

**MARVAL
O'FARRELL
& MAIRAL**

**DOUBLE TAX AGREEMENTS AND ANTI-ABUSE MEASURES:
THE ARGENTINE CASE**

TRANSNATIONAL TAXATION NETWORK – MAY 17, 2010

by Walter Keiniger



INTERNATIONAL TREATIES IN GENERAL

- Until 1994 international treaties and internal law had the same relevance under Argentine law:
 - Internal law could be modified by an international treaty
 - An international treaty could also be modified by internal law, which involved conflicts
- With the 1994 amendment to the Argentine Constitution, international treaties prevail over domestic law
- In 1998 the Argentine Supreme Court confirmed, in a tax-related case, that international treaties prevail over domestic law (the "Hoechst A.G." case)

THE VIENNA CONVENTION ON THE LAW OF TREATIES

- In 1969 the Vienna Convention on the Law of Treaties was enacted
- Argentina adhered to the Vienna Convention
- The U.S. did not because considers many of its provisions to constitute customary international law on the law of treaties
- Some principles:
 - “Pacta sunt servanda”
(a treaty is binding for the parties and must be performed in good faith)
 - A party cannot invoke its internal law for its failure to perform a treaty
 - A treaty must be interpreted in good faith

TAX TREATIES ENTERED INTO BY ARGENTINA

- Most of them follow, in general, the OECD Model (exception: certain treaties with Latinamerican countries)
- They include the "beneficial ownership" concept in connection with payment of dividends, interest and royalties
- Example: Article 12 of the Tax Treaty between Argentina and Belgium:

12.1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

12.2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the beneficial owner of that interest is a resident of the other Contracting State the tax so charged shall not exceed 12 per cent of the gross amount of the interest.

TAX TREATIES ENTERED INTO BY ARGENTINA (cont)

- What does "beneficial owner" mean?
 - No specific definition under Argentine internal law
 - Under international standards (OECD Model commentaries, OECD reports, case law, etc.), very broadly, it is NOT a BO:
 - An intermediary
 - An agent
 - A nominee
 - A conduit company (with very narrow or no power of disposition over the funds)
- What is the liability of the Argentine payer?
- How do the tax authorities find out?

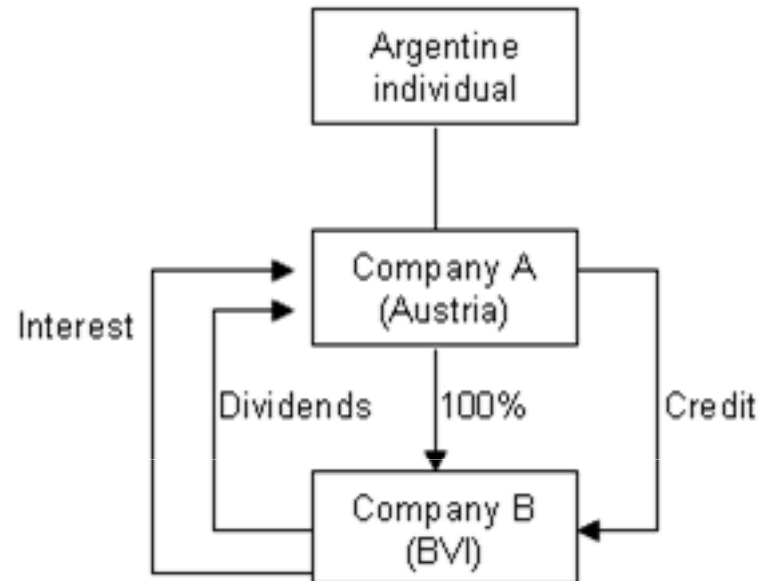
INTERNAL MEASURES

- Certificate signed by the foreign tax authority stating that:
 - The beneficiary of the payment is resident for treaty purposes of the other country, and
 - The beneficiary of the payment has no permanent establishment in Argentina
 - Treaty override?

- The "economic reality" principle:
 - Similar to the "substance over the form" principle
 - In some cases Argentine tax authorities invoke it where don't like the results of a transaction or structure
 - Different from other principles and tests, such as the "integration principle", the "business purpose test", etc.
 - Under Argentine case law the scope of this principle has been narrowed to cases of "simulation" or "fake" transactions
 - The commentaries of 2003 and 2005 to the OECD Model seem to accept the applicability of this kind of internal measures

RULING OF THE ARGENTINE GOVERNMENT (2009)

- Facts:



- Benefits under the treaty between Argentina and Austria (terminated by Argentina in 2008):
 - No Income Tax on dividends received from Company A
 - No anti-deferral rules on benefits obtained by Company A
 - No tax on Personal Assets on holding of shares in Company A

RULING OF THE ARGENTINE GOVERNMENT (2009) (cont)

- Decision: the treaty benefits were denied because the only purpose of company B was "to take advantage of the treaty"
- There were mentioned/invoked:
 - Economic reality principle
 - Substance over the form principle
 - Reports of the UN experts
 - Commentaries to OECD Model
 - Vienna Convention on the Law of Treaties
- Applicable tax treatment for the Argentine individual in the absence of the treaty:
 - Tax on Personal Assets on holding of shares in Company B
 - Income Tax on benefits obtained by Company B at the year-end regardless of distribution

THANK YOU!



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