Argentina

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Acquisitions (from the buyer's perspective)

1 Tax treatment of different acquisitions

What are the differences in tax treatment between an acquisition of stock in a company and the acquisition of business assets and liabilities?

In the case of stock acquisitions, the buyer must register at the local Public Registry of Commerce (according to section 123 of the Corporations Law) and, at that time, appoint a local representation. As for local taxes, the buyer will be subject to personal assets tax at the end of each calendar year. Such tax is applicable to the proportional book value of the shares owned by the foreign investor as of 31 December of each year, in general at a 0.5 per cent rate unless the investor is resident in a country with which Argentina has signed a double taxation agreement. Another issue to be considered is that, for income tax purposes, sales of stocks owned by foreign subjects are exempt from such tax according to Decree No. 2284/91.

Regarding the acquisitions of assets and liabilities, the local regulations rule two types of acquisitions: the acquisition only of assets and liabilities; and the acquisition of commercial establishment under the provisions of Law No. 11,867 (facilities, inventories, commercial name, customers, patents of inventions, trademarks and other rights derived from the business being acquired). The responsibility involved in each type is different as the responsibility of the buyer is limited only in the case of acquisitions ruled by Law No. 11,867 (it is limited only for three months and only applies to fiscal contingencies not determined at the time of the acquisition transaction). In both cases, the buyer should set up a local establishment in the form of a branch or other type of representation, as ruled by section 118 of the Corporations Law.

2 Step-up in basis

In what circumstances does a purchaser get a step-up in basis in the business assets of the target company? Can goodwill and other intangibles be depreciated for tax purposes in the event of the purchase of those assets, and the purchase of stock in a company owning those assets?

Argentine income tax law does not allow the deduction of intangibles as trademarks, goodwill and similar types of intangibles. It only allows the depreciation of intangibles that depreciate over time such as patents, licences, concessions and similar assets.

3 Domicile of acquisition company

Is it preferable for an acquisition to be executed by an acquisition company established in or out of your jurisdiction?

There is no difference in the acquisition itself; there is a difference on the income tax treatment at the time of sale of the stocks (income tax exemption ruled by Decree No. 2284/91) when the owner is a foreign subject.

In the case of acquisitions of assets and liabilities there are no differences, because if the acquirer is a foreign subject then it will be generating a permanent establishment in Argentina upon acquiring the local assets and therefore the tax treatment is the one applicable to Argentine residents.

4 Company mergers and share exchanges

Are company mergers or share exchanges common forms of acquisition?

Although mergers are a very common type of transaction in Argentina, they are usually used by companies of the same economic group to obtain operating benefits.

The Argentine Income Tax Law establishes that certain reorganisations can be 'tax-free transactions'. Requirements that must be met to receive such benefits include the following: for at least two years since the reorganisation, the companies involved in such process must continue to perform the same or similar activities as they did before; and also in those two years since the reorganisation, shareholders must keep unchanged their original ownership of the companies involved. In the specific case of tax losses, there are other requirements to be fulfilled to preserve them after the reorganisation.

5 Tax benefits in issuing stock

Is there a tax benefit to the acquirer in issuing stock as consideration rather than cash?

There are no special provisions for acquisitions that involve issuance of stock instead of cash consideration.

6 Transaction taxes

Are documentary taxes payable on the acquisition of stock or business assets and, if so, what are the rates and who is accountable? Are any other transaction taxes payable?

In Argentina certain onerous transactions or agreements formalised with a deed usually incur a provincial stamp tax. In the case of stock acquisitions, they will be taxed if the transaction is formalised in a deed or similar document. The applicable rates and other formalities are legislated in each province; for example, the rate for Buenos Aires is 1 per cent of the value of the deed. The stamp tax is usually paid jointly by the seller and by the buyer.

Value added tax (VAT) (21 per cent of the sale price) will only be applicable to acquisitions of assets and liabilities; sales of stock are exempt from VAT. The tax paid for the acquisition is considered a tax credit and can be used against future fiscal debits arising from the operations of the local business.

Another relevant tax is the turnover tax legislated separately by each province; again, rates and formal aspects are legislated by each province. Generally, turnover tax is applicable to any type of income arising from onerous and habitual transactions. In the case of stock acquisitions, the tax is only applicable to the seller.

7 Net operating losses, other tax attributes and insolvency proceedings

Are net operating losses, tax credits or other types of deferred tax asset subject to any limitations after a change of control of the target or in any other circumstances? If not, are there techniques for preserving them? Are acquisitions or reorganisations of bankrupt or insolvent companies subject to any special rules or tax regimes?

In reorganisations, the Income Tax Law allows the transfer of net operating losses and tax credits to the continuing company or companies. In the specific case of net operating losses, an additional requirement (to those mentioned in question 4 applicable in general terms to all tax credits to be transferred) must be fulfilled: the shareholders of the original companies need to prove that during the two-year period before the reorganisation they had kept at least 80 per cent of the capital stock of those original companies. The aim of such a requirement is to prohibit operations where the main objective is to reorganise companies solely to use tax losses accumulated in one of the original companies, or other promotional benefits, to avoid paying taxes.

Regarding the reorganisation of insolvent or bankrupt companies, there are no special tax regimes applicable to such reorganisations; the general reorganisation rules mentioned in question 4 are applicable, along with the above-mentioned additional requisite for net operating losses.

Furthermore, there exists a 'bankruptcy regime' that allows selling of the bankrupt or insolvent company through a commercial proceeding. Generally, the statement of bankruptcy implies the final closing of the business and immediate liquidation, but the 'bankruptcy regime' allows the sale of the active company (either through a national or an international bid) to benefit the mass of creditors that expect to see their credits satisfied.

8 Interest relief

Does an acquisition company get interest relief for borrowings to acquire the target? Are there restrictions on deductibility where the lender is foreign, a related party, or both? Can withholding taxes on interest payments be easily avoided? Is debt pushdown easily achieved? In particular, are there capitalisation rules that prevent the pushdown of excessive debt?

Local legislation does not provide special benefits for borrowing to acquire the target. Regarding the deductibility of loan interest, income tax law provides for certain restrictions in the deduction when interests derive from foreign intercompany loans; and when interest derives from loans whose creditor is a financial institution (bank) resident in a country not considered a 'tax haven' in local legislation (income tax law provides a list of countries, territories and regimes considered to be tax havens).

The deduction is restricted to a limit calculation. The limit on the interest deduction is calculated on a fiscal-year basis; the portion of the interests not deducted in a certain period can be transferred to the following fiscal period, which again is subject to the limit calculation. In addition to the mentioned limitation, in the case of interest payments to related parties, such interest can be deducted if it is paid before the due date for filing the income tax return; if the interest is paid after this, then it is deductible in the fiscal year it is effectively paid.

Regarding income tax withholding regimes, there are two main types of regime, one applicable to local creditors and another to foreign creditors. In the case of payments of interest to foreign beneficiaries, the local bank involved in the transaction will be performing the income tax withholding if the debtor cannot prove it has already performed the withholding for such interest payment. It is important to mention that Argentina has signed double taxation agreements and therefore withholding rates can vary depending on the foreign creditor's residence or location.

Another important factor is that Argentina has issued several 'foreign exchange' rules and provisions that affect inflow and outflow of currency. The main provisions affecting debt transactions include:

(i) private debt obtained abroad must be liquidated through the Mercado Único y Libre de Cambios (ruled by the Argentine Central Bank) within 365 days of the funds being paid out;
(ii) all foreign debt must be agreed upon and cancelled in a period of not less than 365 days, no matter what the method of cancellation agreed is; and
(iii) all incoming funds deriving from foreign debt are subject to a bank reserve (*encaje*) of 30 per cent of the amount involved in the transaction. There are a few transactions not subject to *encaje*, as follows:
    - debt obtained with multilateral and bilateral credit agencies;
    - debt to be applied to the cancellation of foreign debt or acquisition of long-term foreign assets; and
    - debt to be applied to the acquisition of non-financial assets (eg, inventories, property plant and equipment, intangibles for mining purposes, exploration expenses) – the debt must be obtained and paid out in a period not less than 24 months.

9 Protections for acquisitions

What forms of protection are generally sought for stock and business asset acquisitions? How are they documented? How are any payments made following a claim under a warranty or indemnity treated from a tax perspective? Are they subject to withholding taxes or taxable in the hands of the recipient?

In most cases the form of protection used is an escrow account to hold an amount agreed by the parties to guarantee the payment of known or unknown contingencies. In case of payments following a claim covered by the protection of the escrow amount agreed by the parties, such payments will be treated as part of the consideration paid for the stock acquisition. Therefore, the tax treatment is such as mentioned in question 1 when addressing the sale of stock tax treatment.

Post-acquisition planning

10 Restructuring

What post-acquisition restructuring, if any, is typically carried out and why?

In general terms, there is no typical restructuring process after an acquisition; it always depends on the transaction itself and the objectives pursued by the acquirer.

11 Spin-offs

Can tax neutral spin-offs of businesses be executed and, if so, can the net operating losses of the spun-off business be preserved? Is it possible to achieve a spin-off without triggering transfer taxes?

As already mentioned, the Income Tax Law establishes that certain reorganisations can be 'tax-free transactions'. Spin-offs are included among those reorganisations that can be tax-free transactions if certain requirements are fulfilled (see question 4). Also, operating losses can be preserved if the requirements mentioned in question 7 are complied with.

12 Migration of residence

Is it possible to migrate the residence of the acquisition company or target company from your jurisdiction without tax consequences?

No. To migrate the residence implies selling and relocating assets and resources involved in the business. If such relocation occurs, then the

Update and trends

While there are no specific changes currently under analysis that could affect the tax treatment of inbound investments, an emerging local trend of some importance is the analysis of the application of foreign exchange rules to the inflow of capital. See question 8 for further information regarding the main rules applicable to financing activities.

local company would be closed and put out of business; as such, it would attract the attention of the fiscal authorities and might end up having several audits from not only federal agencies but also the provincial authorities.

13 Interest and dividend payments

Are interest and dividend payments made out of your jurisdiction subject to withholding taxes and, if so, at what rates? Are there domestic exemptions from these withholdings or are they treaty-dependent?

Dividend payments to both local and foreign beneficiaries are subject to a tax-withholding rate of 35 per cent on dividends comprising only income not taxed previously at the company level. The objective pursued by the law is to withhold the tax at the same rate that such income would have been taxed when accrued by a local corporation.

In the case of interest payments, all payments are subject to income tax withholding, except interest paid to local bank institutions. For interest payment to foreign beneficiaries, the withholding regime establishes the following tax rates:

(i) interest paid when the debtor is a bank institution (governed by Law No. 21,526) – 15.05 per cent;
(ii) interest paid when the creditor is a financial entity resident in a country that is not a tax haven according to the Income Tax Law, or such jurisdiction signed a treaty to exchange information – 15.05 per cent;
(iii) interest paid when the creditor does not comply with the requirements mentioned in (ii) and the local debtor is not a financial institution defined in (i) – 35 per cent; and
(iv) interest derived from certain deposits in local financial institutions ruled by Law 21,526 – 15.05 per cent.

Interest payments made by local corporations to another local entity (except those paid to financial institutions) are subject to a withholding tax rate of 35 per cent.

Double taxation agreements are applicable to dividend and interest payments.

14 Tax-efficient extraction of profits

What other tax-efficient means are adopted for extracting profits from your jurisdiction?

Local legislation defines a tax treatment for each different payment made to foreign beneficiaries, such as royalties, interests, sale of property or services in general. A tax saving is usually achieved through the usage of tax-efficient structures.

It is also important to mention that transfer pricing rules are applicable to transactions between a local entity and its related parties abroad and entities located in a low-tax jurisdiction or a jurisdiction with a low-tax regime. Therefore, such transactions are subject to a special analysis and documentation requirements in order to prove that such transactions were made on an arm's-length basis.

Disposals (from the seller's perspective)

15 Disposals

How are disposals most commonly carried out – a disposal of the business assets, the stock in the local company or stock in the foreign holding company?

In the case of foreign investors, the disposal of stock is very common because the result from such disposal is exempt from income tax (Decree No. 2284/91). Other types of disposal vary depending on the objectives pursued by the investors.

16 Disposals of stock

Where the disposal is of stock in the local company by a non-resident company, will gains on disposal be exempt from tax? Are there special rules dealing with the disposal of stock in real property, energy and natural resource companies?

Again, disposals of stock (whether on real property or other assets) made by foreign investors are exempt from income tax. Also, the sale of stock is exempt from VAT, whether done by local or foreign investors.

17 Avoiding and deferring tax

If a gain is taxable on the disposal either of the shares in the local company or of the business assets by the local company, are there any methods for deferring or avoiding the tax?

In general terms, gains are attributed to the fiscal year in which they are accrued. The Income Tax Law provides a special rule to defer the tax when the payment has been agreed in instalments that are due in more than one fiscal year; such provision is applicable to income derived from the sale of assets, except inventories.

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