to Income Tax.
- ❖ Argentine entities should pay personal asset tax at a rate of 0.5% on the net worth on behalf of the shareholders (in case the shareholders are foreigners)
- ❖ Transactions performed between related parties must comply with transfer pricing regulations
- ❖ If Argentinean bank accounts are used, tax on debits and credits would apply
- ❖ As of today, no regulations have been issued stipulating the withholding and payment mechanism that the non-resident buyer should follow when the transaction is performed between to foreign companies.
- ❖ Previously, Argentina applied strong foreign exchange regulations on the inflow and outflow of funds. However, recent changes have been introduced on this matter by the new government administration.

## 13. Can the group reorganize after the acquisition in a tax neutral environment through mergers or a tax group?

The group can be reorganised after the acquisition in a tax neutral environment if a tax-free reorganisation is performed.

Argentina's income tax law provides for three different types of tax-free reorganisation procedures: merger, spin-off or transfer within the same economic group. The law sets forth special provisions required to achieve a tax-free reorganisation in which the assets and tax status of a company may be transferred with attractive tax benefits. If the law's requirements and regulatory provisions are met, the tax-free reorganisation is subject neither to federal taxes (i.e. income tax and VAT) nor, in certain cases, to provincial taxes (i.e. turnover tax and stamp tax).

Failure to comply with these requirements triggers the collapse of the tax-free reorganisation regime and it, therefore, becomes subject to applicable federal and provincial taxes.

For a merger or spin-off to qualify as a tax-free reorganisation under Argentina's income tax law, and for the tax status to transfer to the continuing or surviving company, the following general requirements must be met:

- ❖ The owners of the previous company or companies must have held at least 80% of their capital in the two years prior to the reorganisation.
- ❖ Capital must be maintained at the moment of and after the reorganisation.
- ❖ The companies must have been conducting the same or related business prior to the date of reorganisation.
- ❖ The same or related activities of the previous company must be continued for at least two years from the date of the reorganisation.
- ❖ A tax report must be filed before the AFIP.

Compliance with all requirements established under a merger or spin-off scenario is required when qualifying a transfer within the same economic group as a tax-free reorganisation. Exceptions are made in fulfilling related activities prior to the tax-free reorganisation, the requirement of conducting business prior to the tax-free reorganisation and certain capital requirement differences.

## 14. Is there any particular issue to consider in case of companies of which main assets are real estate?

The sale of real estate is subject to income tax on net income. The final income tax of Argentina legal entities is calculated at the end of the fiscal year from applying the 35% corporate income tax rate to the result of such particular fiscal year. The real estate transaction affects the result of the fiscal year as per the difference between the sale price and the acquisition cost of the land plus the depreciated construction and improvements cost. The depreciation of the premises and improvements takes place at a rate of 2% per year; for real estate, the depreciation is 2% per year over 50 years.

The collapse of the Argentine financial system resulted in the Argentine Peso's devaluation from its 10-year-long exchange rate of US\$ 1 = AR\$1. In addition, after 2002 Argentina has fallen into an inflationary scenario and it has not been allowed to make inflation adjustments for tax purposes. As a consequence, any capital gain from the sale of real estate could be high since the real estate cost is historical. However, rollover transactions are applicable in Argentina: whenever a depreciable asset is sold and replaced income derived from the sale transaction may be assigned to the new asset's cost, resulting therefore in a deferral in the recognition of built-in gains. General depreciation rules provided in the income tax law are then applied on the cost of the new asset reduced by the assigned income amount. This option is available to the extent that both operations are performed within a one-year term.

In general, real estate transfers are not subject to VAT. However, if the seller uses the premises as a fixed asset, the seller must pay VAT in some specific cases, if the property is sold within 10 years after the date the seller obtained permission to use the premises.

The holding of real estate is subject to minimum presumed income tax. Investments to construct new buildings or make improvements in real estate that are fixed assets are not subject to the minimum presumed income tax in the construction year as well as the following year.

The sale of real estate could be subject to turnover tax. Generally, the sale of fixed assets is exempt from turnover tax.

The sale of real estate is subject to the stamp tax in the city of Buenos Aires at a rate of 3.6%. If the real estate is in a jurisdiction other than Buenos Aires, the tax treatment may vary.

An alternative to avoid paying capital gain taxes is to sell the Argentine entity's shares. In general terms, real estate investments in Argentina are usually structured under two possible scenarios:

- ❖ Direct acquisition of the real property made by a local vehicle (e.g. an Argentine corporation or branch)
- ❖ Acquisition of shares in an Argentine corporation ('sociedad anónima') that owns the real property. The applicable tax treatment for each of the referred scenarios would have certain advantages and disadvantages. The chosen alternative will depend on the purpose of the transaction.

## Sell-Side

### 15. How are capital gains taxed in your country? Is there any participation exemption regime available?

No participation exemption regime is available in Argentina. The results derived from the transfer of S.A shares, SRL quotas and other securities are subject to Argentine income tax, regardless of the type of beneficiary who obtains the income.

Capital gains obtained by Argentine corporate entities (in general, entities organised or incorporated under Argentine law, certain traders and intermediaries, local branches of non-Argentine entities, sole proprietorships and individuals carrying on certain commercial activities in Argentina) derived from the sale, exchange or other disposition of shares are subject to income tax at the rate of 35% on net income. Any loss derived from the transfer of shares may only be offset against profits of the same source from the same type of transactions. If such offset cannot be made in the same fiscal year in which the loss occurred or such loss cannot be offset in full, then such amount may be offset against income of the same source generated by the same type of transactions in the immediately subsequent 5 fiscal years.



Income obtained by Argentine resident individuals from the sale of shares is subject to income tax at a 15% rate on net income, unless such securities were traded in stock markets and/or have public offering authorization, in which case an exemption applies. The implementing Decree 2334/2013 introduced a provision stating that the exemption includes income derived from the sale of shares and other securities made through a stock exchange market duly authorized by the CNV. Any loss derived from the transfer of shares may only be offset against profits of the same source from the same type of transactions. If such offset cannot be made in the same fiscal year in which the loss occurred or such loss cannot be offset in full, then such amount may be offset against income of the same source generated by the same type of transactions in the immediately subsequent 5 fiscal years.

Capital gains obtained by non-Argentine resident individuals or non-Argentine entities from the sale, exchange or other disposition of shares would be subject to income tax (please note that the abovementioned exemption for shares is not applicable to non-Argentine beneficiaries). Therefore, the gain derived from the disposition of shares is subject to Argentine income tax at either (1) a 15% rate on the amount resulting from the deduction of the gross profit paid or credited, the expenses incurred in Argentina necessary for its obtainment, maintenance and conservation, as the deductions admitted by the income tax law or (2) at a 13.5% rate on the sales price. There is currently no guidance under Argentine law with respect to how this election is made. When both the seller and the buyer are non-residents, the person liable to pay the tax shall be the buyer of the shares, quotas, equity interests and other securities transferred. However, as of today, no regulations have been issued stipulating the withholding and payment mechanism that the non-resident buyer should follow.

## 16. Is there any fiscal advantage if the proceeds from the sale are reinvested?

In general, Argentina does not provide any fiscal advantage if the proceeds from a sale are reinvested. Argentina only provides fiscal advantages for reinvestments in depreciable assets (i.e. real estate or movable assets). In this particular case, if the depreciable asset is sold and replaced, the taxpayer can either (i) charge such income to the fiscal period or (ii) affect such gain to the cost of the new depreciable asset. Therefore, the depreciation rules provided in Argentina's income tax law would then be applied on the cost of the new asset reduced by the assigned income amount. The sale and replacement of depreciable assets must take place within a one-year term for the taxpayer to apply this regime.

## 17. Are there any local substance requirements for holding/finance companies?

Foreign holding companies are liable to comply with substance requirements. No specific regulations were issued in Argentina. Analysis is made on the basis of 'substance over form' principle.

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### Argentina



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