Tax reform in Argentina: Transfer pricing implications

January 31, 2018

In brief

On December 27, 2017, the Argentine Congress passed comprehensive tax reform, which became effective as of January 1, 2018. This reform contains important changes related to transfer pricing, including:

- Introduction of new requirements related to transactions of import and export of goods carried out through international intermediaries (intermediary substance test).
- Introduction of substantial changes for the valuation of the exports of commodities carried out through a foreign intermediary, and alignment of the documentation requirements of such transactions with the OECD standards recently developed under Action 10 of the BEPS initiative.
- Introduction of a detailed definition of Permanent Establishment (PE), broader than the definition by the OECD Model Tax Convention Guidelines, and introduction of rules aiming to capture profits generated by the PE.
- Introduction of a Regime named ‘Determinaciones Conjuntas de Precios de Operaciones Internacionales’ (similar to an Advance Pricing Arrangement [APA] program) and regulations that are expected to make the Mutual Agreement Procedures (MAPs) effective.
- Tax havens: due to the modifications introduced in the legislation, transfer pricing rules also apply to transactions carried out with third parties located in (1) jurisdictions considered non-cooperative for tax purposes, and/or (2) jurisdictions of low or nil taxation.
- Introduction of materiality thresholds for transfer pricing documentation purposes.
- Update of the amounts of the penalties for not complying with transfer pricing obligations and introduction of penalties in the Procedural Tax Law for not complying with Country-by-Country (CbC) Reporting obligations, including CbC Reporting notifications.
- Restriction on interest deductions broader than those of Action 4 of the BEPS initiative.

In detail

Foreign intermediaries – substance test

Argentine taxpayers that carry out import and export transactions of goods involving international intermediaries (triangulation) will have to demonstrate that the remuneration obtained by the foreign intermediary is consistent with the functions, assets, and risks involved in the transaction. Specific elements of proof are yet to be determined by the regulation.

Such documentation requirement will apply when (a) the international intermediary
is a related party of the Argentine taxpayer, or (b) the foreign importer/exporter is a related party of the Argentine taxpayer.

**Substantial changes for the valuation of the exports of commodities**

The transfer pricing rules for the valuation of the exports of commodities carried out through a foreign intermediary have been modified to consider the standards recently introduced to the OECD Transfer Pricing Guidelines as a result of the work carried out by Action 10 of the BEPS initiative.

Former rules required a comparison of the quoted price of the goods exported at the time of shipment with the price agreed upon between the parties, and applying the higher of the two prices to assess the transaction for tax purposes, provided that the taxpayer could not support with reliable information that the international intermediary met some specific requirements.

According to the new rules, in addition to complying with the ‘substance test’ described in the previous section, the taxpayer will have to register with the local tax authorities the agreements related to such export transactions, including relevant related information such as comparability differences with the quoted price at the time of delivery of the goods, or the elements considered for the determination of premiums or discounts, so as to allow a proper application of the CUP method. Only failure to comply with such registration will lead to the determination of the taxable income by reference to the quoted price at the time of the shipment date, after considering the comparability adjustments that may correspond.

**Permanent Establishments**

After the reform, the Income Tax Law (ITL) includes a detailed PE definition for foreign parties undertaking activities in Argentina. This definition follows in general the guidelines from the OECD Model Tax Convention on Income and Capital with certain of the amendments proposed by BEPS Action 7. Nevertheless, some deviations go beyond the OECD threshold.

The existence of a warehouse of goods or merchandises through which such goods are regularly delivered on behalf of a foreign subject not only is excluded from the exception of a deemed PE if such activities are of an ancillary or preparatory nature but are specifically mentioned as a PE presence.

On the other hand, there is a positive definition for dependent agent, which takes place where the local subject assumes risks that correspond to a foreign subject, or if it receives a remuneration independently of the outcome of the activities carried out, among other assumptions.

In addition, a rule was introduced aimed at capturing the profits generated by the enterprise or an MNE group by the activities carried out by a local PE. This rule establishes that part of the income generated by the activities carried out by the PE must be assigned to the PE in accordance to its contribution, by applying the transfer pricing methods. Nevertheless, the rule lacks guidance on how to hypothesize the PE as a separate entity. Regulations may bring clarifications to this topic.

**DCPOIs and MAPs**

The tax reform introduced a Regime named ‘Determinaciones Conjuntas de Precios de Operaciones Internacionales’ (DCPOI) that would be similar to an APA program.

In order to initiate a DCPOI negotiation, the taxpayer must file a request before the beginning of the corresponding fiscal year, detailing the intercompany transactions that would be covered by the agreement and a proposal of the arm’s-length prices for such transactions or line of businesses, among other aspects.

This Regime will be regulated by tax administration authority (AFIP). Such regulation would define, among other aspects, the sectors or lines of businesses that would be enabled to apply for a DCPOI.

In addition, the tax reform has introduced rules to the Tax Procedure Law, to regulate MAP established in the tax treaties for the avoidance of double taxation. Such regulations are expected to make the MAPs effective.

**Low or nil tax jurisdictions**

The tax reform has broadened the transactions with unrelated parties subject to transfer pricing documentation rules based on the location of the foreign counterparty. In particular, it establishes that transactions with counterparties located in countries considered non-cooperative for tax purposes or in low or nil tax jurisdictions will not be considered as between independent parties.

Countries considered non-cooperative for tax purposes are defined as those jurisdictions that do not have a tax information exchange agreement or a tax treaty with Argentina, or despite having this type of agreement, have failed to exchange information. Low or nil tax jurisdictions are those countries or tax regimes that are determined to have a maximum corporate income tax rate lower than 60 percent of the Argentine corporate income tax rate.
**Compliance: Annual transfer pricing forms and materiality threshold**

The modification to the ITL introduced annual transfer pricing forms to be submitted by taxpayers to the tax authorities (subject to administrative regulation) and to delegates of the AFIP. Modifications to the ITL also include the issuance of regulations establishing a minimum threshold of revenue and amount of intercompany transactions for transfer pricing compliance.

**Penalties**

The tax reform has created a new regime that will automatically update on annual basis the amounts of the penalties for non-compliance, among other monetary amounts established in the national tax regulations. In addition, it has established variable penalties for failure to comply with the obligations related to the notification and filing of the CbC Report.

**Deductibility of interest**

The previous thin capitalization 2:1 debt-to-equity ratio has been replaced by the BEPS-based rule, capping the deduction on interest expense with local and foreign related parties to 30% of the taxpayer’s taxable income before interest, foreign exchange losses, and depreciation. An extension of the rule is that not only interest expenses must be taken into account for the ratio calculation, but also the foreign exchange losses generated by the loan. Taxpayers will be entitled to carry forward (i) excess non-deductible interest for five years and (ii) unutilized deduction capacity for three years. Interest revenue from related parties may be offset for calculation purposes. **Note:** The Law allows the ruling to establish the inapplicability of this limit depending on the activity of the taxpayer.

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**The takeaway**

The amendments introduced by the tax reform, although with some local deviations, tend to align Argentine transfer pricing rules to international (OECD) standards. The tax reform particularly focuses on transactions that involve foreign intermediaries/triangulation schemes; however, it provides taxpayers with instruments tending to reduce uncertainty and controversy.
Let’s talk

For a deeper discussion of how this issue might affect your business, please contact:

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