

# **International Bar Association Annual Conference 2023**

## **Recent Developments in International Taxation**

### **Argentina**

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## **Executive summary**

In the past year, no major tax reforms took place in Argentina and there was little movement in the area of international tax law. The most significant international tax developments between June 2022 and June 2023 are mainly the following:

- the Argentine Executive Power updated the list of “non-cooperative jurisdictions” included in the income tax regulations;
- the mandatory disclosure regime for taxpayers and tax advisors involving domestic and international tax arrangements, established by the Argentine Tax Authority in 2020, was declared unconstitutional by Federal Courts and was subsequently revoked by the Argentine Tax Authority;
- the Argentine Tax Authority established the Supplementary Information Regime for International Transactions (RICOI), a new simplified mandatory disclosure regime applicable to large corporate taxpayers in regard to certain international tax arrangements.
- Argentina and the United States of America signed an Inter-Governmental Agreement Model 1 (IGA1) within the framework of the Foreign Account Tax Compliance Act (FATCA).

### **A. Update of the list of “non-cooperative jurisdictions”**

Under Argentina’s latest major tax reform, which took place in December 2017, the concept of “non-cooperative jurisdictions” was incorporated in the Income Tax Law. The main adverse effect of being incorporated in a jurisdiction characterized as non-cooperative relates to the taxation of capital gains, since the law foresees certain negative consequences for investments made from those jurisdictions (such as higher tax rates or the non-application of the general exemptions on the sale of listed shares and public bonds). Moreover, Argentine taxpayers dealing with counterparties located in a non-cooperative jurisdiction are required to comply with transfer pricing filings in relation to those transactions, even if parties are non-related; and can deduct expenses only on a cash basis when payments are made to entities located therein.

Article 19 of the Argentine Income Tax Law defines a “non-cooperative jurisdiction” as any jurisdiction that:

1. has not signed an information exchange agreement with Argentina regarding tax matters;
2. has not signed a Convention to Avoid Double Taxation with Argentina, including a broad clause of exchange of tax information; or
3. has signed either an agreement or convention but does not effectively comply with its obligation of sharing information with Argentina.

Pursuant to the law, the Argentine Executive Power is responsible for issuing the list of non-cooperative jurisdictions.

In 2019, the Executive Branch issued Decree No. 862/2019 by which it amended the Regulatory Decree of the Income Tax Law, incorporating the first list of non-cooperative jurisdictions in Section 24 of the Regulatory Decree. The list included 95 jurisdictions, most of which have not signed or ratified the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and its Amending Protocol, developed by the OECD and the Council of Europe. The list did not include the United States of America, even though such country never ratified the amended version of the Convention, but it did include certain jurisdictions with relevance to Argentina due to their geographic position or commercial relationships, as Bolivia and Paraguay.

On January 27, 2023, the Argentine Executive Branch issued Decree No. 48/2023 amending Section 24 of the Regulatory Decree of the Income Tax Law and updating the list of non-cooperative jurisdictions. The amended list was reduced to 80 jurisdictions. Paraguay was eliminated from the list since such country ratified the amended Convention in 2021. Bolivia is still regarded as a non-cooperative jurisdiction.

Both the original list and the amended list, which is applicable for tax periods initiated on or after January 27, 2023, can be verified in the following link: <https://www.afip.gob.ar/jurisdiccionesCooperantes/no-cooperantes/periodos.asp>

## **B. Revocation of the Mandatory Disclosure Regime for taxpayers and tax advisors involving domestic and international tax arrangements after it was declared unconstitutional in court**

In October 2020, the Argentine Tax Authority issued General Resolution No. 4838/2020 (the Resolution No. 4838), which established a Mandatory Disclosure Regime for Domestic and International Tax Planning Arrangements for those Argentine taxpayers and tax advisors who participated in their implementation.

Although inspired in BEPS Action 12 and European DAC 6, the regime was subject to a strong criticism since it was not limited to disclose any potentially “aggressive” or “abusive” tax planning, but a great number of domestic and international transactions that may or may not result in a tax advantage.<sup>1</sup>

Moreover, even though the Resolution No. 4838 allowed tax advisors to refrain from reporting the relevant arrangements on the grounds of professional confidentiality, they had to serve a notice to their clients through the Tax Authority’s website, informing such circumstance. This also generated a great deal of controversy since the mere serving of such notice implied, *per se*, a breach of the confidentiality duty.

In December 2020, the Argentine Federation of Bar Associations filed a class action against the Argentine Tax Authority pursuing a declaration of the unconstitutionality and unenforceability of the Resolution No. 4838. As a basis for its claim, the Federation argued that the Resolution No. 4838 constituted an administrative order of regulatory nature and general scope, and, as such, it had been issued in breach of the rule of law. Additionally, it contended that the Resolution No. 4838 violated the attorney-client privilege. Together with the lawsuit, the Federation requested the granting of an injunction to prevent the Argentine Tax Authority from demanding attorneys to comply with the regime until a final non-appealable judgement was handed down.

On May 4, 2021, the Federal Trial Court in Administrative Matters No. 7 granted the injunction. In its ruling, the judge sustained that there were enough hints to consider, on a preliminary basis, that the Resolution No. 4838 was presumably unconstitutional as it was issued in breach of the constitutional principles of rule of law: reasonability, proportionality, legal certainty, privacy, legal and constitutional supremacy, and the attorney-client privilege, among others.<sup>2</sup> The Court's decision –which was later on upheld by the Federal Court of Appeals<sup>3</sup>– applied to all attorneys across the country.

In the same fashion, Professional Councils of Economic Sciences of several Argentine provinces filed similar actions aiming at protecting the interest of their members that were involved in the implementation of the tax arrangements reportable under the regime (i.e., public accountants and other professionals in economic sciences).

On April 22, 2022, in the case styled "*Consejo Profesional de Ciencias Económicas de la Provincia de Buenos Aires v AFIP on Motion to Strike Administrative Act*", the Federal District Court of La Plata declared that the Resolution No. 4838 was unconstitutional as it imposed a public burden on the professionals that can only be created by a law enacted by the Argentine Congress (Section 17 of the Constitution) and not through a regulation issued by a Governmental Agency.

The effects of this last ruling encompassed only CPAs practitioners in the Province of Buenos Aires who are registered with the Professional Council of Economic Sciences of such jurisdiction. Nevertheless, after its publication, the Argentine Tax Authority decided to suspend the regime application in general terms.<sup>4</sup>

Finally, on December 27, 2022, General Resolution No. 5306/2022 (the Resolution No. 5306) was published in the Official Gazette, whereby the Argentine Tax Authority revoked the Resolution No. 4838 and the "Mandatory Disclosure Regime for Domestic and International Tax Planning Arrangements" was replaced by the "Supplementary Information Regime for International Transactions".

### **C. Implementing RICOI, a new simplified mandatory disclosure regime for large corporate taxpayers**

As mentioned in Section b) above, by means of the Resolution No. 5306, on December 27, 2022, the Argentine Tax Authority established the RICOI.

The RICOI must be complied with by large companies,<sup>5</sup> non-profit entities, trusts, mutual funds, and permanent establishments incorporated or located in Argentina, for the following transactions:

- Transactions performed with legal entities, permanent establishments, trusts, or similar structures incorporated, domiciled, or located abroad, as long as they are related parties.
- Transactions performed by their permanent establishments located abroad with other related permanent establishments also located abroad.

- Transactions performed with parties domiciled, incorporated, or located in non-cooperative jurisdictions or nil or low-tax jurisdictions,<sup>6</sup> carried out directly or through a permanent establishment located abroad, regardless of whether they are related parties or not.

The international transactions to be reported are enumerated in an exhaustive list established by the Resolution No. 5306, including cases in which a permanent establishment in Argentina could be deemed to exist, transactions resulting in an international double non-taxation, arrangements implemented with the purpose of not complying with international reporting obligations; indirect sale of Argentine assets, among others.<sup>7</sup>

Reporting entities must disclose all transactions taking place on an annual basis up to the due date for filing the Income Tax return for the fiscal year to which they correspond. For each transaction, they must submit the type of international transaction being reported, and identify the parties involved in the transaction.

Taxpayers that do not comply with the RICOI may be subject to the fines set out in the Argentine Tax Procedural Law (Law No. 11,683).

Finally, complying with the reporting obligation does not lead to acceptance or rejection by the Argentine Tax Authority on the grounds of the legitimacy of the transaction or the applicable tax treatment.

#### **D. Execution of the IGA1 between the Argentine Government and the U.S. Government**

For the past few years, Argentina has been an active participant in the progress of the exchange of international tax information.

On November 13, 2017, the Tax Information Exchange Agreement (TIEA) between Argentina and the United States of America entered into force, authorizing the exchange of information for tax purposes as from 2018. However, such TIEA required certain conditions for the effective exchange of information and was limited to specific cases. Thus, it did not provide for a general and automatic exchange of information.

Aiming at concluding an agreement to improve international tax compliance and to implement the “Foreign Account Tax Compliance Act” (FATCA), based on domestic reporting and reciprocal automatic exchange pursuant to the TIEA, on December 5, 2022, both Governments signed an Intergovernmental Agreement Model 1 (IGA1).

Under the IGA1, the Argentine Tax Authority shall receive from the IRS certain information on accounts opened in financial institutions in the United States belonging to individuals that are Argentine residents.<sup>8</sup> The IRS shall receive from the Argentine Tax Authority information related to accounts opened in Argentine financial entities belonging to U.S. residents (either individuals or legal persons).

The IGA1 entered into force on January 1, 2023, and it is expected that the first effective exchange takes place in September 2024, in regard to the fiscal period 2023.

In a decision that is recognized as a direct consequence of the subscription of the referred IGA1, on June 6, 2023, the Argentine Government submitted a bill to Congress in order to issue a tax amnesty regime, upon which Argentine residents would be allowed

to voluntarily disclose and regularize their tax situation before the tax authorities obtain the information through the exchange.

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<sup>1</sup> Arrangements that had to be disclosed under the Mandatory Disclosure Regime for Domestic and International Tax Planning Arrangements established by Resolution No. 4838 were:

- Domestic arrangements: Any agreement, scheme, plan, or action carried out within Argentina through which a taxpayer obtains fiscal advantages or other tax benefits with respect federal taxes or reporting regimes.
- International arrangements: Any agreement, scheme, plan, or action through which a taxpayer obtains tax advantages or other tax benefits in Argentina and/or any other jurisdiction. The Resolution established a non-exhaustive list of scenarios that constitute disclosable international tax arrangements:
  - The use of legal entities for obtaining benefits established in conventions to avoid double taxation.
  - The adoption of strategies to avoid triggering the status of “permanent establishment”.
  - Arrangements resulting in double international non-taxation.
  - Arrangements resulting in allocation of profits in foreign jurisdictions.
  - Intents to avoid compliance with any reporting regime.
  - Transactions involving non-cooperating jurisdictions or a low or nil-tax jurisdictions.
  - The use of a mismatch between two or more jurisdictions regarding the tax treatment of an entity or agreement that results in a tax advantage or other tax benefits.
  - A foreign individual or entity holding double tax residency.
  - A taxpayer who is the beneficiary, grantor, or trustee (or has similar characteristics as those taxpayers) of non-Argentine trusts, non-Argentine private foundations, or any other non-Argentine similar structure.
  - Any other arrangement specifically listed on the Tax Authority’s website.

<sup>2</sup> Case “*Federación Argentina de Colegios de Abogados c/ AFIP - DGI s/ Proceso De Conocimiento*”, ruling issued by the Federal Trial Court in Administrative Matters No. 7 dated May 4, 2021.

<sup>3</sup> Case “*Federación Argentina de Colegios de Abogados c/ AFIP - DGI s/ Proceso De Conocimiento*”, ruling issued by the Federal Court of Appeals in Administrative Matters (Room V) dated May 24, 2022.

<sup>4</sup> On September 1, 2022, the Argentine Tax Authority issued General Resolution No. 5254/2022, suspending the regime implemented by Resolution No. 4838 for sixty (60) calendar days beginning on 1 September 2022. Moreover, on November 1, 2022, the Argentine Tax Authority issued General Resolution No. 5278/2022 extending the suspension of the regime for an additional 60 calendar days-term, beginning on 31 October 2022.

<sup>5</sup> Entities categorized as Micro, Small or Medium sized companies are exempt from complying with the RICOI.

<sup>6</sup> Article 20 of the Argentine Income Tax Law defines “nil or low-tax jurisdiction” as any country, jurisdiction dominium, territory, associated state, or special tax regime in which the maximum corporate income tax rate is lower than 60% of the minimum corporate income tax rate provided in the law for local entities (25 %). Therefore, under this definition, a nil or low-tax jurisdiction is country, jurisdiction dominium, territory, associated state, or special tax regime in which the maximum corporate income tax rate is lower than 15%. Argentine income tax rules did not contemplate the enactment of a list of nil or low-tax jurisdictions (in opposition to the case of non-cooperative jurisdictions), but, in June 2022, the Argentine Tax Authority issued a guiding, exemplificative and non-exhaustive list on their website (<https://www.afip.gob.ar/fiscalidad-internacional/jurisdicciones-no-cooperantes/jurisdicciones-baja-nula-tributacion/documentos/JBNT.pdf>). This list does not contemplate special tax regimes.

<sup>7</sup> Section 3 of the Resolution No. 5306 establishes the international transactions to be reported as follows:

- ✓ Cases in which a permanent establishment of a foreign enterprise in Argentina may be deemed to exist.
- ✓ Transactions that result in double international non-taxation.
- ✓ Transfer of benefits to other jurisdictions arising from the use of asymmetries in regulations of two or more jurisdictions on the tax treatment and/or legal status of an entity, agreement, or financial instrument.
- ✓ Agreements, schemes or plans with the purpose of excluding one or more parties from the obligation to report or be reported under the Common Reporting Standard (CRS) implemented by the OECD or The Foreign Account Tax Compliance Act (FATCA) of the United States of America.
- ✓ Business restructurings that have the effect of falling outside the scope of the international Country-by-Country Reporting regime.
- ✓ Indirect sales of Argentine assets by non-Argentine residents, in accordance with Section 15 of the Argentine Income Tax Law.
- ✓ Concessions for the exploitation of any activity involving a transfer of capital.
- ✓ International leasing transactions treated as a financial loan.
- ✓ Payments made by a nonprofit entity to a foreign person.

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- ✓ When a tax advantage is obtained as a consequence of one of the following:
    - Payments or transactions interconnected in a way that such payment totally or partially returns to the entity that made them or to its partners, shareholders, or related parties.
    - International transactions involving one or more entities that are not subject to tax in the jurisdiction of incorporation and their income is directly attributable to their shareholders or partners.
    - Mechanisms that generate uncertainty with respect to the ownership of an asset resulting in taxpayers located in different jurisdictions deducting the tax depreciation of the same asset or alleging the existence of a double taxation in its regard.
    - Deductible cross-border payments made to parties of the same multinational group that are not tax residents in any jurisdiction.

<sup>8</sup> In particular, it is expected that the IRS will collect and send to the Argentine Tax Authority:

- 1) the name, address, and Argentine tax ID of any individual that is an Argentine tax resident and is a holder of an account opened in U.S. financial institutions;
- 2) the account number;
- 3) the name and identifying number of the Reporting U.S. Financial Institution;
- 4) the gross amount of interest paid on the account (at least USD 10 in the year);
- 5) the gross amount of U.S. source dividends paid or credited to the account;
- 6) the gross amount of other U.S. source income paid or credited to the account. The account balance as of the end of each relevant calendar year or other appropriate reporting period shall not be disclosed by the IRS.