



EXPENSE DEDUCTION IN
CROSS BORDER TRANSACTIONS

Recent case law

Valeria Estathio

FEDERAL TAX COURT DECISIONS

- **“Cisco System”, Sala B (April 14th 2015)**
- **“Italtel SPA Sucursal Argentina”, Sala B (April 20th 2015)**

“CISCO SYSTEM”

Intercompany expenses b/w headquarters and the Argentine subsidiary:

- **Airline tickets**
- **Rent a car**
- **Accomodation (hotel)**
- **“Entretain”**
- **Meals**
- **Communication costs**
- **Mobile Phone expenses**
- **“Other expenses”**

TAX AUTHORITY'S POSITION:

No direct link between the expenses and the generation of earnings subject to tax in head of the subsidiary



APPLICABLE INCOME TAX LAW (“ITL”)
PROVISIONS:

- **Article 80 ITL**
- **Article 87 a) ITL**
- **Article 116 ITL Regulations**

FEDERAL TAX COURT “GUIDELINES”

- **Need to incur an expense vs. aim of the expense**
- **No need to prove the success of the expense**
- **No need that the expense be directly linked with sales in Argentina**
- **Need to make an expense vs. an essential/ imperative expense**

MEANS OF EVIDENCE:

- **Expert witness reports**
- **Reports from third parties**
- **Witnesses**

ANALYSIS:

- **Intercompany expenses: services with low added value**

- **BEPS ACTION 10: Transfer Pricing Guidelines Chapter VII (arm's length principle)**

FEDERAL TAX COURT DECISION in re “Cisco System”:

Accepts the existence of the training courses in USA





Federal Tax Court:

- **Airline tickets** 
- **Accomodation** 
- **Communication costs** 
- **Mobile Phone expenses** 



FEDERAL TAX COURT DECISION in re “Cisco System”:

Federal Tax Court:

- Rent a car 
- “Entertain” 
- Meals 
- “Other expenses” 



“ITALTEL”**DTC Argentina - Italy****Expense deductions challenged by Tax Authorities:**

- **Overhead expenses**
- **Production costs**

No direct link between the expenses and the generation of earnings subject to tax in head of the branch

FEDERAL TAX COURT ANALYSIS



TREATY CONTEXT:



Article 7.3 DTC Argentina – Italy

Article 25.2 DTC Argentina – Italy

Item 4 Protocol to DTC Argentina – Italy

**Observation made by Argentina re Article 7
DTC Argentina - Italy**

FEDERAL TAX COURT ANALYSIS

APPLICABLE INCOME TAX LAW (“ITL”) PROVISIONS:

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- **Article 116 ITL Regulations**

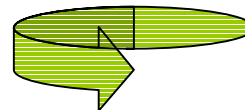
FEDERAL TAX COURT ANALYSIS

- ✓ Attribution of Profits to PE OECD Report (2008)
- ✓ Attribution of Profits to PE OECD Report (2010)

Attribution of profits and expenses to the PE

≠

Allowance of the expense deduction by the source State



Non discrimination principle

FEDERAL TAX COURT ANALYSIS

Article 7.2 OECD

INDIRECT EXPENSES:

Expense deduction limited to the real cost of the expense
(2008 version)

≠

Expense deduction limited to arm's length cost
(2010 version)

DTC Argentina – Italy



Deduction limited to real cost
incurred

FEDERAL TAX COURT ANALYSIS

PREVIOUS CASE LAW



- ✓ **First National City Bank, CNCAF (1979)**
- ✓ **Citibank N.A., CNCAF (1985)**
- ✓ **Walter Thompson Argentina S.A., TFN (1999), CNCAF (2006)**
- ✓ **Desarrollo Pesquero Marítimo del Atlántico Sur, TFN (2006)**
- ✓ **Ideas del Sur, TFN (2007)**
- ✓ **Compañía Financiera Central para la América del Sur S.A., TFN (1993)**
- ✓ **Hoteles Sheraton de Argentina SAC, TFN (2012)**

FEDERAL TAX COURT ANALYSIS

PREVIOUS CASE LAW



✓ **Decision No. 14016 (1999), Corte di Cassazione**



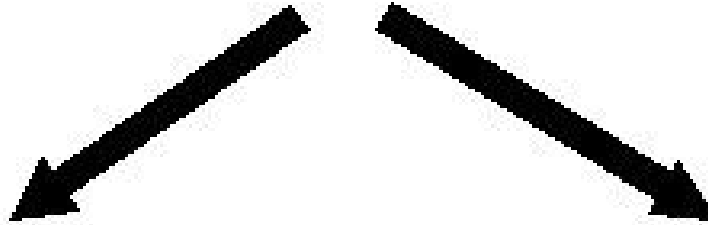
✓ **STS 7418/2008, Tribunal Superior Español**

✓ **STS 2988/2012, Tribunal Superior Español**

“ITALTEL”



Expense deductions



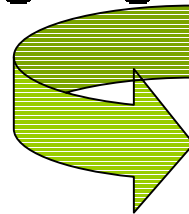
Production costs

Overhead expenses

“ITALTEL”

Production costs:

- ✓ Evidence showed the existence of transactions
- ✓ Relationship b/w the provision of equipment and the cost of acquisition of equipment from headquarters
- ✓ Accounting registration by headquarters



**Precise allocation of costs
to the PE**

“ITALTEL”

Federal Tax Court

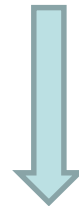


Production costs: Deduction allowed



“ITALTEL”

Overhead expenses related to administrative functions performed by the head office for the benefit of the PE (e.g. management fees, HR, institutional relationships)

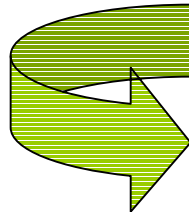



% of sales of the PE

“ITALTEL”

Overhead expenses:

- ✓ OECD only provides guidelines as to the attribution of profits and expenses to the PE
- ✓ Protocol requires direct connection b/w expenses and activity of PE (Vienna Convention)



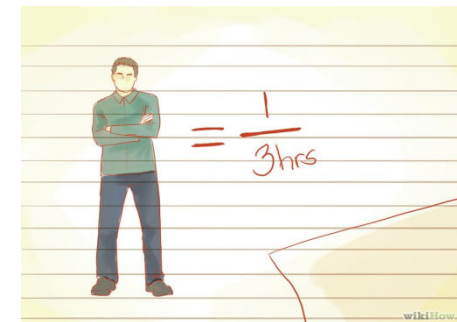
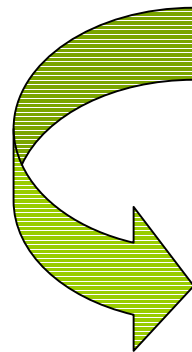
**Does not mean changing the nature of
the expense  Evidence in
accordance with Argentine domestic legislation**

“ITALTEL”

Overhead expenses = % of sales of the PE

Good for allocating expenses to the PE 

Not enough for allowing deduction in the Source State 



Advice: allocate man hours worked

“ITALTEL”

Federal Tax Court:



**Overhead expenses: Deduction not
allowed**





Thank you

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