

GENERAL ANTI AVOIDANCE RULE RECENT CASE LAW IN ARGENTINA

Leandro M. Passarella
Passarella Abogados

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Summary

- Background
- Past structures
- Case Law
- New rules

Background

- Argentina's tax treaty network
 - Double tax treaties

AUSTRALIA	BELGIUM	BOLIVIA	BRAZIL
CANADA	DENMARK	FINLAND	FRANCE
GERMANY	ITALY	NETHERLANDS	NORWAY
RUSSIA	SPAIN	SWEDEN	UNITED KINGDOM

- In Congress → Switzerland

- TIEAs

ANDORRA	ARUBA	AZERBAIJAN	BAHAMAS
BERMUDA	CAYMAN ISLANDS	CHINA (PRC)	COSTA RICA
ECUADOR	GUERNESEY	ISLE OF MAN	INDIA
ITALY	JERSEY	MACEDONIA	MONACO
OECD	SAN MARINO	URUGUAY	

- In the process of being finalized → Armenia, Curaçao, Macao and South Africa

Background

- General Anti-Avoidance Rule
 - Economic Reality Principle
 - Taxation according to underlying transaction if forms are inadequate
- Special Anti-Avoidance Rules
 - Sourcing rules for transactions with derivatives
 - Deduction of payments to foreign related parties
 - Transfer pricing
 - Thin capitalization
 - Transactions with tax haven jurisdictions

Background

- Double tax treaties generally do not contain anti-avoidance rules
- “Beneficial owner” requirement
 - No definition under Argentine law
- Commission to Review and Assess Double Tax Treaties created in 2011
 - As a result of its activities, treaties with Chile, Spain and Switzerland were terminated in 2012.

Past Structures

- ARGENTINE PERSONAL ASSETS TAX ON FOREIGN SHAREHOLDERS
 - Argentine companies required to assess and pay 0.5% tax on their net equity
 - Not applicable to shareholders from Chile, Spain and Switzerland
 - Expanded use of ETVEs by foreign investors.
 - DTTs terminated in 2012.
 - DTTs with Spain and Switzerland renegotiated.
 - Tax Authorities made adjustments to 51 MNCs for ARP 570 million approx. Consent by 82%.

Past Structures

- CHILEAN HOLDING COMPANY
 - DTT with Chile provided for source taxation only
 - Chilean holding company regime in effect since 2002
 - It requires compliance with Chilean SEC's rules
 - Holding company not subject to Chilean tax on its foreign source income
 - Argentines with Chilean holding companies were effectively exempt from Argentine tax on foreign source income

Case Law

- “Molinos Río de la Plata S.A.” (Argentine Tax Court, Aug. 14, 2013)
- Molinos had subsidiaries in Peru, Uruguay, Spain, which contributed to a Chilean holding company (“Molinos Chile”).
- Through Molinos Chile, Molinos also controlled its subsidiaries in Spain, Italy and Switzerland, as well as other parts of the world.
- Tax authorities audited the structure twice, and came up with an adjustment after the second audit.

Case Law

- Tax Court confirmed adjustment.
- Arguments:
 - Tax planning structure would have been OK if some tax had been paid
 - It is “*utterly unacceptable that the result be no taxation at all.*”
 - Chilean holding company regime implied a treaty override by Chile.
 - The general anti-avoidance rule applies.
 - This was a treaty shopping structure.
- Appeal is pending.

New Rules

- Before “Molinos” was decided, Regulations under the Argentine income tax law were amended to change the definition of “tax haven jurisdiction”.
 - Before May 30, 2013: Black list of tax haven jurisdictions
 - After May 30, 2013: White list of cooperating jurisdictions
 - It includes several jurisdictions with tax-preferred regimes
- Then?

White List Jurisdictions

Albania	Andorra	Angola	Anguila	Armenia
Aruba	Australia	Austria	Azerbaijan	Bahamas
Belgium	Belize	Bermuda	Bolivia	Brazil
British Virgin Islands	Canada	Cayman Islands	Chile	China
Colombia	Costa Rica	Croatia	Cuba	Curaçao
Czech Republic	Denmark	Dominican Republic	Ecuador	El Salvador
Estonia	Faroe	Finland	France	Georgia
Germany	Ghana	Greece	Greenland	Guatemala
Guernsey	Haiti	Honduras	Hungary	Iceland
India	Indonesia	Ireland	Isle of Man	Israel
Italy	Jamaica	Japan	Jersey	Kazakhstan
Kenya	Kuwait	Latvia	Liechtenstein	Lithuania
Luxembourg	Macao	Macedonia	Malta	Marruecos
Mauritius	Mexico	Moldavia	Monaco	Montenegro
Montserrat	Netherlands	New Zeland	Nicaragua	Nigeria
Norway	Panama	Paraguay	Peru	Philippines
Poland	Portugal	Qatar	Romania	Russia
Saint Maarten	San Marino	Saudi Arabia	Singapore	Slovak
Slovenia	South Africa	South Korea	Spain	Sweden
Switzerland	Tunisia	Turks and Caicos	Turkmenistan	Turkey
Ukraine	United Arab Emirates	United Kingdom	United States	Uruguay
Vatican	Venezuela	Vietnam		