

CURRENT NOTES ON THE PHENOMENON OF INTERNATIONAL DOUBLE TAXATION: ARGENTINA'S EXPERIENCE

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SYNOPSIS

This study aims to analyze the current international scenario, in the light of the recent movements that have occurred in the field of international taxation, as well as the way in which this framework has influenced in the actions and decisions of the Republic of Argentina Tax Administration.

Our purpose is analyze such phenomenon in the global context and explore solutions that this Administration has been implementing both at the unilateral and multilateral levels, based on trends and current standards.

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In recent decades, in an increasingly accelerated manner, the globalization phenomenon has exercised great influence in the economic structures.

When we talk about globalization and its effect on the world's economies, we do not refer to a new phenomenon but more precisely, sustained growth and impact on international operations.

We have defined globalization as the phenomenon of opening economies and borders, result of the increase in trade, capital

movements, movement of people and ideas, the dissemination of information, knowledge and techniques and a deregulation process¹.

This fact has been transformed and assumed expensive dimensions, having now transcended the actions of companies - in particular of the large economic groups - from mere role as source of work and wealth, to become fundamental actors in the economic, but also social development of communities.

Under that premise, it is undeniable that globalization as such has a decisive influence in the tax systems of the States².

In this transnational scenario, countries must be careful to reach a balance in their tax policy between the legitimate right to exercise their tax sovereignty and taxing taxpayers in their jurisdiction, on the one hand, and the need to avoid double or multiple taxation that may hamper international operations and cross-border capital, on the other hand. They must not lose sight of the existence of other undesirable phenomenon such as double non-taxation.

1. INTERNATIONAL DOUBLE TAXATION

The fact that the income or assets of a company or individual that acts in several jurisdictions can be subject to taxation in two or more countries gives rise to the phenomenon of double international taxation.

Double or multiple taxation occurs when there are jurisdictions with overlapping tax power.

Double international taxation may take place in the field of international transactions, through the interaction of the tax systems worldwide.

Undoubtedly, this fact, considered undesirable, affects the normal development of international economic relations and international businesses, but also the neutrality that tax systems should provide in regards to the circulation of capital.

1. Ricardo Echegaray, "Tax administration versus the global taxpayer", La Ley, Buenos Aires, 2013.

2. *The tax system for the modern society holds great importance, not only as a necessary element of collection of tax revenues to genuinely financed the maintenance of the State, but also in its fundamental role of 'pillar' or scaffolding on which human development, economic progress with social justice, economic productivity and, in sum, the harmonious growth of the nation.*

Facing such problems, that affect growth and prosperity, the states have undertaken efforts to eliminate this phenomenon, to minimize the damage to trade and the difficulties to the sustained economic growth, but while at the same time keeping affirming their sovereign right to set their own tax rules.

When we refer to the design of solutions to the problem of double taxation, outlines the implementation by States of different mechanisms, both at national level, such as the credit for similar taxes paid abroad or the exemption of foreign

source income, as well as international level, from the subscription of agreements for avoiding double taxation.

We do not exhaust these lines with unilateral methods to avoid double taxation, which, in general terms, import the implementation of measures in the internal law to minimize these adverse effects. More precisely, we want to introduce in this analysis the solution of international acceptance, which greatly mitigates the international economic double taxation by means of specific agreements signed by the States.

2. AGREEMENTS TO AVOID DOUBLE TAXATION

For that, indeed, since long ago bilateral treaties have been signed, whose main objectives are, first, to encourage economic growth through the removal of double taxation and other barriers to trade and investment and, in the background, improve the fiscal administration in the two Contracting States, through the reduction of opportunities for international tax evasion³.

Broadly speaking, we can say that agreements for avoiding double taxation are international treaties signed by countries and governed by international law. As in any international treaty, the State, which consent to be bound by their provisions and must then comply with these provisions based on the principle of good faith.

Now, these challenges inevitably lead to the need to agree on the way in which States are to share the costs of the Elimination of international double taxation, cost that translates into lower tax revenues to be obtained by each of them. Also, import this set the political positions with regard to the desirability of adopting solutions which give preeminence at the beginning of subject real, as the criterion of territoriality, or at

the beginning of subject personal, as the criterion of residence.

Whatever the degree of development of the signatory countries of a tax Convention, and its consequent preference or political line of negotiation on the matter, the truth is that there is always the manifest will of the parties to eliminate the distortions generated by the international double taxation. In one way or another, the states manage to agree a bilateral mechanism that distributes the tax powers and the costs of elimination of double taxation, through limitations to the imposition on one of them and the granting of credits or exemptions in another. They always attend to the general benefit of the legitimate recipients of those treatments, which are residents in those countries.

This is what we may call the normal situation, where States that are trying to eliminate double taxation. However, at the same time they seek to minimize the impact that this generates in tax revenues, by accepting certain concessions in favor of its counterpart.

3. *Draft Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries - United Nations - 2001.*

However, tax administrations we are now increasingly frequently, situations in which global taxpayers⁴ use their influence to gain tax concessions apparently legal, but that mock the genuine expectations of the States in the negotiation and signing of the tax conventions.

The global trend indicates that this kind of behavior is growing, both in magnitude and in degree of sophistication.

Indeed, using aggressive tax planning, certain taxpayers with structured global operations seek to unlawfully access to tax benefits that are intended for them, largely for not being resident in any of the States part of a tax Convention. In other cases, for entities resident in the States party to the Convention, artificial structures are set up in jurisdictions with fiscal opacity and low level of effective taxation. They are used to take advantage of low levels of taxation at source and the deferral (or non-payment) of the tax in the jurisdiction of residence, achieving the effect that we know as **double non-taxation**.

This being said, and whatever the legal characterization of behaviors that lead to double non-taxation, it must be admitted that its existence could never be understood as a manifest intention of the signatory States of a tax Convention. Not even as an implied complacency with regard to a situation arising from the application of the rules of the Convention and its interrelationship with the internal tax regime in these countries. Indeed, the absence of taxation for the use of artificial legal structures

is considered in the majority of countries as an abuse of the legal system, whether considered as an abuse of the internal legal rules or also as an abuse of international treaties. In such cases, the international tax planning crosses the threshold of what is tolerable in any legal system that seeks to be fair⁵.

International tax planning is not a legal Institute but a coordinated set of behaviors to create relationships and legal situations aimed at optimizing the tax burden⁶.

The harmfulness of tax planning lies principally in the prejudice caused to the community, to evade the taxes necessary so that the State can finance the provision of goods and public services, infrastructure projects or the redistribution of wealth that allows the development of the common good.

In this context, it has become essential to tax administrations to develop a framework for joint action to adjust the practices that each one implement nationally and adapt them to the needs of today's globalized world, in order to fight efficiently against the evasive behaviors of economic groups who plan their global tax burden.

As the leaders of the Group of 20 have rightly stressed, "despite the risks facing people nationally, we agree that multilateralism is of even greater importance in the current situation and it keep being be our best resource to solve the problems of the world economy"⁷.

4. Concept developed by the Federal Administration of public revenues, which allows knowing the comprehensive taxation of taxpayers and concentrates economic groups, both locally and internationally, and in relation to the different taxes, customs duties and social security that impact on the activity of the taxpayer.

5. Vogel, Klaus, "Double Tax Treaties and Their Interpretation", *Berkeley Journal of International Law*, Vol. 4, Issue 1 (1986), p. 79.

6. Adonnino Pietro, "La planificación fiscal internacional y los paraísos fiscales", *Asociación Argentina de Estudios Fiscales*, 2002, p. 2.

7. G20, 2012.

4. THE BEPS INITIATIVE

In that context, in which multilateralism is declared as the way of attacking the problem, the Group of 20 requested to the Organization for cooperation and economic development a full and coordinated multilateral action plan to treat the problems of the tax base erosion and profit shifting.

Such an initiative in the fight against the erosion of the tax bases and the relocation of utilities became known as the Plan of action BEPS for its English acronym (base erosion & profit shifting)⁸.

This document identifies 15 action plans through which these tax strategies can be addressed to combat the tax bases erosion and the relocation of utilities, ensuring coherence in international taxation, aligning tax rights with substance and improving transparency.

It focuses, indeed, on combating the tax base erosion and profit shifting in order to restore the taxation at source as well as in the residence in a series of cases in which, otherwise, both cross-border revenues would remain without tax or would stay with very low taxation.

This initiative of the Organization for Economic Cooperation and Development attempts to identify aggressive tax planning issues that are common to the Member countries. It detects the causes that allow the tax engineering that leads to the tax bases erosion and designs common strategies to modify legal schemes that allow multinational groups to take advantage of existing loopholes, as well as disrupt fraudulent mechanisms.

The novelty of this plan is that it has provided awareness of the true extent of the problem of harmful tax planning and the need for a coordinated and structured solution based on international cooperation, in order to achieve an efficient result.

The G-20 has repeatedly endorsed the action plans and has urged all developed and developing countries to participate. Recently, they called to implement the commitments in the fight against tax evasion. There, from the resounding investigation known as “Swissleaks”, the director of tax affairs of the OECD, Pascal Saint-Amans, emphasized the need to adopt policy changes. This leads the Organization for cooperation and economic development on behalf of the Group of 20 to design the plan of action against the Tax Base erosion and profit shifting (BEPS), which plans establishing a single multilateral treaty, affirming that it is to eradicate the **double non-taxation**.

Such affirmation, it is worth mentioning, has mostly provided a solid backing to the international policy of renegotiation of agreements to avoid double taxation which is actively developed by the Federal Administration of public revenues of the Republic of Argentina.

Indeed, the context in which we have been describing demonstrates the complex reality of international business transactions and the need for the tax administration to act on this situation with efficiency and strategic planning.

8. *Www.OECD.org website offers a list of participating countries and of the plan of action, its context, and progress.*

5. ARGENTINA'S EXPERIENCE

In the specific case of the Argentina Republic, in recent years significant advances in the detection and correction of some problems that arose because of aggressive tax planning have taken place, through the misuse of benefits provided in agreements to avoid double taxation.

Among the strategies designed to strengthen the control of international operations of the so-called global taxpayers, the Federal Administration of Public Revenues coordinates the implementation of a policy issued by the national Government and involving the Ministry of Economy and Finance and the Ministry of Foreign Affairs and Worship. This policy relates to the concrete and precise identification of the effects that the various tax conventions subscribed by our country have had on the Argentine economy, not only from the point of view of the tax result, but also in other macroeconomic aspects.

To do this, the Committee for the Evaluation and Revision of agreements to avoid double taxation⁹ has been created. It is integrated by the Ministry of economy and finance, the Ministry of Foreign Affairs and worship, and chaired by the Federal administrator of Public Revenues. It was promoted to regularly monitoring the tax implications of the above-mentioned conventions, as well as the analysis and evaluation of existing agreements or which those intended to adopt in a multidisciplinary way not only from the point of view of the fiscal result but also in other macroeconomic aspects.

The main tasks of this Committee were to design and implement comprehensive and coordinated evaluation mechanisms, oriented to determine if the tax sacrifice imposed by the resignation of

the tax authority through the application of the conventions to avoid double taxation in force is justified.

Based on the above, then, the Commission proposes, based on the evaluations, the courses of action that it considers appropriate, such as the partial modification, full renegotiation or denunciation of the existing conventions.

The work of this Committee, for example, reached the conclusion that there were certain tax treaties requiring partial modifications, in order to maintain the balance between tax sacrifice and economic benefits. The consequence of these determinations was the suggestion to re-negotiate these agreements or, eventually, dismiss them. We refer to the conventions to avoid double taxation signed with the Republic of Chile, the Kingdom of Spain and the Confederation of Switzerland.

After the technical and diplomatic conversations needed to achieve the modification demanded by the Argentina, the result was not satisfactory in any of the cases and no agreement could be reached.

The agreement between the Republic of Argentina and the Kingdom of Spain for the avoidance of double taxation and prevention of Tax Evasion in respect of taxes on income and on capital¹⁰ generated adverse effects because of the impossibility of taxing certain elements of assets in Argentina. Another reason was the possibility of using its provisions to avoid fair taxation through the interposition of legal figures in Spain taking advantage of preferential tax regimes in that country.

9. *By joint resolution No. 56/2011-No. 80/2011 Ministry of economy and finance and the Ministry of Foreign Affairs, international trade and worship.*

10. *Agreement approved by the 24.258 law (Official Gazette, 19/11/1993).*

With the application of the Convention between the Republic of Argentina and the Confederation of Switzerland to avoid double taxation in respect of taxes on income and on capital¹¹, maneuvers of tax planning through the use of clauses of the Convention were detected, which provided for exemption from taxation at source in the case of royalties. The research provided evidence of different multinational companies based in third countries would have constituted subsidiaries in the counterpart of the Convention thus avoiding the payment of tax at the source of royalty income by different concepts. Once subsidiaries were constituted, the intangibles, which gave rise to the payment of royalties, were assigned and taxation at source, which previously applied to the respective payments, was thus avoided. Given the limited sharing of information with such counterpart, it was not possible to obtain the evidence necessary to dismiss these maneuvers through the General anti-abuse provisions of Argentine law. Another additional reason resulted in the impossibility of applying the taxation at source with respect to capital taxes on shares and investments in Argentine companies.

Investments and holdings of residents in Chile in companies based in Argentina and other elements of assets as well as the sanction by the Andean country of the preferential regime “Societies business platform” were impossible to tax. This made harmful for Argentina to keep applying the Convention between the Republic of Argentina and the Republic of Chile to avoid double taxation in respect of income taxes, gains or benefits and on capital and successions¹².

Thus, important decisions were taken to protect the tax base, in view of the problems involving the application to the Argentina Republic of the agreements with Chile, Spain and Switzerland,

leading in each case to corresponding diplomatic communication for suspending the treaty application¹³.

Within a framework of mutual understanding and comprehension of the issues, in all these cases it was possible to agree on a tax treatment attentive to the Argentine position.

From the above, negotiations were undertaken with these States, receiving the text of the new conventions agreed upon the issues raised by our country with a strategic improvement of the Argentine position.

As shown by these cases, the task of the Argentine tax administration in terms of identification and disruption of manoeuvres and abuse of agreements to avoid double taxation has intensified in recent years through the actions of assessment Committee and review of agreements to avoid double taxation. The main input in the work of this Commission is the information from the databases of the Federal Administration of public revenues and its efficient exploitation through information crosses and sectorial research.

The new approach that Argentina is introducing is therefore an express reference to the possibility of a periodic review of the Convention in the light of the above objectives. Of course, the parties must also agree on both the frequency of revisions and levels of detail that they wish to insert regarding the definition of objective parameters to be used in the compliance evaluation of such objectives.

In short, beyond the possibility that a review is a faculty inherent to the parties based on their sovereignty, it appears very useful to insert in the text of the Treaty that both parties understand the relationship between the elimination of double

11. Agreement signed on 23 April 1997, amended on 23 November 2000, not ratified by law, provisional application from 1 January of 2001 according to the additional Protocol thus stipulated it, signed in Buenos Aires on November 23, 2000.

12. Agreement approved by law 23.228 (Official Gazette 1/10/1985).

13. The cessation of the effects of international treaties with Spain and Chile took place on January 1, 2013; in the case of Switzerland, on January 16, 2012 the intention of not continuing with its provisional application was communicated.

taxation and the development of economic relations between them.

There is no doubt that the strong momentum of the G-20 has contributed to the effective international exchange of tax information.

The results that have been achieved, thanks to the work of the Global Forum, on transparency and exchange of information and the peer review group, show the need of global political support to the issues of transparency in international taxation that existed in the previous years.

These accomplishments range from significant growth of information exchange agreements signed since the formation of the current Global Forum in 2009¹⁴, to the significant improvement in the commitments of transparency and cooperation demonstrated in many countries that until then had shown less willingness to exchange tax information.

Also in the same vein, we should highlight the strong support for multilateral approaches to information exchange that are proposed as efficient solutions for the rapid development of broad international cooperation networks¹⁵.

In this sense, the Federal Administration of public revenues has taken due note of the current international tax scenario needs and has promoted the entry of our country as the first South American member to the Convention on mutual administrative assistance in tax matters

of the OECD and the Council of Europe, after its modification and expansion in 2010¹⁶.

This adds to the extensive network of international agreements available to the Administration for the exchange of information, either through clauses incorporated in treaties for avoiding double taxation and in other cases through the signing of bilateral agreements allowing the exchange of information¹⁷.

Recently, the Group of 20 proposed a new global standard for the automatic exchange of information on financial accounts¹⁸, for increasing the fight against tax evasion.

The Organization for Cooperation and Economic Development and the Group of G-20 have developed this standard, which is similar to the model of information exchange that many states have used to implement the FATCA¹⁹. The Global Forum was also tasked to implement a mechanism to monitor and review the implementation of the standard. That is, to determine which countries are able to implement the automatic exchange of information.

The Federal Administration of public revenues signed on October 29, 2014 the Global Standard on automatic exchange of information for financial accounts.

Argentina lies within the Group of countries that will implement the new standard as early adopter²⁰, which implies that it will begin to exchange

14. See "The Global Forum on Transparency and Exchange of Information for Tax Purposes - Information Brief", in <http://www.oecd.org/tax/transparency/Journalist's%20brief%20December%202012.pdf>

15. See in this regard the Final communiqué of the meeting of Ministers of economy and Central Bank Governors of the G20, Moscow, 15-16 February 2013, paragraph 20.

16. Argentina joined the Multilateral Convention for mutual administrative assistance with tax purposes on November 3, 2011. The respective instrument of ratification was deposited on 13 September 2012. The Convention entered into force for Argentina January 1, 2013, and may have tax information of countries acceding to the Convention.

17. The TIEA signed April 23 in 2012 between Argentina and Uruguay deserves a specific note. This agreement entered into force on February 7, 2013 and its particularity is the credit method in order to avoid double taxation. This version or "Río de la Plata model" was negotiated on the basis to the model agreement exchange of information in tax matters elaborated by the OECD. However, it is a new format, which involves inserting into an information exchange agreement a clause from an agreement to avoid double taxation.

18. Standard for Automatic Exchange of Financial Account Information in Tax Matters.

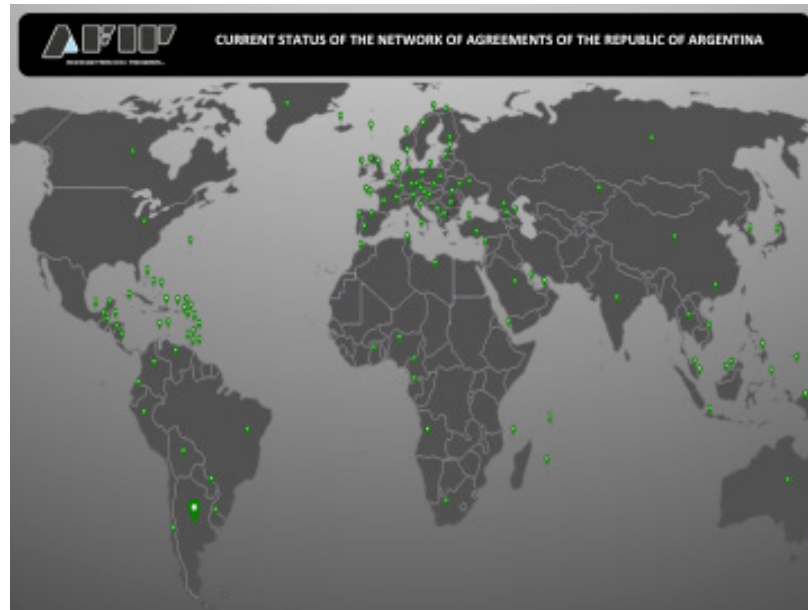
19. United States Foreign Account Taxpayer Compliance Act.

20. Early Adopters.

information under this modality from the year 2017. From then on, the Federal Administration of public revenues will have access to the bank accounts data of Argentines living abroad.

With joining this initiative, Argentina shows that it continues to be at the forefront of the struggle for international transparency and cooperation in tax matters.

Table 1
Agreements to avoid double taxation today



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Created by AFIP

6. CONCLUSIONS

We can see that the fight against international tax evasion is a difficult task that seems reaching higher levels of complexity as international business develop new forms of structuring. When international tax evasion maneuvers involve the application of agreements to avoid double taxation, with the sole or main purpose to achieve a double not taxation, the complexity of the tasks of tax administrations increase even more. They must properly protect the guarantees and rights of taxpayers and avoid violating the international commitments made by countries in the negotiation of tax treaties.

This complexity is well known by the multinational groups and their tax advisers responsible for the tax planning of their global business, situation that is exploited to the maximum to structure sophisticated tax engineering, pushing to limit the individual capacities of the tax administrations, which operate within their national jurisdiction boundaries.

In that sense, an efficient and almost indispensable solution in the tax reality that we manage in a global world lies in international cooperation and joint identification of problems. They challenge indiscriminately countries of different levels of development, and we need to coordinate the adoption of solutions as homogeneous as possible to the legal and administrative issues, which, with different nuances, are rather approximate.

The task is not simple, no doubt, but the magnitude of the problem of aggressive tax planning requires a response of equal magnitude by tax authorities. That response must be based on prevention, to hinder and prevent the development of schemes of fraud and abuse of tax agreements, but also in the design of exemplary sanctions for the most aggressive behaviors of harmful tax planning.

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