

International Fiscal Association

2024

Cape Town Congress

cahiers

de droit fiscal
international

VOLUME 108

B: Practical approaches
to international tax
dispute prevention and
resolution



1938-2024

Summary and conclusions

Preventive dispute mechanisms

- As NBOs³ (i) do not have value either for AFIP or for the consultant (which affects the legal security as well as the essential guarantees which should be offered to the taxpayer that wants to strictly comply with his tax obligations) and (ii) AFIP is not obliged to render a decision, this mechanism is generally seen as ineffective and rarely used by taxpayers.
- Although in practice it has mostly been used for domestic matters, the **Binding Opinion** is the mechanism *par excellence* to which a taxpayer can voluntarily resort to knowing AFIP's interpretation on international issues (e.g. corporate reorganizations involving foreign shareholders). That's true when a petitioner is evaluating the alternative to pursue a business in Argentina. Even though it would be advisable to consider its applicability to DTA interpretation, currently foreign investors not covered by a DTA may have access to this regime. It is positive that a summary of the BO issued –once it becomes final– as well as of the ministerial pronouncement are publicly available giving taxpayers the possibility to know the tax authorities' opinions developments. Even though we note that certain flaws could discourage its use, e.g. (i) the lack of time-limit to declare the BO admissibility or to get a ministerial pronouncement; (ii) the possibility that the regime itself could lead to a tax audit; (iii) the failure to obtain a response within the prescribed time-limit; (iv) the absence of certain limits on the imposition of fines,

¹ Tax lawyer, advises and litigates on sensitive issues regarding domestic and international tax law, tax planning and wealth management. Former associate at Marval, O'Farrell & Mairal and partner at Andersen Argentina. Previously, she worked at the legal division of the United Nations in Vienna. Holds a Master's degree in tax law from the Argentine Catholic University and participated in the International Tax Law course at Leiden University (The Netherlands). Professor on postgraduate courses on tax law at the Argentine Catholic University, Universidad de Belgrano, Universidad ORT (Montevideo) and University of Miami's Law School. Author and co-author of eight books and more than 50 articles on her area of expertise.

² Accountant with more than 30 years of working experience at AFIP. She developed her professional career in auditing, review and appeals, AML/CFT, and International Taxation Advisory Areas. Currently, a member of the Training and Human Resources Development Directorate. Earned her degree and her taxation specialization certificate from the School of Economics, Buenos Aires University. Completed the International Tax Program at Harvard Law School and the Complex Economic Crimes Course at San Martin National University. She specialized in international taxation issues, participated in OECD WDP 6, as a peer review assessor for the Global Forum on Exchange of Information and actively worked on the BEPS project. She is a speaker in seminars on subjects of her field and author of publications in specialized magazines. Member of IFA and of its Argentinean branch and of the Buenos Aires College of Professionals in Economics. Contributes to various technical-professional groups.

³ A list of abbreviations can be found at the end of the report.

even when the consultant adheres to the BO response; (v) the *non-suspensive* effect of the appeal before the Ministry and (vi) the non-taxpayer/advisor participation in the proceedings. We deem that certain aspects could be improved within the regime: e.g. (i) enable the treatment for foreign investment projects pursued by Argentine residents; (ii) deal with procedural issues or issues related to payments on account (foreign tax credit); (iii) establish how a criterion modification or revocation affects other taxpayers with the same circumstances. Despite the weaknesses identified, the BO regime is, in practice, the only one available to generate predictability on the tax authorities' position on international issues.

- The Compulsory consultation with top-level advisory areas (dictámenes), the Compulsory application of top-level technical and legal criteria and the Interpretative doubts and/or proposal for revision of the applicable criterion mechanisms promote a uniform application of the technical and legal criteria established by AFIP's highest level advisory areas and the DTA CA contributing to the necessary legal certainty and ensuring greater transparency in AFIP-taxpayer relationship.
- The JDPIO would prove to be a good means for preventing transfer pricing disputes. However, the absence of a regulation to make it operational does not allow us to make an assessment from a practical point of view. In any case, certain suggestions were made, which could be incorporated into the legal text, and others that could impact future regulations or AFIP's internal structure.
- Very positive aspects surrounding the procedure ending with the pre-vista are noted (i) the regular meetings aimed at properly substantiating the potential adjustment (ii) the possible taxpayer/advisor participation in submitting and producing evidence and (iii) the reduction of fines. Nevertheless, the acceptance of the tax position and tax return rectification accordingly do not prevent AFIP's powers to determine the final taxable amount. This circumstance denotes the main weakness of this prevention mechanism.
- The substantiation of evidence during the *ex officio* determination proceedings as well as the issuance of *measures for better provide* to reach the material truth lead to the avoidance of a future dispute. If the taxpayer decides to adhere to the tax position, this adherence has the effect of a tax return for him/her and an *ex officio* determination for AFIP. The TPL favours the stability and immutability of the administrative *ex officio* determination, since only in a few specific cases such stability may be altered. During the process or even after the resolution has been issued, taxpayers are entitled to a fine reduction.
- The VCA is deemed as a very positive step to avoid subsequent litigation. However, legal amendments should be made to the regime to turn it into a regime respectful of several constitutional principles -e.g. (i) mandatory opening as long as the requirements to apply are met; (ii) taxpayer participation in the process; (iii) outcome publication, at least of those that refer to questions of law; (iv) constitution of guarantees only if it is judicially required; (v) potential use of the documentation and information provided, etc.-. We urge for its prompt regulation to make it operational.
- AFIP speaks through different means, such as Practical compliance guidelines, Recommendations, Specific and FAQ microsites, and Notes which are, undoubtedly useful for taxpayers. However, none of these criteria manifestations entail definitive commitment on AFIP's side as they are not binding on the taxpayer, notwithstanding they could be invoked by a taxpayer within penalty proceedings.
- The Consultation and Participative Drafting of Rules promotes effective citizen participation, guaranteeing equality, publicity, informality and chargeless principles.

This allows AFIP to achieve better operational management and provide services to taxpayers compatible with its duties and the public interest at stake.

- Though taxpayers may file an administrative appeal without having to pay, which could be attractive, they may be discouraged from doing so, as the tax official in charge of its resolution is the hierarchical superior not only to the one that issued the *ex officio resolution* but also to the tax auditor that generated the case. Plus, he/she is the one responsible for maintaining or increasing the revenue collection of the operational unit he/she oversees, thus turning this available mechanism into a non-impartial one which is seldom used by taxpayers.
- The Decision impact statements are a neat illustration of the periodic quality or review control on case development. In view of the existence of similar situations in administrative and judicial stages, the operational and legal areas are instructed on the procedure to be adopted. If decisions are unfavourable to AFIP, it is indicated how to address legal costs.
- Inefficient domestic mechanisms, such as (i) the absence of regulation of VCA, (ii) the lack of suspensive effect of administrative remedies like the reconsideration appeal with AFIP (despite its practical suspensive effect granted by AFIP), (iii) the inability to access justice without payment after exhausting these remedies, (iv) the ambiguity and frequent changes in tax legislation (often influenced by changes in Government), (v) the restriction on access to the jurisdiction of the Supreme Court for certain tax matters, (vi) the absence of regulation of various procedural institutes and generally (viii) the judicial delay in solving remedies presented by taxpayers, all contribute to the urgent need for the implementation of effective and harmonic alternative methods.
- Although the usage of MAPs has increased in Argentina recently, particularly after the introduction of the mechanism through domestic legislation, there is still a significant amount of progress to be made. This is especially true when its implementation is not yet in harmony with the domestic procedure. As a result, there is a possibility that local remedies and MAP solutions could lead to contradictory outcomes, which can be detrimental to both the taxpayer and the tax administration. In this regard, the local procedure does not prevent the judiciary from reaching a decision in which the taxpayer is obligated to pay, only for the MAP to later reach an opposite outcome, or vice versa.
- The non-inclusion of *arbitration* as an available method in DTAs (except for a few cases), is also seen as a field to work on, especially where the competent authority is unable to resolve the case by a MAP. Expanding arbitration within the network of existing and new treaties to be entered would implicate a valuable step forward as an alternative avenue for conflict resolution within the international tax field.
- Regarding other international tax controversy resolution mechanisms, despite Argentina having entered into numerous international investment agreements that set forth arbitration regimes, the instrument has not been widely used for resolving international tax controversies other than in some specific cases as with internal stamp taxes. Together with stronger domestic legislation, this could be a valuable manner of efficiently resolving these sorts of matters among signatory jurisdictions.
- There has been very little experience with joint audits, and there are no records of simultaneous audits. Preventing disputes by taking advantage of existing conventions and legal empowerment would be highly beneficial.
- So far, AFIP has participated in two cooperative experiences in which it has followed the guidelines established in the ICAP Program, which allows it to express its views or suggestions on such guidelines to increase the attractiveness of the Program for

potential participating companies. It is expected to continue participating, as the ICAP is proven to be one of the multilateral mechanisms that can yield, principally, satisfactory results measured in time resolution.

Part One: Main features corporate compliance system

1.1. General legal framework

Argentina has federal legislation, ranking as follows: (i) National Constitution and International Human Rights Treaties with constitutional status; (ii) International Treaties without constitutional status, including DTAs; (iii) Laws enacted by the National Congress; (iv) Delegated Decrees by the Executive National Power in those matters of administration or public emergency expressly delegated to it by the National Congress or by reason of necessity and urgency (that in any case do not include criminal or tax matters); and (v) Decrees of Need and Urgency by the Executive National Power.

The legal system is based on the civil law tradition.

Taxes and procedural issues are regulated by separate laws.

The Federal Government through AFIP collects -among others- the income tax.⁴

For income tax purposes, incorporated business companies established in the country, the foreign companies' branches and other PEs are considered resident entities and thus subject to taxation.

Resident entities pay income tax according to a progressive scale, which foresees a minimum tax rate of 25% and a maximum of 35 % on the net income subject to tax. Tax residents may credit against these taxes those amounts effectively paid as similar taxes on their activities abroad up to the limits established of the increase in tax obligations arising from the incorporation of the earnings gained abroad.

Argentina has adopted transfer pricing rules that follow, in essence, the OECD Guidelines.

1.2. Organization of Tax Administration

The TGD organization deploys 25 RDs throughout the country which concentrate their enforcement power at the regional level on n-LNT. Each RD has auditing specialized units on economically relevant sectors such as mining, fishing, energy, agriculture, and agro-industry.

The SGLT is responsible through the LNTCD for controlling major fiscal significance taxpayers -at corporate level- throughout the country on national and international tax matters. It participates in the ICAP, interacts with international organizations, and cooperates, when required, as technical support in the negotiations and local implementation of multilateral agreements and/or international recommendations; gives support to the RDs in international matters and will take part in the JDPOIs requests.

⁴ ITLOC 6 December 2019.

The RDs and the SGLT have an investigation, audit, review and appeals, legal and collection units.

The TAD provides technical interpretation on legal provisions, as well as analyzes jurisprudence on tax technical matters, direct taxation, and procedural matters applicable to international transactions, and advises on measures to be adopted.

Centralized units

The TaSSRLAD provides interpretation and advice on legal issues.

The EGaHNWD designs auditing strategies and promotes specific rules to prevent and/or detect evasive tax behaviour, among others, in EMNs.

The IRD participates in the management of international agreements and DTAs in force or those to be entered, as well as in the follow-up of their tax implications, proposing courses of action.

1.3. Extent (number of treaty partners) of tax treaty network, if any

Argentina signed 26 DTAs at the level of income tax: 21 are in force: Germany, Australia, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, United Arab Emirates, Spain, Finland, France, Italy, Mexico, Norway, Netherlands, Qatar, United Kingdom, Russia, Sweden, and Switzerland; 5 are not yet in force: Austria, People's Republic of China, Japan, Luxembourg, and Turkey and an amended Protocol with France; negotiations with Colombia, Israel, and an amendment of the DTA with Germany are in progress.

Most of the DTAs follow the OECD Model even though certain aspects such as the configuration of construction and services PEs and the joint tax power on royalties adhere to the UN Model Tax Convention.

Bolivia DTA endorses the territoriality principle contemplated in the Andean Pact Model.

Argentina signed the MLI on 7 June 2017 which as of 15 December 2023, is pending approval by the National Congress.

1.4. Filing and assessment procedures

The determination and collection of taxes levied based on the laws is made on tax returns to be filed by taxpayers for the payment of taxes in the way and within the terms established by AFIP (self-assessment principle). The ITL requires taxpayers to file an annual return to report their taxable income, determine their tax liability, deduct any taxes withheld or paid in advance, and pay any balance due.

1.5. Audit process, including selection and opportunities for engagement

AFIP must issue an IO to begin to audit taxpayers' tax situation, except in certain cases as e.g. CTL proceedings. The IO is notified to the taxpayer indicating, principally, the date of issuance, the taxes and the fiscal years to be audited. The completion of the inspection stage is also notified.

The “*pre-vista*”

Once the audit stage is completed, the tax auditor will notify the taxpayer of the proposed adjustment to the tax return filed or, the corresponding liquidation if the tax return hasn't been filed: the “*pre-vista*”.

If the taxpayer does not agree, the *ex officio* determination procedure will be initiated.

Ex officio determination procedure

This procedure is followed by a public official to determine *ex officio* the taxable amount or tax loss and to assess the corresponding tax.

Prior to the issuance of the *ex officio* resolution, taxpayers could request a VCA.

1.6. Administrative/pre-litigation remedies

Administrative Appeal Procedure Reconsideration appeal and National Tax Court

These remedies are mutually exclusive. The first one is filed within AFIP while the second is filed before the NTC which is not part of the Judiciary but falls within the realm of administration. Therefore, when taxpayers bring a case before the NTC, they have not actually taken their case to court. Since pursuant to the Argentine legislation, NTC has a hybrid condition (although being part of the Ministry of Finance it is independent of AFIP, it is deemed as a judicial first instance and has functions that are equal to judicial functions) for organizational matters we will refer to it in this report as within the judiciary stage).

1.7. Court system

Different remedies could be filed in the court tax system: appeals before the *National First Instance Court* (NFIC), the *National Chamber* (NC) or even the *Supreme Court* (SC).

Part Two: Pre-dispute phase

2.1. Purely domestic dispute prevention mechanisms

2.1.1. *Advance rulings and/or Advance Transfer Pricing Agreements*

Argentina, at the end of 2017, introduced in its TPL⁵ the JDPIO regime which resembles the Advance Pricing Arrangements. It enables a taxpayer to request AFIP to reach a joint

⁵ TPL, Law 11.683, OG 20/7/1998, s. 217.

resolution on the criteria and methodology applicable for the determination of prices, amounts of consideration or transaction profit margins with its related parties.⁶

Taxpayers must file an application, before the commencement of the fiscal year in which the transactions to be covered by the JDPIO will be conducted, including a proposal supporting the market value for the transactions or business lines involved.

This submission neither suspends deadlines nor justifies taxpayers' non-compliance with the transfer pricing regime.

The agreed tax criteria and methodology based on the circumstances and other provided data considered up to the moment of its subscription have an exclusively binding effect for the taxpayer and AFIP.

The JDPIO reference information may be exchanged with third countries within the framework of international Agreements or DTAs.

The JDPIO's effectiveness and application are subject to the *subsequent condition* that the transactions be carried out according to the provisions set forth therein.

AFIP may overrule the JDPIO, with effect from the notification to the taxpayer in certain scenarios.

The JDPIO resolution does not prevent AFIP from exercising its auditing powers.

Assessment: An assessment cannot be made from a practical point of view as, after 6 years of the JDPIO incorporation in the TPL, the respective regulation to enforce it hasn't been issued.⁷ However, certain aspects that arise from the TPL will be assessed:

- In principle, the JDPIO application can be submitted by any taxpayer who carries out operations covered by the transfer pricing regime. Note that the regime implementation could be gradual as AFIP is empowered to define sectors of activity or lines of business accessing the mechanism.
- The transfer pricing regime has been in place for approximately 25 years. The LNTCD that will be in charge of processing the JDPIO is made up of some officials who have conducted transfer pricing audits for many years, so they are highly specialized in the field. In auditing and related administrative proceedings, taxpayers always were advised by experts with a high level of specialization, it is expected that those who would intervene in the JDPIO have the same professional qualities.
- Information on the involvement of the taxpayer/advisor in the process or on the transparency of the process to the taxpayer or on the publicity of the outcome is not provided by the TPL.
- The JDPIO provisions exclusively bind the taxpayer and AFIP.
- A *resolatory condition* applies if the transactions are not carried out according to the provisions set forth in the JDPIO.
- AFIP may, unilaterally, annul the JDPIO (cancellation) from the moment it notifies the taxpayer for two reasons. These are not attributable to the taxpayer: if it verifies the lack of comparability of the prices, amounts of consideration or profit margins established with those used by independent parties or if the existing economic circumstances at the time of the JDPIO approval have changed significantly. The decision does not affect the validity of the transactions carried out in accordance with the JDPIO clauses.

⁶ ITL, s. 17.

⁷ Distinguished tax advisor expressed that AFIP does not feel in a position to administer such a scheme since, despite its inclusion in the law, it is not fully operational for taxpayers yet (LORENZO, Armando, Reportaje Tributario N° 175: Dr. Juan Carlos FERREIRO, Consultor Tributario, Setiembre 2021).

- We consider that the JDPIO would be especially useful for preventing disputes on transfer pricing issues. To ensure its effectiveness we suggest that some modifications should be made to the TPL -to comply with the rule of law principle- and others could be covered in a future administrative regulation or considered at the organizational level:
 - *At the legal level:* the limitation of access to hypothetical or merely speculative situations; the time-limit for resolving and signing the JDPIO, as well as for its validity; the definition of grounds for revocation, effects and remedies, as well as remedies in the event of cancellation; the taxpayer's power to request a JDPIO modification when arise significant variations in the assumptions considered at the time of its conclusion; the coordinated treatment of the importation of goods by tax and customs authorities (AFIP-single agency); the penalty treatment for criteria differences, in the fiscal period in which the JDPIO is reached or in the previous ones (in the event that the roll-back be incorporated); the publication of the JDPIO's relevant data -except, confidential information used in the negotiation referring to the taxpayer or third parties- on AFIP's Electronic Library; the limitation, if a JDPIO is not successfully concluded, on the partial or total use of the information provided by the taxpayer e.g. subsequent inspections or future litigation except in the case of revocation or cancellation.
 - *At the regulatory level:* the obligation to identify collateral issues at an early stage; the execution of unilateral JDPIOs, for certain sectors of activity or lines of business on which AFIP has developed sufficient audit experience, or operations are not of a significant amount or represent significant risks (export of commodities; low-risk distributors that do not involve royalty payments or marketing expenses and that obtain a limited profit margin; limited risk contract manufacturers, etc.) or for SMEs with lower reporting requirements.
 - *At the organizational level:* the superior hierarchical dissociation of the JDPIO proceedings functions and the auditing functions to achieve taxpayers' adherence to the JDPIO.

2.1.2. *Collaborative compliance systems (which may for instance include pre-filing real time audits and elevation of possible disputes within the tax authority)*

Elevation of possible disputes within the tax authority

Compulsory consultation with top-level advisory areas (dictámenes)

The operational areas *must* consult the top-level advisory areas when the issue in question is of institutional relevance (when there are generalized approaches or divergent pronouncements from different departments on the same topic, or the controversial issue is complex and/or novel and there are no technical and/or legal precedents establishing the applicable interpretation, or when the characteristics of the taxpayer or any other duly justified cause generates reasonable doubts on the viability and acceptance of the tax criterion, by the administrative or judicial contentious instances competent to resolve the appeals that may be filed by the taxpayer).

AFIP's operational areas may make consultations to the TAD and the TaSSRLAD units -among other matters- on international transactions treatment, and on DTAs clauses

application. In this latter case, the TAD, the IRD and the TaSSRLAD units will issue their opinion on the matter.

If there are no precedents, the consultation will be referred to the DTA CA. In all cases, the technical or legal criteria are set out in *dictámenes*.

Assessment: These guidelines are regulated by AFIP's internal rules and are mandatory for officials. The mandatory application of the interpretative criteria established by the highest advisory authorities of AFIP as well as by the DTA CA provides certainty in the officials' as well as taxpayers' performances. These criteria are set out in *dictámenes* of technical or legal nature. Making consultations is mandatory in cases of institutional relevance, but it is also feasible to make them in other types of cases ("...*any other duly justified cause generates reasonable doubts on the viability and acceptance of the tax criterion...*"). Opinion may be requested during an audit or an *ex officio* assessment procedure, or even in instances of a contentious-administrative or judicial dispute. Frequently, taxpayers propose to tax officials to make a consultation when the amounts at stake are material and the outcome is expected to impact several fiscal years. When making the respective consultation, the tax official, certainly, considers the taxpayer's point of view. Generally, neither the taxpayer nor his representative participates in the process. The taxpayer acknowledges the outcome when the administrative proceedings in question are heard. Consultations may deal with international issues. Note that they can also be a means of dispute resolution since criteria can be generated even when administrative or judicial disputes are involved. In the latter case, in light of several adverse judgments for AFIP. The *dictamen* is published in AFIP's Electronic Library and is accessible to every official and taxpayer. Any mention of the taxpayer's identification is suppressed.

2.1.3. *Alternative or Supplementary dispute prevention mechanisms*

Voluntary Conclusive Agreement

By the end of 2017, the VCA regime was incorporated into the TPL.⁸

Prior to the issuance of an *ex officio* resolution, AFIP may provide taxpayers with access to the VCA in specific cases except that a criminal complaint should be filed under the CTL.

A CCB made up of the officials involved in the process giving rise to the dispute, the officials at the highest legal technical level of AFIP, and the officials of the internal audit area appointed for this purpose will assess the case and issue a detailed report recommending a conciliatory solution or its rejection. The CCB is empowered to request sufficient guarantees to secure the debt in dispute.

The agreement must be approved by the FA.

If the taxpayer rejects the conciliatory solution provided, AFIP will continue with the *ex officio determination* procedure.

The VCA content is understood to be fully accepted by the parties and constitutes a sufficient basis to pursue tax enforcement.

AFIP may neither disregard the facts on which the agreement was based nor challenge them in any other jurisdiction unless it is proven that those are false.

⁸ TPL, unnumbered s. after s. 16.

The approved agreement neither establishes jurisprudence, nor is a precedent for other proceedings, but in questions of law, it will serve as a precedent for other taxpayers, if they agree to the conciliation process and to the payment of the conciliated amount under the same conditions as those decided in the precedent.

Assessment: Given that this settlement procedure has not been implemented yet, it is not possible to assess it from a practical point of view. Even though certain aspects that arise from the TPL will be assessed:

- Although the TPL does not state or prevent the taxpayer from requesting the opening of the instance, it grants AFIP the exclusive power to enable it.
- The TPL does not establish limitations on the type of taxpayers who could access the VCA, nor on the amount in dispute, but there are restrictions on the issues to be considered: (i) where it is necessary for the assessment of the determining facts and the correct application of the rule to the specific case; (ii) where it is necessary to carry out estimates, valuations or measurements of data, elements, or characteristics relevant to the tax liability that make it difficult to quantify, or (iii) in the case of circumstances which, due to their nature, novelty, complexity, or significance require a conciliatory solution.
- VCA could deal with transfer pricing issues,⁹ and could have been particularly useful in preventing disputes that took several years to be resolved (e.g. interquartile range -almost 9 years-¹⁰, composition of operating profit -7 years-¹¹) as well as for other issues of international taxation.¹²
- VCA is not applicable when a criminal complaint should be filed under the provisions of the CTL.
- As the CCB is made up of public officials that belong to AFIP's highest technical and legal level staff it is expected that they fulfil the required level of expertise to solve all the matters on cross-border transactions.
- It is not provided that the taxpayer, his advisor or an expert in the field of controversy participate in the process. Nor is it expected that the taxpayer will be notified of the progress of the procedure. Taxpayer's legal assistance should be a condition for the validity of the VCA to safeguard taxpayers' guarantees and due process.¹³
- Since the VCA can only be authorized by AFIP -a discretionary power- and in whose substantiation the taxpayer does not intervene leads to the conclusion that the VCA is more an adhesion act than an agreement and at odds with the equality of the parties to the legal-tax relationship, the right to defence and due process constitutional principles.¹⁴
- VCA publication is not foreseen, however, the TPL states that when it comes to purely legal issues, it may be used as a precedent by other taxpayers. It is inferred that the future regulation, should set for its publicity as the TPL mandates to provide a taxpayer

⁹ GOLDEMBERG, Cecilia, *Reforma Tributaria: Ley 27.430 / Humberto J. Bertazza*, 1st ed. La Ley, 2018, p. 538.

¹⁰ *Toyota Argentina S.A.* (TF 26.860-1) c/DGI, SC, 2 September 2014.

¹¹ Stiefel Argentina SA NC, VI, 18 June 2019.

¹² LIQUIN, Graciela V., *Derechos y Garantías de los Contribuyentes*, tomo II / Humberto J. Bertazza. – 1a ed. Ciudad Autónoma de Buenos Aires, La Ley, 2022. p. 1318 et seq.

¹³ TOZZINI, Gabriela I., *Comentarios acerca del proyecto de reforma tributaria*, ADLA, 1,9, 2018.

¹⁴ CORONELLO, Silvina E., *Acuerdo Conclusivo Voluntario. Una falacia de dudosa constitucionalidad*, DTE, XL, 391, Abril 2019.

with a treatment similar to that granted to others who are in the same tax condition.¹⁵ The mere identity of the purely legal issues should be sufficient for other taxpayers to apply the precedent with a high degree of certainty and even prevent them from having to resort to a conciliation proceeding.¹⁶

- If the taxpayer rejects the conciliatory solution, AFIP will continue with the *ex officio* determination procedure.
- If the taxpayer accepts the VCA, and a tax credit arises, it constitutes an executive title. The absence of remedies and grounds to challenge the *unilaterally* VCA reached by AFIP contravenes the defence in court constitutional principle.¹⁷
- The taxpayer must foresee that he may have to incur the cost of securing the disputed debt. This breaches the principle of property, since such guarantees could only be required through the Judicial Power, according to the SC doctrine.^{18 19}
- Said debt would include the principal, compensatory interest and possible fines, which could be at least 100% of the unpaid tax as exemption and reduction penalty regime does not apply.
- No deadline is established for reaching a conciliatory solution, but it is understood that it should be reached within the statute of limitations for the determination of the tax liability. A one-year suspension of the statute of limitation in progress will be added unless another greater limitation suspension cause exists.
- If the conciliatory solution is rejected, the assertions stated, and the documents provided by the taxpayer could be used in a subsequent *ex officio* determination procedure, placing the taxpayer at a clear procedural disadvantage.²⁰
- Taxpayers' rights are affected as any tax obligation, that cannot be subject to a VCA due to the absence of regulation, accrues compensatory interest, and would continue accruing it if appealed in successive instances.
- The mechanism would be especially useful for cases where the evidence to be presented during the *ex officio* determination procedure before AFIP yields results that merit an evaluation of modifications to the assumptions that AFIP may have used when issuing the "*vista*", and in the face of the risk that the taxpayer may subsequently appeal, with the possibility of obtaining a total or partial revocation of the determinative resolution.
- In practice, hybrid situations are verified in which, despite the fact that AFIP may even issue *measures to better provide* for the evidence offered and/or produced by the taxpayer to ascertain the material truth of the tax liability, these measures may not have sufficient scope to clarify the case, thus VCA would be valuable for reaching a conciliatory situation between the fiscal position and that of the taxpayer.

¹⁵ GARCÍA VIZCAINO, Catalina, (2018). Reforma de la Ley 27.430 a la Ley 11.683. IMP – Práctica Profesional, XXIII, 14.

¹⁶ LIQUIN Graciela V., op. cit.

¹⁷ YEDRO, Diuvigildo, El Novedoso Acuerdo Conclusivo Voluntario, DTE, XXXIX, 103, Febrero 2018.

¹⁸ CORONELLO, Silvina E., ob. cit.

¹⁹ AFIP c/ Intercorp S.A. s/ ejecución fiscal, SC, 15 June 2010.

²⁰ YEDRO, Diuvigildo, ob. cit.

2.1.4. Other

Compulsory application of top-level technical and legal criteria

The *technical and legal criteria referring to the interpretation of the applicable law*, arising from acts of a general nature (GRs, external notes, general instructions, etc.) as well as from advisory acts in specific cases (binding opinions, compulsory consultations, etc.), issued by the top-level advisory areas must be applied by *all tax officials in all cases submitted to their opinion or resolution*.

However, the *factual situations* debated in each specific case, as well as their evaluation and framing within the criteria, is the exclusive responsibility of the AJ or of the competent intervening official.

Interpretative doubts and/or proposal for revision of the applicable criterion

If in a specific case, there is reasonable doubt as to the application of any of the said criteria or duly grounded reasons which merit a new analysis of the problem or a review of the administrative case law, the matter in question must be referred back to the top-level advisory area which may maintain or revoke the criterion in question.

Assessment: The mandatory application of the interpretative criteria established by AFIP's highest advisory authorities as well as by the DTA CA provides certainty in the officials' as well as taxpayers' performances. Note that they can also be a means of dispute resolution since new interpretations may arise when administrative or judicial cases are being dealt with. The acts of general nature as well as those issued in specific cases are published in AFIP's Electronic Library and are accessible to every official and taxpayer. Any mention of the taxpayer's identification is suppressed.

Binding General Rules

The FA, according to Decree 618/97 is empowered to interpret the said Decree and tax law provisions, when he deems it is appropriate or requested by, among other subjects, taxpayers, importers, exporters, trade associations and any other organization representing a collective interest, as long as the pronouncement to be issued is of general interest. The request shall not suspend any decision that other AFIP officials must take in a particular case.

Interpretations are published in the OG and have the status of *Binding General Rules* if, after 15 working days from their publication, they are not appealed before the Ministry of Finance by any of the mentioned subjects. In this event, it will have such status from the following day on which the Ministry's approval or modification is published. If an appeal occurs, a prior hearing is given to the FA to express any objections to the interpretation.

Final interpretations may be rectified by the quoted tax authorities, subject to the provisions of the preceding paragraph, but such rectification shall not apply to events or situations occurring prior to the time such rectification takes effect.

Assessment: This power is seldomly used (e.g. criteria for allocating the results of secured loan swap transactions).²¹ Note that once the administrative channel has been exhausted the party harmed may file a judicial review of administrative acts remedy.

Binding Opinion

TPL provides for a “**Binding Opinion**” (BO) regime²² that enables taxpayers to request AFIP, with individual scope and in specific cases, the technical interpretation with respect to the legal and regulatory standards related to the determination of taxes or social security resources.

AFIP ruled the distinctive features of the regime.²³ We will raise those applicable for a petitioner intending to submit a BO on the CIT.

Mainly, the request will include: (i) a detailed statement about the persons and facts, legal-economic relations and legal forms or structures concerned. Supporting documentation should be provided and if it is in a foreign language the certified public translation. If BO´s are requested on preferential tax regimes, transfer pricing, unilateral downward adjustments of benefits not reflected in the financial accounts, PEs or entities channelling income, consultants are required to provide certain additional information regarding related resident or non-resident parties; (ii) the petitioner’s opinion on the technical-legal framework applicable and his concerns about the issue he/she seeks advice on.

The Deputy Director General by virtue of subject-matter competence after assessing all background information will decide the formal admissibility or rejection of the request as a BO. Later, he will be, also, in charge of resolving the BO. The FA and the TGD may exercise their *certiorari power*.

BOs on international issues: e.g. if a tax-free corporate reorganization provided in the ITL is applicable when exclusively foreign corporations are involved in such reorganization, which would be the tax treatment and who would pay the tax for the transfer of Argentinean shares²⁴ or if its effects are maintained when a company resulting from the reorganization moves its domicile abroad before or after two years from the reorganization and from when this period is computed;²⁵ if a foreign corporation, for the provision of the service of optimization of processes, facilities, use of materials and tools in warehouses of the local entity, has a PE in Argentina or, on the contrary, is subject to the tax foreign beneficiaries’ regime.²⁶

Assessment:

- The request will refer to the determination of taxes and be submitted before the taxable event occurs or within the term for its filing and allude to specific factual situations or investment projects in which the petitioner or its representative has a own and direct

²¹ GR (AFIP) 2535/2009, OG 26 January 2009.

²² TPL, unnumbered s. incorporated after s. 4°.

²³ GR 4497/2019, OG 30 May 2019.

²⁴ BO SDG TLI 40/2016.

²⁵ BO SDG TLI 17/2010.

²⁶ BO SDG TLI 11/2015.

interest. Note that the BO must deal with all the substantive aspects of the taxable event and cannot include procedural issues or issues related to tax advances as payments on account. It is an optional system for the taxpayer, so the suggestion to use this mechanism when other means are available conflicts with the principles of sound administration and respect for taxpayers' rights.²⁷

- By regulation, the taxable events or situations that are not under the scope of the BO are those: (i) governed by a DTA in force; (ii) subject to an auditing procedure of any nature duly notified to the taxpayer or to a related party with respect to the same taxes for which the request is intended to be made (tax restriction and parties restriction), or being treated in an *ex officio* determination or in a debt in process, or in an appeal filed in an administrative, contentious-administrative, or judicial venue, or in an administrative resolution or ruling of any final instance with respect to the petitioner or a related party (topic restriction and parties restriction). Such limitation applies even when the audit, determination, appeal, administrative decision or ruling refers to a fiscal year other than that involved in the request; (iii) included in the JDPIO regime.
- As the number of taxpayers carrying out international transactions has increased strongly in recent years, the possibility of requesting a BO on issues covered by a DTA should be enabled to know, in an early stage, AFIP's criterion.²⁸ The DTA CA involvement in an early stage could lead to an improvement in the regime as well.
- In practice, topics consulted are not so diversified, the most on tax-free corporate reorganizations.²⁹ In the international arena when corporate reorganizations involve foreign shareholders.
- There is no regulated term for the admissibility notification. Several taxpayers' representative entities requested that the terms for the verification of the formal aspects be computed within the 90-day term that AFIP has to issue a decision or at least the admissibility declaration term be shortened. So far, AFIP has not accepted the proposal.
- No remedy is provided for an admissibility denial. In practice, appeal is exceptional.
- AFIP must provide an answer within a term that shall not exceed ninety days, from the date of the BO formal admissibility notification. Time limits are put on hold: (i) when the petitioner is asked to produce additional documentation or information: until the term set in the respective requirement or until the taxpayer meets the request, whichever is earlier or (ii) when AFIP needs to gather information or technical opinion from other public agencies until AFIP receives the response. If AFIP does not issue a decision within 90 days, the taxpayer may file a *remedy for delay*. Deadlines were established for AFIP to comply with them in due time -especially when there are no reasons for the delay- without waiting for taxpayers to resort to a remedy for delay to exercise their rights.³⁰
- The consultation will not suspend legal terms nor will justify the taxpayer's non-compliance. Taxpayers remain subject to the actions of determination and collection of the debt, as well as of the interests and penalties. A taxpayer wanted to know if he was entitled to be registered in any tax and, if so, in which ones. In the BO response, AFIP omitted to inform him about one of them and subsequently claimed it and

²⁷ Asociación Mutual Argentina de Azul SASMA s/recurso de amparo, NTC, A, 12 October 2017.

²⁸ O'DONNELL, Agustina, Judicialización de la respuesta en el procedimiento de consulta vinculante, DTE, XXXVIII, pág. 817, Agosto, 2017.

²⁹ LORENZO, Armando, Reportaje Tributario N° 117: Dra. LAMAGRANDE, Consultor Tributario, Noviembre 2016.

³⁰ Cappelletti, Marilina, NTC, A, 19 June 2020.

applied a penalty. The penalty was annulled because the taxpayer showed interest in cancelling its tax obligations by making the BO and complying with what it had been informed therein.³¹ When the BO answer is delayed (e.g. two years and eight months), the taxpayer must file the tax returns due during this period. If the taxpayer followed a criterion different from the one sustained in the answer to the BO, he/she may rectify his/her tax returns but will still be fined. It was ruled that the taxpayer had behaved diligently by having, in due time, requested clarifications on the interpretation to be given to a new rule and AFIP's attitude qualified as reckless and lacking in good faith, as there was no reason to delay the response.³² The same approach was given with a 7-month delay.³³

- All BO responses state: "... the BO will be answered from a theoretical point of view and according to the information provided, without carrying out any verification, which will be in charge of the pertinent operative area...". A BO resolved that the activity of a taxpayer was exempt. Subsequently, AFIP verified that certain requirements to enjoy the exempt treatment were not met. The answer is of a theoretical nature and does not replace any audit procedure, and particularly those established to enjoy an exemption benefit.³⁴
- The petitioner may lodge with the Ministry of Finance a well-founded appeal against the answer issued by AFIP. It will be filed with *devolutive* effect within ten administrative working days from being notified. Appeals filed before the Ministry are exceptional. Most of the ministerial pronouncements ratified the criteria stated by AFIP. There is no time limit for the Ministry to resolve an appeal. A *remedy for delay* was granted and ordered to issue a decision within thirty days since reasonable time patterns had elapsed (one year and two months) without the Ministry issuing a resolution or stating in a well-founded manner the impossibility of resolving the claim.³⁵ The statutory, not legal, limitation on the review of the Ministry's response seems to be left behind, as the possibility of a judicial challenge was recognized in a very particular case where procedural issues were at stake.³⁶
- The BO regime has been in place for many years. The TAD is made up of officials who have been involved in this proceeding for long. They have a level of expertise and specialization required by the field they participate in. Taxpayer advisors -usually, accountants, and lawyers- have sufficient technical and general professional knowledge to be able to offer an efficient service in attending consultations.
- The BO request may be filed, among others, by legal entities, trusts, directors, managers and other legal entity representatives, trustees and others that may file tax returns for them and those submitting investment projects to be conducted in Argentina. Nothing is said about residents who pursued investment projects abroad that could generate foreign source income involving the taxable event in Argentina. A professional may formulate a BO on behalf of a taxpayer he advises if he acts as attorney-in-fact or legal representative of his client.
- Neither taxpayers nor their advisors participate in the BO proceedings.

³¹ *Velázquez, Enrique Gustavo (TF 25914-I) c/DGI*, NC, IV, 25 April 2013.

³² *ESPN Sur SRL*, NTC, D, 18 September 2008.

³³ *Tinelli, Marcelo Hugo s/recurso de apelación por denegatoria de repetición*, NTC, D, 16 February 2000.

³⁴ *Pagos Ya S.A. c/EN-AFIP-DGI* NC, I, 6 June 2023.

³⁵ *Madanes, Miguel c/EN – MH s/amparo por mora*, NC, V, 23 August 2018.

³⁶ *Righetti, Heinz*, NC, V, 7 March 2017.

- A summary of the BO issued -once it becomes final- as well as of the ministerial pronouncement are published in the AFIP Electronic Library. Any mention of the taxpayer's identification is suppressed.
- The consultation and its respective reply shall be binding exclusively on the applicant and AFIP in relation to the case strictly consulted, insofar as the circumstances, background and other data provided up to the time of the issuance of the act by which the consultation is answered have not been altered. The criterion laid down in the individual interpretative act is of mandatory application until new legal or regulation provisions enter into force, or AFIP modifies it through an administrative act of general application or until the Ministry issues a revocation or modification pronouncement in an appeal proceeding.
- The BO issued may be reviewed, modified, or annulled *ex officio* at any time by AFIP. When the respective criterion arises from a pronouncement of the Ministry issued in an appeal proceeding, the Ministry's approval must be sought in advance. The change of criterion will be effective only in relation to the taxable events that take place from the notification of the resolution that provides for its revocation or modification. Note that responses to BOs are only binding for AFIP and the consulting party³⁷ and for the taxable events occurring from the date of notification of the act which provided for its revocation or modification. However, the TPL doesn't specify how this criterion affects taxpayers who didn't consult but are in identical circumstances to the consultant's (e.g. a BO said that the treatment on payments made for advertising services rendered from abroad were of foreign source and out of ITL scope. Three years later,³⁸ AFIP reviewed its criterion and said that they should be subject to income tax withholding³⁹).
- The petitioner must strictly comply with the technical-legal criterion exposed in the answer provided by AFIP or by the Ministry if an appeal is filed. Taxpayers must file tax returns in which the tax event at issue has to be reported according to the provisions of the awarded answer and pay the respective amounts plus interest. Likewise, the criterion must be applied in all fiscal years not subject to a statute of limitations and to those expiring thereafter. Non-compliance with these obligations is an aggravating circumstance when assessing the application of fines.
- In the event of an unfavourable answer, the taxpayer may (i) comply with AFIP's criteria and pay the tax (ii) comply with AFIP's criteria, pay the tax and file a refund request, which must be filed at the administrative venue since it is a spontaneous payment and, if denied, may file an appeal for reconsideration -with a very low probability of success-, or appeal to the NTC or to the Ordinary Court and subsequent appeal stages; (iii) not comply with AFIP's criteria, with the likelihood that an audit and subsequent *ex officio* determination will be issued, in which the taxpayer's behaviour will be considered as aggravated. Subsequent appeal stages could be pursued.
- Taxpayers do not have to pay any fees to access this procedure.
- An MNE tax advisor considered that the BO regime could replace in some cases the JDPIO, although that procedure is not so inclusive as it lacks a negotiation stage that would characterize the latter.⁴⁰

³⁷ *Cámara de Comercio e Industria de La Plata (TF28550-I)* NC, 11 14 February 2013.

³⁸ BO SDG TLI 54/2018.

³⁹ BO SDG TLI 39/2021.

⁴⁰ LORENZO, Armando, Reportaje Tributario N° 175: Dr. Juan Carlos FERREIRO, op. cit.

The “pre-vista”

During an auditing procedure, preparatory and mandatory inter-area meetings (Review and Appeals, Legal and Auditing) are held to address the adjustments under development. The periodicity will depend on the relevance of the case. The aim is to unify criteria and achieve a better qualitative and quantitative result.

Once the adjustment has been determined, the inspector and his/her supervisor make it available to the taxpayer *-the pre-vista-* for a term of five working days. If the taxpayer accepts it, he/she is entitled to a reduction in the fine applicable.

As such liquidation is not an administrative determination of taxes, AFIP is empowered to determine the taxable matter that finally results. So, the rectification submitted does not entail tax stability.

AFIP rules the applicable procedure through a mandatory internal procedure rule.

If the taxpayer does not accept the fiscal position, the path is open to the *ex officio* determination procedure. If he/she regularizes his/her situation before such procedure is initiated, he/she is entitled to a fine reduction.

Assessment: (i) Taxpayers (regardless the type of taxpayer, the amount of tax at stake or the type of dispute) may prevent a dispute if the proposed adjustment is accepted; (ii) Usually, taxpayers and tax authorities dealing with cross-border issues are tax professionals with the level of expertise required by the disputed issue; (iii) The taxpayer/representative-advisor may participate in the auditing process by submitting evidence, holding interviews with the auditor and with his/her hierarchical superior; (iv) The possibility during the inspection stage to avoid entering in a dispute phase is available to any taxpayer notified of an IO; (v) If the taxpayer accepts the adjustment and rectifies his/her tax return accordingly, this submission becomes an enforceable title; (vi) The acceptance of the tax position and tax return rectification accordingly do not inhibit AFIP’s powers to determine the final taxable amount. This circumstance denotes the main weakness of this prevention mechanism.

Ex officio determination procedure

When tax returns have not been filed or when those filed are challenged, AFIP will proceed to “determine *ex officio*” the taxable amount or tax loss, and to assess the corresponding tax, either on an actual or on a presumptive tax basis depending on the available information.

An official so-called “*administrative judge*” (AJ) -an accountant or a lawyer- will lead the procedure.

- 1) it starts with the “vista” stage, with a notice to the taxpayer regarding the administrative proceedings and the objections or charges made. Within fifteen days-which may be extended, only once, for an equal period, the taxpayer can present his/her defence and offer or submit evidence supporting his/her case.
- 2) Once the evidence has been considered and if applicable produced, *measures to better provide* dictated and the hearing has been held or the term indicated has elapsed, the AJ will issue a substantiated resolution determining the tax amount, compensatory interest, and monetary correction, when applicable, and indicating the corresponding remedies available. A fine is imposed if it is considered that no tax crime has been committed.

If the AJ is an accountant, prior to the issuance of a decision, he/she must require a legal opinion to assure that all the proceedings were followed in accordance with the law and that the rules were fairly interpreted within their scope and meaning.

Such resolution will not be issued if -prior to that act- the taxpayer agrees with the charges raised; such acceptance has the effect of a tax return for the taxpayer and of an *ex officio* determination for AFIP.

If the taxpayer regularizes his situation before the issuance of the resolution, he is entitled to a fine reduction, if he does so after the issuance the reduction is smaller.

Assessment: (i) Taxpayers (regardless the type of taxpayer, the amount of tax at stake or the type of dispute) may prevent entering a dispute phase if they accept the *ex officio* determination; (ii) Usually, taxpayers and the AJ dealing with cross-border issues are tax professionals with the level of expertise required by the disputed issue; (iii) The taxpayer/representative-advisor may participate in the determination process by submitting and producing evidence, even monitoring the outcome of the *measures for better provide*. They have access to the administrative file; (iv) The taxpayer has the possibility during the proceedings and until the appealing deadline expires to accept the tax position and thus avoid a future dispute. If -prior to the issuance of the decision, the taxpayer agrees with the charges raised; such acceptance has the effect of a tax return for the taxpayer and of an *ex officio* determination for AFIP; (v) The decision, once final, only may be modified against the taxpayer: respect of those aspects not expressly considered in such decision or if new elements of judgment arise or the existence of error, omission or fraud in the exhibition or consideration of those elements that served as the basis for the decision is proven. The due procedural process principle applies to the entire process, and as part of it, the right to be heard; to offer and produce evidence; and to a reasoned decision. The harm of these taxpayer guarantees has been strongly criticized both by the NTC and higher judicial instances. In fact, over the years, judges have become increasingly inclined to declare the *ex officio* determination resolutions nullity in cases where the non-compliance of any of these guarantees by AFIP is proven.

Non-Binding Opinions

Taxpayers may request **Non-Binding Opinions** (NBOs).

Officials' response is not subject to appeal and does not produce legal effects, neither for AFIP nor for the taxpayer. The NBO submission does not suspend deadlines, nor does it justify the non-compliance of the obligations to be borne by the consultant.

Assessment: (i) There are no express restrictions as to the object of the NBO or the quality of the subject that formulates it, however, in this last aspect, it is understood that only those who have a legitimate interest would be entitled to consult by virtue of the principles enshrined in the administrative procedure law and if AFIP does not issue an opinion, the prompt dispatch of the proceedings could be requested;⁴¹ (ii) In practice, there are no NBOs dealing with complex or international issues. In the latter case, only on formal matters; (iii)

⁴¹ AGÜERO, Verónica A., La interpretación de la ley tributaria a la luz de las modificaciones introducidas por la reforma tributaria, Consultor tributario, Junio 2019.

The outcome of the NBO is not publishable; (iv) Officials' response to an NBO is not subject to appeal and does not produce legal effects, neither for AFIP nor for the consultant; (v) The NBCs are free of charge.

Practical compliance guidelines or recommendations

Broad administrative guidance, addressing the practical implications of tax laws and outlining its administrative approach, e.g. List of Jurisdictions with Low or No Taxation – General Regimes; suggestions to taxpayers when conducting a transfer pricing analysis in the COVID-19 pandemic context.⁴²

Specific and FAQ microsities

AFIP's website provides extensive information, general in nature and simply expressed, to assist taxpayers/advisors to understand and meet their obligations, among others, on international taxation.⁴³

Notes

Communications on different matters, internal and external; e.g. when DTA provisions of a certain DTA denounced by Argentina cease to be effective;⁴⁴ what information taxpayers have to report when operating with foreign independent parties, etc.⁴⁵

Forums for Dialogue (FFD)

Meetings with professional associations, business chambers and sectoral groupings to exchange proposals and/or recommendations, to consider external perceptions. The **general FFDs** are periodic meetings; the **particular FFDs** requested by the said entities or by AFIP, without a defined periodicity, e.g. transfer pricing, tax planning information regime; treatment of dividends – holding company; interest deductibility under the thin capitalization regime; integration of the foreign tax credit as a payment on account, etc. The conclusions reached are published on AFIP's website.

Assessment: AFIP speaks through different means, such as *Practical compliance guidelines, Recommendations, Specific microsities and Frequently asked questions microsite, and Notes* which are, undoubtedly useful for taxpayers, however none of these criteria manifestations entail definitive commitment on the tax authorities' side as they are not binding on the taxpayer.⁴⁶ However, they could be invoked by a taxpayer to avoid/reduce a penalty.

⁴² International Transactions. Transfer pricing and COVID-19.

⁴³ International Taxation. Transfer Pricing.

⁴⁴ External Note N° 6/2008.

⁴⁵ External Note N° 6/2005.

⁴⁶ TPL, s. 1°.

Consultation and Participative Drafting of Rules (CPDR)

AFIP ruled this procedure to disseminate certain regulatory projects, and to receive opinions related thereto.⁴⁷ This current one replaced another of similar characteristics which was used, among other topics, to release a draft of a significant reform of the administrative regulations concerning the transfer pricing regime.

Assessment: The CPDR promotes effective citizen participation, guaranteeing equality, publicity, informality and free-of-charge principles and allows AFIP to achieve better operational management and to provide services to taxpayers compatible with its duties and the public interest at stake.

2.2. International dispute prevention mechanisms

2.2.1. Interpretative clarification under article 25(3) of the OECD/UN Model Tax Conventions which may avoid multiplication of the same disputes

The interpretative MAP reached by the Argentina and Switzerland CAs to clarify the procedure applicable to the refund or partial exemption of Swiss withholding tax on dividends and interest for an Argentine tax resident was a good example of the application of this mechanism in Argentina.

Also, the agreement reached by the Chile and Argentina CAs, which established that as of 1 January 2019, the limit on withholding tax in the source state of 15%, as provided in DTA, was reduced to 12% of the gross amount of interest paid due the entry into force of the Chile and Japan DTA, which activated the most favoured nation clause.

Through an exchange of letters between the Argentina and France DTA CAs, it was agreed to give a specific interpretation to one of its clauses regarding interest paid under a loan made, guaranteed, or insured by a French state agency concerning exports.⁴⁸

2.2.2. Bilateral or multilateral Advance Pricing Agreements

The TPL provides that the DTA CA may authorize AFIP to celebrate **JDPIOs** with the CA of a co-contracting state.⁴⁹ It may be understood that it is stipulated that a regulation from AFIP is necessary to be able to actually enter into (bilateral) JDPIOs in practice.

2.2.3. Any other bilateral or multilateral tax mechanisms used to avoid disputes arising

Argentina announced that it would start participating in the ICAP in September 2021. AFIP signed two MoUs on ICAP exchange of information aspects, a key requirement for Argentina's participation in the program. The LNTCD participated in two Programs

⁴⁷ Provision (AFIP) 42/2023, OG 07 March 2023.

⁴⁸ A complete analysis on these cases can be read in the chapter by LIQUIN Graciela V., op. cit., p. 1353–1355.

⁴⁹ TPL, s. 217.

regarding two different MNEs. Both leader administrations are headquartered in Europe. One of the Programs was completed in the middle of 2023. The risk analysis performed, made up the letter of results sent to the parent company (via the lead administration). Regarding the other case, LNTCD informed the leader administration that it is already in a position to issue its letter of results as the corresponding risk analysis has been completed.

Assessment: So far AFIP participated in these two cooperative experiences in which it followed the guidelines established in the Bases of the ICAP Program to which it adhered. Up to now, in our jurisdiction, every MNE that applied for joining the Program has been accepted. For the time being, no results have been published (some statistics are expected to be published in January 2024).

2.2.4. *Other*

Joint and simultaneous audits

Many TIEAs in force provide for exchange of information upon JAs. The ITL indicates that AFIP may perform JAs with the foreign tax authorities under bilateral agreements providing for the exchange of information.⁵⁰

Some joint audit operations took place with a partner.⁵¹ Even though, in a recent document, this exchange of information form is not mentioned as one of those conducted by AFIP.⁵² No other public information is available.

There are no records of simultaneous audits.

2.2.5. *Any other dispute prevention procedure as may be applied under international investment agreements*

Argentina has signed several international investment agreements (IIAs) in the form of:

- BITs, for instance, with the United States, Canada, United Kingdom, Spain, France, Italy, People's Republic of China and Germany;
- FTAs with investment chapters (for example with People's Republic of China and Mexico), and
- other regional or multilateral agreements (for instance within MERCOSUR or ALADI).

These treaties provide mechanisms for the resolution of investment disputes through international arbitration and offer provisions related to investment protection and dispute resolution that might be of application for international tax matters among signatory jurisdictions. There was an intent to use arbitration⁵³ provided in one of the treaties, in a

⁵⁰ ITL, s. 17, para 8°.

⁵¹ Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Argentina 2012, p. 59.

⁵² Global Forum on Transparency and Exchange of Information for Tax Purposes: Argentina 2023 (Second Round, Combined Review), p. 95.

⁵³ Issue addressed to in case: *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. República Argentina* CIADI No. ARB/01/3 <https://www.italaw.com/sites/default/files/case-documents/italaw7910.pdf>

case that originally began in 2001 with an arbitration claim related to the collection of stamp taxes by certain Argentine provinces on the company's operations as in violation of the BIT. In 2003, Argentina raised objections to the jurisdiction of the Center and the competence of the Tribunal regarding the stamp taxes claim. The development of the case was suspended in 2005 by mutual agreement of the parties involved.

Part Three: Dispute phase

3.1. Purely domestic dispute resolution mechanisms

Once the taxpayer has been notified of the *ex officio* determination, he/she faces four alternatives:

- 1) Agree with the fiscal criterion and pay.
- 2) File a reconsideration appeal with AFIP.
- 3) File an appeal with the NTC.
- 4) Take no action.

These alternatives will be commented on below.

3.1.1. Administrative review

Administrative Appeal Procedure

Within option 2, the Regional Director (RD) may conduct an internal review process initiated by a formal objection or opposition presented by the taxpayer against an “*ex officio*” resolution. The taxpayer is afforded the right to challenge that resolution at the administrative level prior to initiating judicial proceedings.

The appeal should contain the facts, the references to any relevant legal provision or to an authority supporting the taxpayer's position, and the evidence produced and to be produced. It must be stated, the federal case and the petition.

Regarding the admissible evidence, the term to produce it is thirty non-extendable days.

Although procedural legislation does not grant suspensive effect to this remedy, in practice, taxpayers are not required to pay the disputed tax and the appeal is granted with such an effect. It must be filed electronically through AFIP secure website within fifteen administrative working days of notification of the challenged administrative act.

The RD must dictate the resolution within 20 days and may decide to uphold or reduce the amount of tax resulting from the decision that the taxpayer objects.

In the first case and regarding the tax component, the taxpayer must pay the involved amount and then may apply for a judicial review within a judicial claim for a refund. Regarding fines, the taxpayer can move forward to the judiciary stage with no obligation to pay the involved amount.

In the latter scenario, the RD has the power to require that the amount of tax assessed be adjusted accordingly so that if the taxpayer accepts the revised amount, the dispute is resolved.

The RD cannot increase the amount of tax assessed by taking a position that is different

from that initially taken.

This official is a different one from the one who took the action that is disputed e.g. the AJ, however, it should be noted that he/she is hierarchical superior not only to the said AJ but also to the audit official. Moreover, he/she is responsible for keeping and if possible, enhancing the amount of collected taxes according to the goals set by the administration for his/her region. These circumstances could constrain his/her decision.

3.1.2. *Judicial review*

Options 2 and 3 mentioned above are mutually exclusive.

With option 2, the taxpayer is granted the right to challenge the resolution at the administrative level prior to initiating judicial proceedings.

If the taxpayer agrees with the fiscal criterion and pays -option 1- (payment upon request) enables him/her to initiate a restitution claim either before the NFIC or before the NTC. The judgments issued by either of these courts are subject to appeal before the relevant NC.

In the case of having chosen the NTC route (option 3): if this entity issues a confirming resolution of the fiscal claim, whether the judgment is appealed or if the taxpayer, without filing any appeal, fails to prove payment of the alleged debt within fifteen days of the judgment becoming final, AFIP is authorized to issue a Debt Notice. In addition to the suspensive effect, there are numerous additional advantages that lead taxpayers to choose the NTC route over any other alternative. These include: i) the specialization of its members in tax matters; ii) the independent exercise of its functions apart from the active administration; iii) interdisciplinary integration through the joint work of lawyers and accountants; iv) the application of the principle of procedural impulse by the tax court judges; and v) the legal requirement to seek the material truth beyond the arguments presented by the parties.

After the NTC instance, and as long as the ruling is favourable to AFIP, the legislation adheres to the principle of "*solve et repete*" since although it provides the taxpayer with an option to bring the case to court, it does not grant the same suspensive effects. In the view of the SC, this rule is constitutional, if the judiciary makes available mechanisms for taxpayers to be exempted from the payment obligation when they demonstrate the impossibility of meeting it.

If the taxpayer follows option 4, after fifteen days have passed since the notification of the *ex officio* determination, the tax administration is authorized to pursue the collection of the allegedly owed amounts through the mechanism of fiscal execution.

The SC intervenes as a third instance through the extraordinary appeal in cases where the issue involved relates to the interpretation of federal legislation, which usually occurs in national tax matters. Until recently, there was also an ordinary appeal available in cases that exceeded a certain amount and in which the national government was a party, although it was declared unconstitutional by the SC, so it also ceased to be used in tax matters.

3.1.3. *Alternative or Supplementary dispute resolution mechanisms*

3.1.4. *Other*

Decision impact statements: the implications of a SC decision are published on the intranet and are mandatory for all the officials involved in administrative procedures or in contentious lawsuits in progress (e.g. how to accredit a contract for liabilities taken with a foreign entity as well as the consideration for the funds received). Moreover, it outlines the course of action to follow on the imposition of costs in unfavourable decisions to AFIP.

3.2. **International dispute resolution mechanisms**

3.2.1. *Mutual Agreement Procedure under tax treaties*

As commented above, in Argentina, the MAP process is governed (i) by DTAs, as well as (ii) by the domestic legislation that has incorporated the remedy to the TPL.

Characteristics set forth within the TPL are as follows:

- CA is the Secretary of Finance of the Ministry of Finance, which has the authority to request necessary documentation and reports at any stage of the procedure.
- Submission of a request before the expiration of the stipulated period in the respective agreement is necessary or, if not defined, within three years from the day following the first notification of an act that could result in non-compliance with the agreement.
- MAP initiation can be pursued by any fiscal resident in Argentina, or a non-resident when permitted by the agreement, when they believe measures taken by another state may lead to non-compliance with the agreement. The CA notifies the other state's CA upon receiving the request.
- Formal requirements of the request include comprehensive information about the involved parties, detailed facts, legal and economic relationships, identification of fiscal periods, and the legal framework believed to be applicable. The requester must also provide information on any related administrative or judicial actions.
- Additional information requests can be supplied within two months of the initial submission. The requester has one month to address any deficiencies, and failure to do so results in the closure of proceedings.
- CA has two months to admit or reject the case. Lack of a decision within the specified timeframe implies admission. Among the grounds for denial are the absence of controversy or late submission.
- The case might be resolved unilaterally if it pertains to incorrect application of the agreement in Argentina.
- The CA has six months to respond to communications from the other state.
- Termination of procedure occurs either by the explicit withdrawal of the taxpayer or a unilateral or bilateral decision by the CA, communicated to the requester and the CA authority of the other state.
- When a dispute is also subject to judicial proceedings, and the CA's decision favours the taxpayer, the tax authorities must adopt that decision without imposing costs.

There have been some precedents of tax issues resolved by MAPs within the framework of tax treaties in Argentina. Some examples include MAPs carried out with the relevant tax authorities of Switzerland, Spain, Chile, Brazil, Germany, Italy, France and Mexico. Generally, the dispute arose from the interpretation of treaty terms and the application of tax rates regarding dividends, interests, royalties, fiscal residence, services, real estate and pension income among others.

In fact, according to statistics published in a CIAT research⁵⁴ MAP usage has lately increased in Argentina (third place within the region, after Mexico and Brazil), especially after the introduction of the mechanism with domestic legislation.

Particularly regarding dual or multiple fiscal residence, Argentine scholars have remarked that reaching a result is truly relevant, meaning that if it cannot be resolved by applying the criteria set forth in domestic legislations or tax treaties for determining residency, it must be resolved through a MAP procedure to avoid double taxation.⁵⁵

3.2.2. *Arbitration in tax treaties*

While most of the DTAs signed by Argentina include the MAP, they have not adopted arbitration as a method of solving international tax disputes. A possible exception can be observed within the -renegotiated- tax treaty with Chile, in which the Protocol states that "In the event that Argentina changes its policy regarding arbitration as a mutual agreement procedure for dispute resolution, the competent authorities shall consult to consider negotiating an agreement for the modification of the Convention." Likewise, the protocol to the DTA with Switzerland contains a similar provision. There is still a long way to go towards the acceptance of arbitration for the resolution of tax disputes by Argentina and of course, it will depend on multiple factors. There were valuable contributions towards the acceptance of arbitration in tax matters. Among them is the proposal presented by Rodolfo Spisso,⁵⁶ who proposed that the legislation that organizes the system establishes that the awards are issued by permanent arbitral tribunals, with judges appointed for periods whose expiration operates in stages.

3.2.3. *Alternative or Supplementary dispute resolution mechanisms applied under tax treaties*

Argentina primarily relies on traditional dispute resolution mechanisms outlined in DTAs. The preference for these methods might stem from a desire for more direct control and involvement in the resolution process, as well as trust in the established procedures.

⁵⁴ <https://www.ciat.org/ciatblog-procedimientos-de-acuerdo-mutuo-como-mecanismo-de-resolucion-de-disputas-de-precios-de-transferencia-en-latinoamerica/>

⁵⁵ IRIARTE YANICELLI, A. y VERSTRAETEN, A., El procedimiento de acuerdo mutuo para resolver los conflictos fiscales internacionales, Tratado de Derecho Internacional Tributario (Asorey y García, directores, Billardi, coord.), T. II, p. 678.

⁵⁶ Acciones y Recursos en materia Tributaria, ed. LexisNexis (Capítulo XIV).

3.2.4. *Dispute resolution under EU tax law*

Not applicable.

3.2.5. *Any other dispute resolution procedure as may be applied under international investment agreements*

We referred to this topic in section 2.2.5.

Part Four: Other mechanisms and features which may trigger disputes

4.1. Mechanisms used by Tax Authorities

4.1.1. *Risk assessment*

AFIP states that it will put into practice a new tool for the “annual control plan for MNEs” that will be focused on transfer pricing matters,⁵⁷ deepen the research on new national and international tax planning structures, in accordance with the new trends, e.g. on the digital economy taxation.⁵⁸

It proposes to overcome a fragmented approach in the control of tax planning by exploring the logic of the MNEs by systematically analyzing from a comprehensive perspective the structures, instruments and mechanisms used for this kind of taxpayers.

4.1.2. *Audit manuals and other compliance training*

The AGSD developed Sectoral Handbooks (e.g., for the metalliferous mining, agriculture and livestock, phishing activities, software industry, etc.) to provide the operational areas with auditing strategies that enable them to address the tax audit procedures aimed at measuring the degree of taxpayers’ compliance with their fiscal obligations.

The economic framework of each sector, as well as all the stages of the value chain and the operating and productive particularities of each activity, are considered. The specific tax legislation applicable is contemplated.

In addition, regarding the sector risk management they collect the experiences gathered by the operational areas on evasive and elusive patterns which serve as the basis for the elaboration of the proposed strategies. These address domestic and international aspects. In the latter case, e.g., transfer pricing and DTA issues.

These Handbooks are made available on the micro site of the AGSD which also preserves historical publications among others, sectoral studies, control methodologies and technical

⁵⁷ Sourced in the CbCR and related and/or independent parties international transactions tax returns reported.

⁵⁸ AFIP Plan Estratégico 2021-2025, Revisión de Medio Término.

reports.

The AGSD and the SGLT produced a Handbook on Transfer Pricing providing the main lines of action in that field to address tax risk and the strategies for its treatment.

4.1.3. *Cross-functional consultations and progress reporting*

From the SP, the last mid-term evaluation arose: the importance of focusing on a strategic operation in LNTs area, given its relevance to AFIP's control and collection activities. In this regard, three key issues were identified: (i) the *LNT Padrón* re-setting; (ii) the definition of a strategic focus for MNEs control and, (iii) the introduction of inducing compliance factors to facilitate taxpayers' performance. It has also noted the need to stress the federal control on sectors that were not foreseen in the original SP as mining, fishing, construction and energy sectors due to the changes in the national economic environment and the relevance of the said activities. Training activities are planned to accompany the plan development. Case development is subject to periodic quality review through the *Compulsory consultation with top-level advisory areas (dictámenes)* and the *Decision impact statements* mechanisms.

4.1.4. *Other*

No comments to add.

4.2. Mechanism used by taxpayers

4.2.1. *Risk mitigation structures*

Taxpayers in Argentina often take, among others, the following measures to reduce the risks of running into disputes with tax authorities or prolonging existing ones: (i) maintain accurate and comprehensive financial records and documentation; (ii) keep detailed records of transactions, invoices, and supporting documents to substantiate tax positions; (iii) maintain transparent and open communication with tax authorities and responding promptly to any inquiries or requests for information from them; (iv) conduct regular internal audits to identify and rectify potential tax issues before they become disputes; (v) implement strong internal controls to minimize the risk of errors and non-compliance and (vi) work closely with tax professionals and legal advisors in the event of any ambiguity or complexity in tax matters.

4.2.2. *Public reporting requirements*

Since 2022 there is a mandatory reporting regime in force for international transactions and applies to all Argentine companies and local trusts except for MNEs in certain categories. Reportable transactions include cases involving PEs in Argentina, transactions resulting in double international non-taxation, mismatch between tax treatments in different jurisdictions leading to tax advantage, agreements, schemes, or plans excluding parties from CRS or FATCA reporting, business restructurings outside the scope of the CbCR,

indirect disposal of assets or rights in Argentina, concessions for economic transfer of capital, international leasing transactions treated as financial loans, payments by non-profit entities to foreign entities, obtaining tax benefits through interconnected payments or uncertain asset ownership and cross-border payments to non-resident multinational group companies. When reporting international transactions, taxpayers must provide details about involved parties, such as tax ID number, domicile, country of tax residence, and jurisdictions involved.

4.2.3. Other

Covered in section 4.2.1

4.3. Features which may trigger disputes

Many tax disputes arise in Argentina due to one or more of the following circumstances: (i) the mechanism to claim foreign tax credits is quite complex and burdensome; (ii) the system pursuant to which tax benefits arising from tax treaties are applied, is also complex since it is based on an Argentine model form that the foreign tax authority needs to fulfil and generally it is difficult for them to adapt to it, (iii) domestic legislation is many times ambiguous and unclear regarding the application of rules linked to international tax issues which usually creates uncertainty and unpredictability for taxpayers; (iv) domestic legislation is sometimes contradictory to DTAs.

Abbreviations used within this branch report:⁵⁹

- AFIP: Administración Federal de Ingresos Públicos
- AGSD: Auditing General Sub-Directorate
- AJ: Administrative Judge
- BIT: Bilateral Investment Treaty
- BO: Binding Opinion
- CbCR: Country-by-Country Report
- CIAT: Centro Interamericano de Administraciones Tributarias
- CCB: Collegiate Conciliation Body
- CPDR: Consultation and Participative Drafting of Rules
- CIT: Corporate Income Tax
- CRS: Common Reporting Standard
- CTL: Criminal Tax Law
- DTA: Double Taxation Agreement
- DTA CA: Double Taxation Agreement Competent Authority
- EGaHNWD: Economic Groups and High Net Worth Department
- FA: Federal Administrator

⁵⁹ Clarification: we define the “*pre-dispute phase*” as the one prior to the expiration time limit for lodging an appeal against the *ex officio* determination.

- FATCA: Foreign Account Tax Compliance Act
- FFD: Forums for Dialogue
- FTA: Free Trade Agreement
- GR: General Resolution by AFIP
- ICAP: International Compliance Assurance Program
- IIA: International Investment Agreement
- IO: Intervention Order
- IRD: Institutional Relations Directorate
- ITL: Income Tax Law
- JA: Joint Audit
- JDPIO: Joint Determination of Prices of International Operations
- LNTCD: Large National Taxpayers Control Directorate
- MAP: Mutual Agreement Procedure
- MNE: Multinational Enterprise
- MLI: Multilateral Convention to Implement Tax Treaty Measures to Prevent Base Erosion and Profit Shifting
- MOU: Memorandum of Understanding
- NBO: Non-Binding Opinion
- NFIC: National First Instance Court
- NC: National Chamber
- N-LNT: Non-Large National Taxpayers
- NTC: National Tax Court
- OG: Official Gazette
- OECD: Organization for Economic Co-operation and Development
- PE: Permanent Establishment
- RD: Regional Directorate
- SC: Supreme Court
- SGLT: The Subdirector General of Large Taxpayers
- SP: Strategic Plan
- TaSSRLAD: Tax and Social Security Resources Legal Advisory Directorate
- TAD: Technical Advisory Directorate
- TGD: Taxation General Directorate
- TPL: Tax Procedural Law
- VCA: Voluntary Conclusive Agreement



International Fiscal Association



9 789083 087498