

# Global Tax Briefing

Vol. 11, Issue No. 10 December 18, 2009

## INSIDE

### INSIDE

- 1 Chile
- 4 Mexico
- 6 Colombia
- 8 Brazil
- 10 Venezuela
- 14 Argentina
- 16 Dominican Republic
- 17 Costa Rica
- 18 Ecuador
- 21 Guatemala
- 22 Bolivia
- 23 Nicaragua

This month's issue of Global Tax Briefing is written entirely by members of the Latin American Tax and Legal Network (LATAXNET). LATAXNET, headed up by Miguel Valdés, of Valdés, Machado & Associates, LLC., is a network of top tax and legal specialists all over Latin America, Puerto Rico, the Caribbean and the United States. See back cover for more information about LATAXNET.

## Chile

### International Tax Updates in Chile

*By Jorge Espinosa Sepulveda, Lataxnet Abogados y Consultores Limitada, Santiago, Chile*

#### Effective Beneficiary and Control Regulations

Circular No. 57, dated October 16, 2009, explains the meaning and scope of the expression "effective beneficiary," and the application of control regulations that are included in the Conventions for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains (CADT) that Chile has entered into and are currently in force.

The term effective beneficiary has not been defined in the CADTs. Article 3 paragraph 2 of the same states, in relation with terms not defined therein, the following:

[a]s regards the application of this Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which this Convention applies, any meaning

under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

The tax laws do not provide for a definition of the term effective beneficiary. However, some pronouncements of the Internal Revenue Service have mentioned this term. For example, Circular No. 16, dated February 26, 2009, states that

[t]he effective beneficiary must be the investor itself. For these purposes, the requirement set forth in letter b) above means that revenues derived from the investments that are made in accordance with the provisions set forth in article 18 — of the Income Tax Law must become part of the equity of the appropriate institutional investor or in lieu of its subsidiaries or branches and not to the equity of third parties whether or not related.

Such pronouncements also apply to these specific cases that are dealt with herein.

Likewise, with regard to the term effective beneficiary, the CADTs currently in force follow the Organization for Economic Co-Operation and Development Model Convention for the Avoidance of Double Taxation (OECD Model). Therefore, the commentaries made by the OECD that clarify the use of such term based on the objective pursued by the CADTs may be used as a complementary interpretation tool as provided in article 32 of the Vienna Convention.

In relation to the limit regulations for passive income, the OECD Model commentaries describe a special regulation intended to prevent taxpayers from applying article 10 (dividends), article 11 (interest), article 12 (royalties), and article 21 (other income) of the OECD Model Convention if the main purpose or one of the main purposes of the taxpayers concerned with the creation or assignment of transactions is to take advantage of these articles by means of that creation or assignment.

### **Application of the Chile - Argentina International Convention with respect to VAT and Specific Tax on Diesel Oil set forth in Law Number 18.502.**

Ruling No. 2.657, dated August 27, 2009, deals with the application of the Chile - Argentina Convention for the Avoidance of Double International Taxation with respect

to the Value Added Tax and Specific Tax on Oil, since the referred treaty only applies to income taxes. Further, as provided in Chapter I, "Subject Matter of the Convention and General Definitions," the taxes in this convention in the Republic of Chile are: the taxes set forth in the income tax law and real estate tax. Therefore, the provisions of the referred treaty only apply to these taxes.

In connection with the income tax, and pursuant to the provisions set forth in article 8 of the Chile - Argentina convention, the parent company with domicile in Argentina must be taxed in that country with regard to the income earned in Chile. Therefore, no income taxes should be imposed in Chile upon the branch remitting foreign currency to its parent. This Ruling also deals with domicile in terms of applying the Chile - Argentina convention, that is to say, cargo or passenger transport companies are only taxed in the country of their domicile. This relief also applies to the income derived from transport activities earned by the branches or permanent establishments thereof in the other State. The permanent establishments these companies may have in Chile—organized pursuant to the Chilean laws—are not taxed in Chile, for which reason they are not obliged to make monthly provisional payments, nor file the annual

income tax return with respect to the gains under the provisions of article 8.

Decree Law No. 825 of 1974 deals with the VAT exemption specifically in article 12(E), according to which certain services and compensations that are therein enumerated are exempt from the Value Added Tax. In its turn, article 12(E)(2) specifies the exemptions as follows: sea, river, air and land freights from overseas to Chile and vice versa and

## **Global Tax Briefing**

### **Senior Editor**

Jerome Nestor

### **Editor**

Kristina Kulle

### **Production**

Mohd Haffiz Mansor

### **Designer**

Kathie Luzod

CCH, a Wolters Kluwer business, has been a leader in topical law reporting since 1913. Today, CCH offers more than 300 print, on-line, and CD-ROM tax and business products across the globe from its offices in the United States, Canada, Europe, Australia, New Zealand and Asia. CCH also offers an extensive tax research library on the internet, at [www.CCHGroup.com](http://www.CCHGroup.com).

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is distributed with the understanding that the publisher is not engaged in rendering legal, accounting or other professional service. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

CCH welcomes articles submitted by outside authors for possible publication. Manuscripts and inquiries may be directed to the Editor, Global Tax Briefing, International Taxation, CCH Incorporated, 2700 Lake Cook Road, Riverwoods, IL 60015.

international tickets. Therefore, they are exempt from the Value Added Tax under the above provision. For freights inside Chile, taxpayers are not under the exemption set forth in article 13 of Decree Law No. 825 for this exemption only applies to gains derived from the transport of passengers.

### **Meaning of the “Residence” Pursuant to Article 8(8) of the Tax Code**

Ruling number 2.757, dated September 3, 2009, deals with the term “residence” in article 8(8) of the tax code, which provides the following definition: “a resident shall be any individual that stays in Chile for a period of six months within any calendar year or a total period over six months within two consecutive fiscal years.” In turn, article 2(7) of the income tax law (ITL) defines the term “calendar year” as a twelve month period ending December 31, while article 2(9) of the referred law defines “fiscal year” as the period during which taxes or the first installment thereof have to be paid.

Article 4 of the ITL states that the absence alone or the lack of residence in the country does not constitute grounds for the loss of domicile in Chile. This also applies to persons who are absent from the country but keep Chile as their main place of business, either as an individual or through partnerships. According to paragraph 1 of article 29 of Decree Law No. 1.094 of 1975, law governing foreigners, a temporary resident visa will be granted to a foreigner that has the intention to stay in Chile provided that such foreigner proves to have family ties or an interest in the country and whose residence is considered useful or advantageous. Ruling No. 1.683 of 1992 provides for a definition of resident, that is, any individual that stays in Chile for a period over six months uninterruptedly within a calendar year or in two consecutive fiscal years, as the case may be. As a calendar year is the twelve month period ending December 31 of the relevant year, the six month residence period of such individual starts the date of entry to Chile. If the individual’s date

of entry occurs the immediately previous year, the residence period shall start on January 1 of the then current calendar year.

An individual will become a resident if the same stays in the country for a period over six months uninterruptedly within two consecutive fiscal years. The term “fiscal year” must be deemed as the period of time in which the taxes levying the taxpayer’s income are payable and the term “consecutive” must be deemed as immediately after. Then, for example, for revenues derived from investments made within year 2007, the time such individual stayed in Chile within Fiscal Years 2008 and 2009 is to be calculated from January 1, 2008 through December 31, 2009.

### **Taxation Applicable to Income Derived from the Assignment of a Document to a Spanish Foundation**

Ruling No. 2.775, dated September 9, 2009, states that, as provided in article 3 of the income tax law, persons who are residents of or domiciled in Chile are subject to taxes on their income of any origin, whether the source of the income is situated inside or outside the country. Consequently, the income arising on the sale or any other way involving the total transfer of the ownership of a document or the assignment of the use, enjoyment, or exploitation of the same is subject to taxes in Chile.

The information in the preceding paragraph is neither altered nor modified by application of the Chile – Spain Convention for the avoidance of double taxation since the referred convention does not provide for any regulation that limits or prevents the country of domicile of the income recipient, in this case Chile, from applying its local laws in order to tax incomes accrued by persons that are residents or domiciled in its territory.

The tax treatment applicable to the income earned in Spain from the sale or assignment of the use, enjoyment, or exploitation of a document is to be determined in accordance with the

laws currently in force in Spain in consideration to the provisions contained in the convention referred to above, specifically the regulations that limit and sometimes prohibit the taxation on incomes earned by residents of the other State, in this case Chile.

Finally, and regarding the eventual exemption of the income according to the provisions of a cultural convention, note that the Cultural Convention between Chile and Spain—that was entered into on December 18, 1967 and enforced by means of Decree No. 292 of the Foreign Ministry and published in the Official Gazette on June 20, 1969—does not provide for any clause or regulation that allows to exempt from the income tax the income arising on the sale of a document or the assignment of the use, enjoyment, or exploitation of the same.

### **Tax Consequences Derived From the Sale of Oil to a Foreign Company**

Ruling No. 2.809, dated September 15, 2009, qualifies this transaction as a local sale subject to VAT for the same is used to transfer title over a corporeal good situated in the national territory

and is carried on by an habitual seller. Likewise, this type of sale is not likely to benefit from the exemption set forth in article 12(D) of Decree Law No. 825 of 1974 relative to exported goods for this is not an oil sale to a foreign territory, but the same is fully carried on in Chile, even the transfer of the goods title.

### **Conventions to Avoid Double International Taxation Entered into by Chile**

As of October 2009, Chile currently has Conventions to Avoid Double Taxation in force with the following countries: Argentina, Brazil, Canada, South Korea, Croatia, Denmark, Ecuador, Spain, France, Ireland, Malaysia, Mexico, Norway, New Zealand, Paraguay, Peru, Poland, Portugal, United Kingdom, and Sweden. Conventions with the following countries have been signed, but are not yet in force: Belgium, Colombia, Russia, Thailand and Switzerland. The convention with South Africa is yet to be confirmed by Congress. Finally, Chile is negotiating conventions with the following countries: Australia, Austria, Peoples' Republic of China, Cuba, United States of America, Finland, Netherlands, Hungary, India, Italy, Kuwait, the Czech Republic, Uruguay, and Venezuela. ♦

---

## **Mexico**

# **Proposed Mexican Tax Reform for 2010**

*By Jorge Salles-Berges, Ortiz, Sosa, Ysusi y Cía., S.C. Asesores Fiscales, Distrito Federal, México*

The purpose of this article is to provide a general overview of the relevant issues of the Mexican Tax Reform that is being proposed for year 2010 by the Mexican executive power. Please note that such proposal of reform has not been approved up to date. Therefore, further modifications could be made to it.

### **Income Tax on Mexican Corporations**

For 2009, the corporate income tax rate is 28%. However, under the tax reform pro-

posed for 2010, such tax rate will be modified as follows:

- For years 2010, 2011 and 2012 the corporate tax rate will be 30%;
- For year 2013 such tax rate will be 29%; and
- For year 2014 and subsequent years, the corporate tax rate will return to 28%.

Tax deductions will be allowed for donations made by Mexican corporations to international entities in which the Mexican corporation forms a part of or participates in, provided certain re-

quirements are met. Additionally, in 2010, the withholding income tax rate on interest paid by Mexican financial institutions to Mexican residents will be reduced from 0.85% to 0.60%. Such withholding tax rate is applied to the capital that gives rise to an interest payment. However, as of January 1, 2011, the tax regime for the determination of income tax withholding on interests obtained from Mexican financial institutions will be substantially modified. Under this new regime, interests will be taxed on a separate basis. The withholding tax rate will be the corporate tax rate in effect in the corresponding year (30% for year 2010), which shall be applied to the real interests accrued on a monthly basis. For purposes of determining the real interest accrued by taxpayers in each month, a specific procedure shall be followed, which is based on an “input and output” regime, and considers the inflationary effects during each month.

In 2010, corporations will also be authorized to consolidate their tax results and shall pay, in annual installments, the income tax deferred in the preceding sixth year, derived from applying the consolidation tax regime, as provided in the chart below.

For 2004 and previous years, the income tax deferred under the consolidation tax regime during such years shall be paid together in annual installments. Under this tax reform, the benefits provided by the consolidation tax regime will be temporary (5 years).

## Value Added Tax and Cash Deposits Rates Impacted

Under the proposed reform, the general tax rate for Value Added Tax will be increased from 15% to 16%. In the case of activities carried out in frontier regions, the tax rate will be increased from 10% to 11%. The proposed reforms also impact tax rates and applicable exemptions on cash deposits. The tax rate applicable to cash deposits will be increased from 2% to 3%. The tax exemption on cash deposits made on a monthly basis, will be reduced from \$25,000 MXP (approximately USD\$1,800) to \$15,000 MXP (approximately USD\$1,100).

## Federal Fiscal Code

Tax invoices are also subject to the proposed reform. As of January 1, 2011, taxpayers will be obliged to issue digital tax invoices (during 2009 and 2010 the issuance of digital tax invoices is optional). The procedure to issue the digital tax invoices will be modified, since such invoices will have to be issued using an application, which will be provided in the Mexican tax authorities’ web page. Additionally, such digital invoices shall be sent to the Mexican tax authorities for validation before delivering a printed copy to the taxpayer requesting said invoices. Tax invoices for amounts up to \$2,000 MXP (approximately USD\$150) may be issued through printed invoices. However, they shall bear a specific device provided by authorized suppliers in order to be legally valid. ♦

Payment of income tax derred under consolidation tax regime								
Year	Annual installments							
	2010	2011	2012	2013	2014	2015	2016	2017
2004 and previous	40%	15%	15%	15%	15%			
2005		40%	15%	15%	15%	15%		
2006			40%	15%	15%	15%	15%	
2007				40%	15%	15%	15%	15%

# Treaty and Corporate Tax Updates in Colombia

*By Adrian F. Rodriguez and Marta L. Ramirez, Lewin & Wills Abogados, Bogota, Colombia*

## Temporary Settlement of Local Tax Controversies

Congress Act 1328-2009 has authorized the settlement of local tax controversies—such as those involving industry and commerce tax, property tax, and registration tax—including any disputed penalties and interests. The settlement authorization is only available until January 15, 2010. Additionally, it is exclusively available for tax controversies originated before December 31, 2008, and already being disputed before the tax courts.

Pursuant to the settlement legislation, taxpayers wishing to terminate their tax controversies would benefit from a reduction of the assessed and disputed liability as follows:

- If the tax controversy is before the lower tax court, the disputed tax liability would be reduced by 20%, while disputed penalties and interest would be eliminated;
- If the tax controversy is before the lower tax court, but the only disputed item is a penalty, the amount of the disputed penalty would be reduced by 20%; and
- If the tax controversy is before the highest tax court, or is before the lower tax court but is a controversy for which appellate level review is not available, the disputed tax liability would not be reduced, but disputed penalties and interest would be eliminated.

## Income Tax Treaty Developments

Colombia executed income tax treaties with Spain in March 2005, Chile in April 2007, Switzerland in October 2007, Canada in November 2008, and Mexico in August 2009. The government is currently negotiating income tax treaties with Belgium, the Czech Republic, Germany, South Korea, The Netherlands, India, and the United States of America.

In April 2007, Colombia and Panama entered into a tax treaty to avoid double income taxation on air transportation activities. In December 2008, Congress approved the treaty (Act 1265-2008), which was recently ruled constitutional by Colombian courts (Ruling C-466-2009), clearing the way for its ratification and entry into force in the near future. Colombia has executed similar tax treaties to avoid double income taxation on shipping and air transportation activities with several countries, such as: Argentina, Germany, Chile, Venezuela, Brazil and the United States of America.

The treaty with Spain entered into force in October 2008. The Constitutional Court held as constitutional the treaty with Chile (Ruling C-577-2009), clearing the way for its ratification and entry into force in the near future. Congress recently approved the treaty with Switzerland (Act 1344-2009), which prior to its ratification is now pending requisite constitutional review. Treaties with Canada and Mexico are now pending both congressional approval and subsequent constitutional review, before the government can proceed with ratification.

To control income tax treaty application, the Colombian Tax Service has introduced two certificates that will be issued upon request by the taxpayer (Colombian Tax Service Resolution 3283-2009). To obtain the above-mentioned certificates, the interested party must follow the special procedure recently established by the Colombian Tax Service. These certificates are the:

- Fiscal residence certificate—certifying that the taxpayer was in fact a Colombian tax resident for the corresponding fiscal year; and
- Fiscal situation certificate—certifying the amount and nature of the item of income

realized in Colombia and the taxes paid or withheld for the corresponding fiscal year. This document will confirm if the income is or will be subject to income tax and/or capital gains tax. This certificate can be requested directly by a non-Colombian resident.

### **Amortization of Stock's Purchase Price Corresponding to Good Will**

On July 23, 2009, Colombia's highest tax court (*Consejo de Estado*) revoked a series of revenue rulings in which the Colombian Tax Service denied taxpayers the possibility to amortize the part of the purchase price corresponding to good will in the acquisition of stock.

According to the revoked revenue rulings, the Colombian Tax Service had adopted the position that in a stock (or quotas) purchase deal, the part of the purchase price that exceeds book value (intrinsic value)—and that under Colombian GAAP can be treated as a payment for goodwill—is part of the tax basis in the stock and not amortizable as an intangible. The Court has revoked these rulings, adopting the position that in certain cases such portion of the stock's purchase price could be amortized in no less than 5 years and no more than 20 years. This possibility exclusively applies to the cases in which the purchaser already has or is acquiring a controlling interest, and the seller and the purchaser are not related parties.

### **Stock-For-Cash Reorganizations**

In Colombia, tax-free treatment is available for statutory mergers, statutory divisions, corporate transformations, and stock-for-cash reorganizations of "simplified stock corporations." However, the Colombian Tax Service has recently adopted the position that in the case of stock-for-cash reorganizations of "simplified stock companies," the tax-free reorganization treatment granted by the Colombian Tax Statute, exclusively benefits the company level and not the share or quota holder level (Revenue Ruling 53516-2009).

### **Foreign Tax Credit Availability under the Alternate Minimum Taxable Income System**

The Colombian Tax Service issued a ruling (Ruling 65231-2009) authorizing income taxpayers to benefit from foreign tax credits, even if they were subject to the alternate minimum taxable income system when calculating their income tax liability. Until this recent ruling, the Colombian Tax Service's position was that the foreign tax credit was not available in those cases.

### **Legal Stability Agreements Status Update**

Since their adoption under Congress Act 963-2005, Legal Stability Agreements (LSAs) have become important tools for eligible investors and companies in Colombia seeking to prevent future changes in selected features of the Colombian legal and tax framework, that they consider key to their investments and business activities in the country. To date, 124 requests for the negotiation and execution of LSAs have been filed with the government. Of these 124 requests, the government has executed 49 LSAs. Lewin & Wills recently performed a study of the LSAs available in the public record (28 out of 49), finding, among other interesting facts, that approximately 70% of the legal or regulatory provisions for which investors and companies sought "stabilization" were of a tax nature (350 different provisions), while the remaining 30% were related to foreign trade law, labor law and commercial and corporate laws. Among the tax provisions frequently included in LSAs, we find those relating to:

- (1) Foreign-source items of income;
- (2) Taxpayer's current income tax assessment methodology;
- (3) Capital contributions not deemed taxable for share or quota holders;
- (4) Allowances and deductions, including but not limited to, the deductibility of local-level taxes paid by the income taxpayer, the deductibility of expenses abroad, and the Fixed Assets Investments Income Tax Deduction;
- (5) The reduced 15% income tax rate for certain eligible Free Trade Zones' income taxpayers; and
- (6) The revocation of the 7% remittance tax for payments to foreign beneficiaries. ♦

# Regulations on the Settlement of Tax Debts

*By Carlos Augusto da Cruz, Fábila Azevedo and Alexandre R. Gentil Ferreira,  
Machado Associados Advogados e Consultores, São Paulo, Brasil*

Joint Ordinance No. 6, of July 22, 2009, enacted by the Treasury Attorney General and by the Brazilian Federal Revenue Service (PGFN/RFB Joint Ordinance No. 6), regulates the new program (New Program) for the payment of tax debts in cash or in installments under articles 1 through 13 of Law No. 11941/09, and establishes supplementary rules to PGFN/RFB Ordinance No. 1/09, regulating installment payments under Provisional Measure No. 449/08, which was converted into Law no. 11941/09).

The matter has become very significant and its regulation was eagerly awaited by taxpayers in light of the advantages offered by Law No. 11941/09, such as the reduction of interest, delay and infringement fines, and isolated fines levied on the debts to be paid in cash or in installments, among other benefits discussed below. Under the New Program, Brazilian individuals and legal entities may consolidate certain tax debts—overdue up to, and including, November 30, 2008—and pay the resulting amount in cash or in installments within 180 months, with impressive reductions of interests and fines and legal charges relating to foreclosures.

In summary, the New Program applies to:

- (1) Debts owed to the Brazilian Federal Revenue Service (RFB) or the Treasury Attorney General (PGFN);
- (2) The balance of debts consolidated under other prior tax installment payment plans, even if the debts have been excluded from the specific program;
- (3) Debts arising from the undue set off of Excise Tax (IPI) debts against credits of the same tax arising from the purchase of raw material, intermediary products and packaging, whenever the purchases benefit from a zero percent IPI rate or an IPI non-taxation;
- (4) Debts related to payroll contributions aimed at funding the social security system or social assistance programs offered by certain industry associations (SESI, SENAI etc);
- (5) Debts related to the Contribution for the Social Security Funding (COFINS) due by firms engaged in providing regulated professional services; and
- (6) Other debts managed by the RFB defined in further rules.

In this article we address some of the benefits offered, and other significant and innovative aspects related to the New Program to which the PGFN/RFB Joint Ordinance No. 6 refers, especially if compared to other previous programs.

## Benefits Offered under the New Program

Contrary to the regulations of previous programs for installment payments, taxes withheld that have not been effectively paid may be included in the New Program. Additionally, subject to certain rules, the New Program allows the taxpayer to choose the debts managed by the RFB or the PGFN to be included in the consolidation of their debts. The taxpayer may also, fully or partially, withdraw from previous programs for installment payment and give up the discussion of debts at judicial or administrative proceedings, in order to adopt the New Program. It is feasible to give up the discussion of part of the debts challenged in proceedings only if it is possible to separate the debts to be included in the New Program from other debts that would continue to be discussed in the administrative or judicial proceeding. Concerning the debts included in previous programs, the legislation establishes that the withdrawal from the previous program shall encompass all taxes that have been consolidated in such original program. For

instance, where the taxpayer decides to include a COFINS debt in the New Program has been consolidated with other tax debts in the former REFIS program, they shall withdraw completely from such program, and not only in relation to the COFINS debt amount.

The New Program also provides that judicial or administrative deposits related to debts to be paid in cash or in installments within the scope of Law No. 11941/09 may be discounted from the consolidated debt amount. PGFN/RFB Joint Ordinance No. 6 allows the taxpayer to recover deposited amounts that exceed the consolidated debt to be paid in cash or in installments, but it does not provide clear rules concerning the procedure to be adopted in this case.

Another interesting aspect of the New Program is the possibility to use the taxpayer's balance of Corporate Income Tax (IRPJ) and of the Social Contribution on Net Profit (CSLL) losses for the payment of delay or infringement fines and interest related to the debts to be paid in cash or in installments. The amount used will correspond to the application of 25% on the balance of IRPJ losses and of 9% on the balance of CSLL losses, ascertained in periods that *ended up until the publication of Law No. 11941/09 and were already declared to the RFB*. In light of this rule, there are doubts about the possibility to use IRPJ and CSLL losses ascertained in the first quarter of 2009 by legal entities that have adopted the quarterly Actual Profit regime. A legal entity that uses IRPJ and CSLL loss balances to settle interest and fines, pursuant to Law No. 11941/09, shall maintain, during the installment payment term, the books and documents required by the tax law that evidence the authenticity of the amounts used, and control the offsetting of the balances in Part B of the Actual Profit Ascertainment Book (Lalur). We should clarify that the taxpayer may not consider in the ascertainment of IRPJ and CSLL the amounts used (for payment in cash or in installments) for offsetting purposes, except if they terminate the payment in installments or fail to make the payment in cash required by the New Program.

Furthermore, the reduction of fines, interest, and legal charges for the payment in cash or in installments, as stated in Law No. 11941/09, will not be included in the taxable bases of the IRPJ, CSLL, PIS and COFINS.<sup>1</sup> Also, the New Program provides that a taxpayer may advance the installment payment with the same reductions established for the payment in cash, provided that the amount to be amortized is equivalent, at least, to 12 installments and there are no overdue installments, in which case they shall be previously settled. PGFN/RFB Joint Ordinance No. 6 provides that this amortization will apply the proportional reduction of the number of installments, and the installment amount determined in the consolidation of debts shall remain the same.

## Other Aspects Related to the New Program

**Referential Rate of the Special System for Settlement and Custody (SELIC)**—The installments will be increased by interest based on the SELIC rate. Please note that in the previous programs, in general, the interest rate applied was the Long-Term Interest Rate (TJLP), a less burdensome rate.<sup>2</sup>

**Communication by Electronic Means**—According to PGFN/RFB Joint Ordinance No. 6, the RFB will create an electronic address for each taxpayer that adopts the New Program. This electronic address will be considered as the taxpayer's "tax domicile" and will be used to send communications related to the payment in installments and as a reference for counting the deadlines. The taxpayer shall give their express consent to this electronic address before the RFB at the time of adoption of the program.

**Giving up from Proceedings and Appeals**—Unlike what was required in the previous programs, in order to enjoy the benefits granted by Law No. 11941/09, the taxpayer shall abandon filed defenses, administrative appeals, or judicial proceedings—as well as any legal allegations on which the administrative or judicial proceedings are grounded—within 30 days after the acknowledgement of the approval of the request for adoption of the New Program or from the date of the payment in cash.

**Guarantees**—The adoption of the New Program does not depend on the provision of a guarantee, but the guarantees and the assets listed in connection with debts transferred from other types of payment in installments will be maintained for the New Program. ♦

## End Notes

- <sup>1</sup> PIS and COFINS are social security contributions levied on revenues of Brazilian companies, except for a few exceptions, at combined rates that, as a general rule, vary from 3.65% to 9.25%.
- <sup>2</sup> In 2008, the annual sum of SELIC monthly rates amounted to 12.45% while TJLP amounted to 6.25%.

## Venezuela

# Reporting and Filing Obligations Implemented in Venezuela

By Juan Carlos Garantón-Blanco and Nelson E. Borjas Espinoza, Torres, Plaz & Araujo, Caracas, Venezuela

This article focuses on the most relevant developments in the Venezuelan tax system in the last quarter. These developments include: (1) the National Assembly's announcement expressing that no new taxes would be passed for the remainder of 2009; (2) the "Plan Evasión Cero" process extension and; and (3) new developments by the Venezuelan Tax Courts, with regards to default interest computation in case of obligations on the part of the Treasury from excessive taxation or claims for tax refunds, and identifying the taxable base for the Municipal Tax on Industrial, Commercial & Services Activities.

## No New Taxes for Remainder of 2009

Recently, Venezuela's National Assembly representatives announced their intent to not pass new taxes during the remainder of 2009, despite of the year's fall in GDP, and the consequences from the sharp decline in crude oil prices in public collection for the 2009 budget. Representative Hiroshima Bravo, president of the subcommittee of taxation of the Finance Committee of the Asamblea Nacional, recently expressed to the media that

[w]e [Finance Committee of the Asamblea Nacional] do not anticipate any Law for the creation of new taxes, on the contrary, in the

light of the slight fall of the Venezuela GDP in the 2009 second semester, we are studying what type of incentives can be created to re-stimulate the Venezuelan economy.

Among the measures that the Venezuelan Government is considering for accelerating economic recovery, is to speed up the approval and delivery of foreign currency under the foreign currency exchange control.

To this date, the only bill for a new tax under review by the *Asamblea Nacional* is the bill for a targeted tax on the purchase and sale of new and secondhand vehicles (referred in our past report). The bill is currently under consideration of the Ministry for the Science and Technology. More recently, amidst the continuous shortage in water supply to major cities and the black outs and other power shortages, the presidency has warned about the possibility of imposing special consumption taxes on water and electricity consumption. It is still unclear how said taxes would be applied.

## SENIAT Extends "Plan Evasión Cero"

In light of the XXI century socialism policies, SENIAT has decided to extend the "Plan Evasión Cero" —to this date limited mostly to the area of

VAT—to a more substantive review of payment of income tax and other taxes. Under this extension process, SENIAT has begun a policy for carrying out major audit processes on transfer pricing.

As referred to in past reports, the “Plan Evasión Cero” is an initiative developed by SENIAT with a stated purpose of creating conscience in the population about proper compliance of their tax obligations and duties (specifically at the level of wholesalers, retailers and manufacturers), and reducing the levels of fiscal evasion—based on a very stringent view of compliance with formal duties. The initiative has resulted in the imposition of a large number of fines, and temporary shut-downs of operations for minor breaches. From its beginning, the plan was limited mostly in the area of VAT, and to date, has not been subject to a more substantive review on the payment of income and other taxes.

The purpose of this expansion process suggests moving on to a new stage. This means SENIAT will carry out major controls and audit processes on previously unexplored sources taxation, such as compliance with transfer pricing rules. In this respect, SENIAT Superintendent José David Cabello has expressed that

[w]e cannot forget nowadays, more than 70% of the international trade is ruled by the exchange between subsidiaries and international parent companies. If we take in consideration that these companies locate many subsidiaries in tax havens that have investments in Venezuela, there is a new source of unexplored taxation, which is going to bring important results for SENIAT.

In the past few months, SENIAT has begun to perform audit proceedings on transfer pricing rules compliance. The most significant cases to date have been tax assessments on *Pfizer Venezuela*, which paid 36.58 million bolivars (17.01 million dollars USD) to the Venezuelan Tax Authorities, and *Chrysler Venezuela LLC*, which paid a total sum of 13.4 million bolivars (6.4 million dollars USD).

## “Special Taxpayers” Required to Electronically File Income Tax Returns

On May 5, 2009, the SENIAT published Administrative Ruling No. SNAT/2007-0034 (“Ruling 34”) in Official Gazette No. 39.171, establishing that Venezuelan “special taxpayers” (“*Sujetos Pasivos Especiales*”) must file their Income Tax returns electronically. Ruling 34 entered into force as of May 6, 2009. According to the Administrative Ruling, individuals and companies that qualify as special taxpayers may only file their income tax returns through the SENIAT website ([www.seniat.gob.ve](http://www.seniat.gob.ve)) in accordance with the terms established in the special taxpayers’ calendar.

Ruling 34 states that SENIAT officials and national funds receiving offices may no longer accept forms DPNR25, DPNNR25, DPJ 26, EPJ 28 and EPN29 from such special taxpayers. Taxpayers failing to comply with the obligation to electronically file income tax returns are subject to a fine of 5 Tax Units (Bs. 2.751), increased by 5 additional Tax Units for each breach, up to a maximum of 25 Tax Units (Bs. 6.875). Ruling 34 repealed SENIAT’s Administrative Ruling No. 0948 of October 31, 2005, published in Official Gazette No. 38.319 of November 23, 2005, which provided that individuals qualified as special taxpayers had to file their income tax returns on line.

## Reporting Obligations of Income Tax Withholding Remittances

On September 22, 2009, SENIAT published Administrative Ruling No. 095 in Official Gazette No. 39.269, establishing new rules on income tax withholding remittance (payment) and reporting obligations (“Ruling 095”). The more relevant features of Ruling 095 are discussed below.

Income tax withholding agents must file an electronic return through SENIAT’s web page before remitting withheld amounts. The return must include information on payments and credits made by the withholding agent, even when such payments were not subject to withholding, if the

payments correspond to operations described in the Income Tax Withholding Partial Regulations. The obligation of filing an electronic return will apply to regular taxpayers from January 1, 2010, and to special taxpayers from the date of publication of Ruling 095. Such obligation will not apply to income tax withholdings arising from (1) lottery and gaming; (2) conveyance of shares; and (3) dividend payments.

Once the electronic return is filed, and within the first 10 days following the end of the month in which payments or credits took place, the withholding agent must remit withheld amounts to the treasury (through a bank duly authorized to receive public funds). Special taxpayers must remit withheld amounts within the periods established in the Special Taxpayers Calendar. Withholding agents may comply with their remittance duties either by (1) using the form issued through the web site of SENIAT; or (2) an electronic wire transfer through the banks allowing this option. Amounts remitted through forms not issued through the web site of SENIAT or through non-authorized banks or entities will be deemed to not have been made. Withheld amounts arising from (1) lottery and gaming, (2) conveyance of shares, and (3) dividends payment, should be remitted within the periods established in the Income Tax Withholding Partial Regulations.

Withholding agents must file their yearly income tax withholding reports for amounts withheld during 2009 before April 30, 2010, or within two months following termination of their business and activities, whichever first, following the technical guidelines set forth in SENIAT web site. Withholding agents qualified as special taxpayers on or after January 1, 2009, and persons making payments on behalf of special taxpayers, should file their income tax withholding reports for amounts withheld during 2009, but only with respect to monthly periods for which they have not filed an income tax withholding report under Administrative Ruling SNAT/2008/0030, published in the Official Gazette No. 39.083 of December 18, 2008. Withholding agents qualified as special taxpayers on or before December 31, 2008, are not required to file the aforementioned report.

## Customs Duties: Time and Place for Paying Import Duties

On September 3, 2009, SENIAT published Administrative Ruling No. 0089 in Official Gazette No. 39.256, establishing regulations for the payment of taxes, duties and obligations on customs operations. The object of the ruling is to set forth the procedure for paying import taxes and duties applicable to the corresponding customs qualification and other customs duties on which payment is required by SENIAT's Customs Intendancy, and which shall be applied by customs authorized to conduct such customs operations. The Ruling establishes that payment of taxes and import duties must be made by the importer on the same date on which the corresponding customs declaration is filed before in the National Customs System ("*Sistema Aduanero Nacional – SIDUNEA*") at an office where national funds are received. Such payment of self-assessed taxes must be made using the special encoded format issued by SIDUNEA. Payment of the customs return is to be verified by customs authorities in the course of inspection proceedings, as well as matching of self-assessed payment and characterization of the import. If all elements match, formal customs entry is granted. The process is likely to result in mismatches corresponding to erroneous characterization or measurement, which may end up in overpayment or underpayment.

- (1) Underpayment—In the event that the documentary and physical review by the customs authorities result in an amount exceeding the one declared and paid, the customs authority will issue a supplementary assessment form for pending duties as well as applicable fines.
- (2) Overpayment—If as a result of the review the customs authorities determine that amounts have been paid in excess, the taxpayer must follow the procedure for repayment set forth in the Master Tax Code, which is likely to result in no recovery or the possibility to set-off in a term ranging for five (5) to ten (10) years.

According to Ruling No. 0089, requests for reimbursement or compensation of self-assessed duties for losses or damage arising after the inspection shall not be admitted once they have been paid. If the importer, once the declaration has been filed, is authorized to re-export the merchandise, it will be entitled to pursue reimbursement, set off the amount paid against other taxes, or request the annulment of unpaid duties (with the exception of customs service rates). Where the importer expects an exoneration or exemption of import duties, the self-assessment and payment of such duties are deemed an implied (tacit) waiver of any request for said tax incentives. Hence the importer would not be entitled to request reimbursement or set-off compensation of amounts paid.

The Ruling will enter into force thirty (30) calendar days following the date of its publication in the Official Gazette, which is on October 3, 2009, from which date all the main and/or subsidiary customs and importers shall follow the procedures for the payment of import duties established in the ruling. It is important to underline that the processes covered there under can be considered contrary to the principle of rule of law.

### **Municipal Tax on Industrial, Commercial & Services Activities Taxable Base**

On October 8, 2009, the Political Administrative Chamber of the Supreme Tribunal of Justice (TSJ) published Decision No. 01442 (*Banco Plaza, C.A.*), ruling on the taxable base to be considered for filing the tax on industrial, commercial, and service activities ("*Impuesto Municipal sobre Actividades Economicas*").

Through this decision, the Political Administrative Chamber ratifies its longstanding criteria, later recognized by the Municipal Master Law, in that the taxable basis to be considered to file the tax on industrial, commercial, and service activities is the gross income actually received by the taxpayer directly from its activities during the immediately-prior fiscal year, and not

accrued revenues. Therefore, to compute the tax basis on which the rate of the Tax must be applied, only gross income actually received by the taxpayer during the immediately prior fiscal year is to be considered. Hence all accrued gross income recorded in the accounts receivable of the taxpayer but unpaid, are to be excluded.

### **Default Interest on Excess Payments by the Taxpayer**

On September 30, 2009, the Political Administrative Chamber of the TSJ, published the ruling No. 01376 (*Total Venezuela S.A.*), through which it applied the criterion set by the Constitutional Chamber with respect to the timing for computing default interest on tax obligations, but this time, on obligations on the part of the Treasury Department resulting from excess payments (by means of excess or undue withholding or assessments or by means of tax recovery mechanics such as VAT zero rate recovery, *inter alia*) by taxpayers for claims or rights governed by the 2001 Master Tax Code (MTC).

As reported in the prior quarter, the Constitutional Chamber on March 9, 2009, modified the criterion on default interest established by the Political Administrative Chamber (based on request for review filed by the judicial representation of a municipality), as it stated that the criterion of the Constitutional Chamber on this issue expressed in the TELCEL C.A. decision, with respect to the accrual of default interest (default interest accrued as from the date when there was a final court decision regarding the payment of the tax), applies only to cases governed by the repealed MTC of 1994. After the entry into force of the 2001 MTC, on October 18, 2001, default interest is to be computed from the date on which the tax liability should have been paid to the date on which payment is actually made.

In particular, the decision issued by the Political Administrative Chamber established that said criterion modification (under the application of

the 2001 MTC) also applies to obligations of the Treasury Department with taxpayers resulting from restitution of excess tax payments. In said sense, the Chamber expressed that, in all cases where the Treasury Department is obliged to pay

default interest, this is, when a delay occurs on the restitution excess payments, default interest will accrue, by law, on the sixtieth (60th) day after their claim by the taxpayer or, after the service of proceedings, until definitive payment. ♦

## Argentina

# Source Income and Tax Powers Before the Federal Court of Appeals in Argentina

By Eduardo A. Aguilera, Rosso Alba, Francia & Ruiz Moreno, Abogados,  
Buenos Aires, Argentina

The following article provides an update of the most relevant developments in Argentine legislative and judicial tax law in the last quarter. First, we will provide a brief description of recent reforms in the Buenos Aires fiscal code, followed by a report regarding case law. The latter will focus on the concept of Argentine source income, the tax powers of the state in the Exclusive Economic Zone, Value Added Tax in franchise contracts, and tax-efficient structuring under the Stamp Tax.

**State Tax Code Reform**—Province of Buenos Aires, Law 14,044 (published on October 16, 2009).

The recent reform has, on the one hand, raised some tax rates and, on the other, created new taxes, such as the tax on donations and the free transfer of property. The gross income tax rate of 3.5% has been raised to 4.5% for many business activities, such as the production of wine, hotels, transportation, real estate, health, etc. The sale of used cars now falls under the Stamp Tax at a rate of 20%. Any increase in the assets of a person or company domiciled in Buenos Aires over 3 million Argentine Pesos, due to the free transfer of property, is now taxed at a rate between 5% and 10.5%, depending on the value of the transferred assets. Donations, legacies, inheritances, and anticipated inheritances, are only a few examples of what the law considers a free transfer of property.

**Concept of Argentine Source Income**—Federal Court of Appeals, *Austral Lineas Aereas (Cielos del Sur S.A.) c/ DGI*, June 2, 2009 (published in September 2009).

At issue in this case was the business relationship between the Argentine airline *Austral Lineas Aereas* and the Spanish service provider, *Amadeus*. The latter provided access to a worldwide database designed to facilitate bookings and reservations in hotels, car rentals, and airlines. As consideration, *Austral* paid a booking fee when a reservation was actually made. According to the Argentine Revenue Service (ARS), that payment constitutes Argentine source income in the hands of the Spanish company that is subject to at-source withholding. The Argentine Income Tax Law considers payments for technical advice given from abroad as Argentine source income. The Court held that there is “technical assistance” when service or intellectual assistance, regulated by an art or science, is hired and paid for, thus agreeing with a broad definition of the concept. In the Court’s opinion, if the benefits of such a service are located in Argentina, at-source withholding applies regardless of where the service provider is located. The concept of Argentine source income will, for the moment, remain broad enough to include access to foreign databases.

**Tax Powers of the State in the Exclusive Economic Zone**—Federal Court of Appeals, *Pesquera Sebastián Gaboto S.R.L.*, March 17, 2009 (published in September 2009).

In this case, the taxpayer was a seafood distributor in Argentina. The company bought seafood from different fishing companies, of Argentine or foreign nationality, and then sold the seafood at retail and wholesale. The taxpayer specifically hired Japanese ships to fish and process squid within the Argentine Exclusive Economic Zone. The Japanese ships were described in the case as movable industries, with capabilities to perform on board what most fishing companies do once the seafood reaches the coast. The taxpayer failed to withhold income tax from the payments made to the Japanese companies on the grounds that withholding was unnecessary as the companies were doing business as a permanent establishment of a foreign company in Argentina.

The Court had to decide whether Presidential Decrees 2623/1991 and 103/1997 are unconstitutional because they extend the tax powers of the government to the Argentine Exclusive Economic Zone. The decision focused on article 56 of the UN Convention on the Law of the Sea (UNCLOS), which states that in the Exclusive Economic Zone, the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superadjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. According to the Court, tax powers are a consequence of sovereign rights. The Japanese ships needed a fishing authorization, assistance from the coast guard and were supervised by the customs service. All of these three examples of State authority, together with the power to set taxes, are nothing but examples of sovereign rights of the coastal State. Presidential Decrees 2623/1991 and 103/1997 were only adding detailed regulations to a fiscal reality unquestionable from the legal point

of view: Argentina can set taxes in its Exclusive Economic Zone because it has sovereign right over it. The hardship from the ruling is that, the seller did not comply with the registration of a permanent establishment, and the Argentine payor was liable for the withholding tax.

**Value Added Tax on Franchise Contracts**—*La Caballeriza (TF 20280-I) c/ DGI*, June 18, 2009 (published in September 2009).

The Federal Court of Appeals reviewed the ruling of the Federal Tax Court regarding a franchise contract and its fiscal consequences. The issue was whether the business relationship of a famous steak house franchise and an investor wanting to start up a restaurant under its publicly known brand, “*La Caballeriza*.” According to the taxpayer, franchise contracts are exempted under Article 7(h)(23), of the Value Added Tax Law, which basically provides an exemption to concessions. On the contrary, the Argentine Revenue Service argued that the franchise contracts is a services agreement with other ancillary contracts, neither of them exempted from the tax. The Court defined a franchise contract as a contract that regulates the start up and assistance in all the different levels of the marketing process, of a business under a brand in exchange of a royalty. Regardless of how the parties decided to call the contract, the underlying business relationship is what judges should study to make their decisions, in other words substance should prevail over form. Thus, according to the Court, franchise contracts where a party has to perform a service are to pay Value Added Tax.

**Stamp Tax**—*Esso Petrolera Argentina S.R.L. c/ Entre Ríos, Provincia de s/ acción declarativa de certeza*, September 8, 2009; *Esso Petrolera Argentina S.R.L. c/ Chaco, Provincia del y otro (Estado Nacional) s/ acción declarativa de certeza*, September 8, 2009; *Petrobras Energía S.A. c/ Chaco, Provincia del s/ acción declarativa de certeza*, September 8, 2009; *Yacimientos Petrolíferos Fiscales S.A. (YPF) c/ Tucumán, Provincia de s/ acción declarativa de certeza*, September 8, 2009.

All of the above-mentioned cases have three things in common: they were decided by the Supreme Court of Argentina, they involve oil companies and in all of them the Court rejected the arguments of the local tax authorities. They are not leading cases; the Court simply confirmed its previous rulings regarding the Stamp Tax and the conflicts between local tax law and Federal

Law 23,548. Stamp tax can only be charged by local states when there is a complete document or instrument in which the parties to a business relationship have written down their regulating conditions. Thus, offer letters with an answer accepting the offer—in a separate document, which does not spell the main content of the offer—or offer letters tacitly accepted cannot be taxed. ♦

## Dominican Republic

# Supplementary Compensation in the Dominican Republic

*By Norman de Castro, Milcíades Rodríguez and Adolfo Toca, Pellerano & Herrera, Santo Domingo, Dominican Republic*

Article 318 of Law No. 11-92 (Tax Code) and its amendments define a “supplementary compensation” as any product, service, or benefit furnished by an employer to an individual for their work as an employee in a relationship of dependency, in addition to any monetary compensation given thereto, but only if the good, service, or benefit is given in kind, contains a personal, identifiable element, and provides personal satisfaction to the employee or the people who depend on them. For example, housing and vehicle-related services covered by an employer in favor of the employee are deemed to be supplementary compensation. An employer must pay, on a monthly basis, a tax on supplementary compensation at a rate of 25% on the benefits of such nature granted in favor of an employee, except when the employer enjoys a general tax exemption, such as nonprofit institutions, and free zone companies, among others. Where an employer enjoys the aforementioned general tax exemption, such supplementary contributions shall be considered taxable compensation received by the employee, subject to the applicable bracket on the income tax table for individuals to be withheld by the employer.

For purposes of Law No. 16-92, dated May 29, 1992, (Labor Code), Article 192 defines wages

as the remuneration an employer must pay an employee as compensation for work performed, consisting of cash and any other benefits received for such work. From the definition provided by this Article, it is understood that the supplementary compensation granted by an employer to its staff should be deemed to be part of the salary, so that, in case of termination of the employment contract, the additional remuneration received by the worker should be considered for the purposes of making the calculation for fringe benefits, including vacation compensation, Christmas bonus, income-participation bonuses and finally, labor benefits.

With regard to the Social Security Law, Article 17 of Law No. 87-01, dated May 14, 2001, establishes that for employed workers, the wage subject to contributions is defined in Article 192 of the Labor Code. Therefore, the supplementary compensation granted by the employer to its employees can be considered part of the base salary to calculate contributions to be made to the social security insurance system set forth by Social Security Law No. 87-01. Moreover, employee-made contributions to their social security insurance reduce the amount of payable income tax that must also be made, as set forth in Article 15 of Law 87-01.

Treatment of additional compensation is particularly important with respect to laws granting tax exemptions, as is the case of Law No. 179-09 on Deduction of Education Expenses from Income Tax for Individuals. Article 5 of this Law provides that if an employer grants coverage of educational expenses to its employees, in addition to payments in cash, and the employee's income does not exceed the exemption amount granted on income tax for individuals, such compensation shall not be subject to tax on supplementary compensation.

However, for the purposes of labor and social security laws, such compensations for educational expenses constitute part of the salary and should, accordingly, be considered when calculating the employee's compensation for vacation pay, Christmas bonus, income-participation bonuses and finally, employment benefits upon termination of the employment contract and as part of wages subject to contributions to the Old Age, Disability and Survival Insurance, as well as Family Health Insurance and Occupational Risk Insurance. ♦

## Costa Rica

# Practical Comments on the Tax Law to Support Strengthening of Housing Programs

*By Gabriela Barrantes Alpízar, Facio & Cañas, San José, Costa Rica*

The Tax Law to Support Strengthening of Housing Programs, commonly known as the "Luxury Home Tax," seeks to tax real estate property located within Costa Rica that meets the following criteria:

- Residential real estate used on a regular, occasional, or recreational basis that constitutes a residential unit, regardless of whether it occupies different plots in the National Registry;
- The real property must be comprised of fixed permanent buildings and facilities, i.e. homes, pools, gazebos, sports facilities, parking lots and other such buildings and facilities with a value greater than 100,000,000 (one hundred million colones); and
- Should buildings on the real property exceed the value of 100,000,000 (one hundred million colones), the value of the land should be added. The resulting total value of the buildings and land will constitute the taxable base.

Owners or title holders of residential units located on such property (condominiums, property rights, etc.) must be appraised independently. Owners or holders of possessory rights to the property are subject to taxation, for example, concessionaires, co-owners, permit holders,

occupants of the border zone and maritime concessions, among others. For purposes of this law, the taxpayer shall be the owner or individual in possession of the real property on the first of January of each year.

The tax came into force and effect as of October 1, 2009. The Tax Administration established under Resolution No. 29-2009, published in the Gazette dated September 29, 2009, the obligation of those subject to passive taxation to register within a term of 3 months subsequent to publication of the resolution using the digital form available on Tribunet and Tributación Digital (Digital Tax Return). In light of the above, taxpayers must file a tax return for each residential unit taxable under this tax and must pay in pro rata the tax due for fiscal year 2009, from October 1 to December 31, 2009. Therefore, the payment will be a quarter of what said taxpayer would have paid on an annual basis for such tax.

The tax base is changed in three instances:

- In the cases stipulated under Article 14 of the Real Property Tax Law, (i) the value stipulated through a public instrument; (ii) establishment of

a mortgage lien; (iii) for area correction or joining of properties; (iv) the highest value formally recognized by those subject to passive taxation; (v) subdivision of the real property; and (vi) construction or improvements to the real property that require a construction permit in which the assessment changes the tax base, as long as they represent a value equal or greater than twenty percent (20%) of the registered value;

- By a determination of those subject to passive taxation; and
- By official determination.

The amount of the tax due varies from 0.25% to 0.55%. The fiscal year runs as a calendar year (January 1 to December 31) and must be paid no later than the first 15 days subsequent to the date accrued, i.e. January 15. For the first appraisal of the real property, i.e. Fiscal Year 2009<sup>1</sup>, taxpayers must use the appraisal parameters established by the Technical Standardization Organ as follows:

- The Unitary Base Manual by Construction Type for appraisal of buildings and other fixed and permanent facilities published in Official Daily Gazette No. 78 of April 23, 2008, available at website: <https://www.hacienda.go.cr>; and

- Maps and Value Charts by Homogenous Zones for appraisal of land. Available at website: <https://www.hacienda.go.cr>.

The taxpayer must file a sworn affidavit every three years during the first 15 days of the month of January, updating the value of the real estate property. In the case of co-owners, only one of them should be selected for registration with the Registry and the designated owner may include the other owners on the form. In the case of condominiums or rights to properties subject to this tax, each residential unit must be registered and the tax paid independently. Co-owners are liable jointly and in cases of transfer of ownership, the acquiring individual will be jointly liable for payment of the tax for the current fiscal year on the date of purchase, as well as any interest, fines and other corresponding sanctions.

---

### End Notes

---

- <sup>1</sup> For part of the year and payment of the part of the year 2009 from October 1 to December 31, 2009, the taxpayer must file a tax return for each residential unit taxable under this tax, and must pro rate the tax among the months during which the law is in effect. Therefore, the payment will be a quarter of what said taxpayer would have paid on an annual basis for such tax.

---

## Ecuador

# Proposed Reforms and New Procedural Guidelines in Ecuador

*By Cesar R. Holguin, LawNetworker S.A. Asesores Legales, Guayaquil, Ecuador*

## Resolution Issued Establishing Procedural Guidelines and Submissions by Certain Foreign Corporations

In order to regulate recently-enacted reforms to the Company Law, the Superintendency of Companies has issued a resolution, establishing procedural guidelines to be followed and the information and documents that foreign companies that are shareholders or partners of Ecuadorian

companies must submit to regularize their situation with the Superintendency of Companies. The first deadlines granted for the presentation of such information and documentation fall at the end of September, October, and November 2009, regardless of the obligation to re-file the information and documentation in December 2009, January and February 2010.

While it can be agreed upon that a foreign company that wants to be a partner or shareholder

of a local company must demonstrate that it has been legally incorporated in its country of origin, that it is in good standing, and has appointed an Attorney-in-Fact in Ecuador, certain requirements nonetheless constitute a hindrance, an obstacle to foreign investment. For example, the requirement mandating submission of a list of all members, partners, shareholders, and directors, their nationality, as well as the names and surnames of spouses, ID number, PO Box, e-mail address, telephones, fax, etc. This information must be notarized and legalized by the Ecuadorian Consul or apostilled, and filed annually with the Superintendency of Companies. The only missing requirement would be the obligation for shareholders, partners, administrators and directors to present a blood test.

It is really very unfortunate that “*a contrario sensu*” of what occurs in other countries, where the incorporation of companies is facilitated, we still have burdensome proceedings in Ecuador, like the ones contained in this resolution, that not only that slow down the incorporation of companies, but more importantly, make foreign investment pass by to other countries. The National Government’s desire for disclosure of basic information concerning foreign corporate shareholders and partners of Ecuadorian companies is quite understandable. However, it seems pretty absurd to have this extensive information disclosed annually, not only with respect to the foreign company itself, but also with respect to their partners, shareholders, administrators, directors, and their spouses, with all the additional requirements and legalizations that such yearly updates imply.

The Superintendency of Companies has prepared a form for the information that must be submitted by foreign corporate shareholders and partners that in turn are partners or shareholders in Ecuadorian companies.

### **Tax Reform Sent to the National Assembly for Approval**

On August 26, 2009, the President sent a proposal to the National Assembly reforming the Internal Revenue System Law (The Tax Law) and the Tax Fairness Law. Highlights of the proposed reforms include:

**Tax Exemption**—Dividends and profits, calculated after payment of corporate income tax, and distributed by national corporations or foreign corporations resident in Ecuador, on behalf of another national or resident foreign corporation, or on behalf of individuals not resident in Ecuador, shall be exempt from tax.

**Allowances**—Indirect expenses allocated to Ecuadorian domiciled corporations from abroad by their related companies cannot exceed 5% of their taxable base for income tax purposes, plus the amount of said expenses.

**Allowances**—Costs and expenses supported by fake vouchers, or nonexistent contracts, or in general entered with nonexistent, ghost, or supposed persons or corporations, shall not be deductible.

**Transfer Pricing**—Taxpayers that carry out operations with related parties will be waived from the obligation to file the Transfer Pricing Integral Report when all three requirements, discussed below, are met:

- (1) The income tax due exceeds 3% of their taxable income,
- (2) They do not perform transactions with related parties domiciled in tax haven or tax preferred jurisdictions, and,
- (3) They do not have contracts in place with the government for the exploration and exploitation of non-renewable resources.

**Taxation of dividends and profits distributed to individual shareholders**—Dividends and profits distributed by corporations to their individual shareholders resident in Ecuador, shall become part of their global income. However, such shareholders are entitled to utilize, as a tax credit in their annual return, the corporate tax paid by the corporation with respect to said dividend or profit, which in no case shall exceed 25% of its amount. The applicable tax credit referred hereto shall not be greater than the tax that the shareholder would have to pay on account of that income within his global income.

### **Reduction of income tax for reinvestment—**

Corporations that reinvest their profits in Ecuador will be granted a reduction of 10 points in the income tax rate (15% instead of 25%) on the amount reinvested on productive assets (provided that the amount reinvested is used in the acquisition of new machinery and equipment for their productive activity), as well as for the acquisition of goods related to research and technology to improve productivity, and generate diversification and increase of employment. To this purpose, they must increase their capital stock accordingly until December 31, of next fiscal year.

**Loans to shareholders—**When a Corporation resolves to grant loans to its shareholders, these loans will be treated as anticipated payments of dividends, and are thus subject to a withholding tax of 25%. Such withholding made by the company will be declared and paid within the following month, and will constitute a tax credit for the company in its income tax return.

**Advanced payment of income tax—**The advanced payment of income tax shall be considered as “minimum payment of income tax,” and thus is not refundable.

**VAT on export of services—**The general rule is that services for export are not subject to the 12% VAT. With the reform, in order to be considered as a service for export, the following requirements must be met:

- (1) Exporter of services must be resident or domiciled in Ecuador;
- (2) User or beneficiary of services exported must not be a resident or domiciled in Ecuador;
- (3) The use, benefit, or exploitation of the services by user or beneficiary, must take place completely outside Ecuador, even if the services are provided in Ecuador; and
- (4) The payment made by user to exporter of services must not be charged back to Ecuador, as cost or expense.

**ICE excise taxes** levied on several goods and services, including:

- Cigarettes;
- Tobacco products;
- Alcoholic drinks;
- Soft drinks;
- Motor vehicles;
- Planes, small planes, helicopters;
- Perfumes;
- Videogames;
- Guns and ammunition;
- Light bulbs;
- Paid TV;
- Casinos, games salons, and other similar games; and
- Dues, membership fees, stock and other similar charges collected by social clubs from their members, when exceeding USD 1,500.00 a year.

**Capital flight tax exemptions—**Ecuadorians and foreigners that travel outside Ecuador carrying an amount in cash, up to the non-taxable fraction of the personal income tax rates (USD 8,000.00), shall be waived from the payment of the 1% Capital Flight Tax. Such persons will be taxed on the excess at the rate of 1%. Similarly, the transfer of funds made abroad through banks and other financial institutions, not exceeding USD 500.00 shall not be subject to this tax. However, purchases made with credit cards, shall not apply for this exemption.

**Increase of the rate of the capital flight tax—**If the reform is approved as sent, the rate of the Capital Flight Tax will be 2% instead of 1%

**Calculation of taxable income—**For calculating taxable income, adjustments on account of transfer pricing, reference prices, quality adjustments and other adjustments deemed applicable for purposes of income tax, shall be included. ◆

## Tax Reform Bill Introduced in Guatemala

By Eduardo Mayora Alvarado, Mayora & Mayora, S.C., Guatemala City, Guatemala

As a result of the failure of the 2007 Income Tax Act Reform Bill, which contained substantial changes to the Guatemalan tax system—having intended a complete amendment of the Income Tax Act by introducing such topics as transfer pricing, permanent establishment regulations, and a worldwide system of taxation—the executive office submitted a different bill, which focuses on strengthening the Guatemalan tax and customs systems through new taxes and amendments, as well as rules of general extent, mainly seeking the improvement of the government's tax collection capacity.

The specific areas considered in this bill include the following:

**Tax on first registration of land motor vehicles—** A specific tax arising on the first registration of Land Motor Vehicles is being proposed; it would be a new internal *ad valorem* tax substituting customs duties on the importation of vehicles, and would, among other things, also prohibit the importation of relatively old vehicles.

**Reforms to the Guatemalan customs system—** Rules developing some of the topics contained in the Central American Uniform Custom Code are introduced and regulate, among other issues, the electronic auction of abandoned goods, the competence of the Tax Administration on the harbor zones; and the creation of new figures on customs violations and their sanctions.

**Amendments on the Value Added Tax Act—**By way of these amendments, subsequent and later sales of real estate properties are exempt from the 12% Value Added Tax, which are then burdened with the 3% Stamp Tax, more rigorous controls for exempt entities (universities, diplomatic bodies, etc.), are created, and different withholding systems exclusively for VAT purposes are also created.

**Amendments to the Tributary Code and other laws—**By way of these amendments, the obligation of using banking products in all transactions over US\$1,200.00 (approximately) would be an obligation for purposes of supporting Income Tax deductible expenses, the Tax Administration would be empowered to obtain information from banks and other financial entities regarding *specific transactions* related with the compliance of the taxpayer's liabilities; and the Tax Administration would be empowered to install sophisticated control systems or devices in the taxpayer's facilities to obtain information regarding the manufacture, importation, distribution, or transportation of goods. Finally, the sanction system would broaden and the Tax Administration would be empowered to lower the sanctions and fines up to 85%, depending on the express acceptance by the taxpayer's of the Tax Administration's proposed assessment.

### Obligation to Use the Electronic Books Systems Expanded

In other developments, as part of the transparency campaign launched in June 2006, the tax administration has systematically implemented the compulsory usage of electronic tools to the different types of taxpayers. The mandatory use of the electronic tool "*Asiste Libros*," as well as the electronic transmission of data related the accounting ledgers of sale of goods and services and purchase of goods and services, for those taxpayers classified as Middle Special Taxpayers (1,600 commercial entities contributing the 75% of the yearly tax collection) was established through Resolution SAT-S-379-2009, published in the Official Gazette on June 12, 2009. As of 2006, before the publication of the quoted resolution, only Major Taxpayers (about 300 commercial entities), were compelled to use this electronic tool.

## 2010 Regional Conference of General Customs Directors of America

The XII Regional Conference of General Customs Directors of America and the Caribbean (CRDGA) was held from September 7 – 9,

2009 in Cartagena de Indias (Colombia), presided by the Regional Vice-President, Silvina Tirabassi, from Argentina. In this conference, the offer from Guatemala to welcome the next CRDGA meeting in May 2010 was accepted. ♦

### Bolivia

## Legislation Issued on Corporate Income Tax and Financial Transactions in Bolivia

*By Ramiro Guevara, Guevara & Gutiérrez S. C. Servicios Legales, La Paz, Bolivia*

In the third quarter of 2009, the Bolivian government issued legislation (laws, supreme decrees, and regulations) pertaining, but not limited to, taxation of hydrocarbons, royalties, financial transactions, and customs duties.

**Law No. 4115**, dated September 25, 2009, interprets the scope of article 47 of Law No. 843, dated May 20, 1986, and modified by Law No. 1606, dated September 22, 1994. The new law clarifies that the Direct Tax on Hydrocarbons (“IDH,” by its acronym in Spanish) and effectively paid royalties and participations are deemed to be deductible sale expenses in the determination of the net income subject to the Corporation Income Tax (“IUE,” by its acronym in Spanish).

**Supreme Decree 0199**, dated July 8, 2009, broadens the term of Supreme Decree 28815, dated July 26, 2006, as well as any other administrative regulations issued for the application of the Tax on Financial Transactions (“ITF,” by its acronym in Spanish), created pursuant to Law No. 3446, dated July 21, 2006, according to the stipulations of article 53 of the Nation’s General Budget for the 2009 term. The ITF tax will be in effect for an additional thirty six (36) months, beginning on July 24, 2009. The tax will be permanently in effect with the new amendment.

**Supreme Decree 0207**, dated July 15, 2009, determines the closure of the Fiscal Program

Unit, by transferring its budget credit to the Vice Ministry of Treasury and Public Credits.

**Supreme Decree 0209**, dated July 15, 2009, sets forth that for a term of one (1) year beginning on July 15, 2009, the customs duty (“GA,” by its acronym in Spanish) for the importation of liquid petroleum gas and jet fuel will be zero per cent (0%).

**Presidential Administrative Resolution No. 10.0014.09**, dated September 29, 2009, updates the value of the set quota for every hectare of the Unified Agricultural Regime (“RAU,” by its acronym in Spanish) for the 2008 term. The RAU regime was created by Supreme Decree 2148, and later amended by Supreme Decree 24463, in order to regulate an informal sector in the economy dedicated to low scale economic activities carried out by small farmers. In that regard, RAU taxpayers’ obligations are directly linked with the size of the land they develop and/or exploit. Although the RAU does not tax the land as such, it taxes an estimate of the commercialized production of the RAU taxpayer. Consequently, the existence of the RAU regime is subject to the:

- (1) Size of the land;
- (2) Activities being exploited (if they render services or in any way carry out an industrial development, they are excluded from the regime); and

(3) The RAU taxpayer's characterization as an enterprise.

The Tax Administration has been carrying out several assessments to RAU taxpayers as they have evidenced in some cases that said taxpayers were abusing the regime as they were not really small scale farmers but part of a much larger scale of companies taking advantage of the low tax rates of the regime. The Tax Administration's argument to assess taxpayers was the fact that they were employing legal structures that are clearly inappropriate or atypical to the economic reality of the taxed events, acts or economic

underlying relations in those structures, the tax norm will be applicable disregarding those structures, notwithstanding their effectiveness in other law areas (civil or others).

**Presidential Administrative Resolution No. 10-0015-09**, dated October 9, 2009, regulates the registry and presentation of original sworn statements (tax returns) by means of cell phones, by using the Short Messaging System, and generally results in the payment of Value Added Tax ("IVA," by its acronym in Spanish) and/or the Transactions Tax ("IT," by its acronym in Spanish) by certain users.◆

## Nicaragua

# Mandatory Filing of Income Annual Report of Payments and Retentions in Nicaragua

*By Gloria Maria de Alvarado, Alvarado y Asociados, Nicaragua*

Per Administrative General Disposition No. 10-2009, which derogates Disposition No. 10-2007, all taxpayers must submit the Income Annual Report of Payments and Retentions. Government institutions, natural and legal persons, non-profit organizations, as well as all companies that collect IVA and ISC, must submit the payments made during the ordinary fiscal year, regardless of whether a retention was made or not. Taxpayers with special fiscal years are not exempt, and must submit the Income Annual Report of Payments and Retentions. The report must contain two sections:

- The registry of all payments and retentions to natural and legal person (in accordance to format A); and
- The registry of all payments and retentions to employees and Board of Directors members (in accordance to format B).

Pursuant to General Administrative Disposition No. 11-2009, all taxpayers must submit their annual Income Declaration in the ordinary period. However, the disposition grants a 30-day extension to submit the Annual Income Declaration.

The taxpayer's office issued a statement setting the rules for changing from an ordinary fiscal year to a special fiscal year. A letter in accordance with the formalities of the Tax Code must be submitted to the Tax Legal Director and must be presented 30 days prior to the beginning of the fiscal year requested, as demonstrated below:

- (1) April 1<sup>st</sup>, March 31<sup>st</sup>. — January 31<sup>st</sup>
- (2) October 1<sup>st</sup>, September 30<sup>th</sup>. — July 31<sup>st</sup>
- (3) January 1<sup>st</sup>, December 31<sup>st</sup>. — November 30<sup>th</sup>◆

## Latin America Tax and Legal Network

Name	Country	Phone	e-mail
Mike Valdés (President)	USA/Brazil	1 773 8678629	mvaldes@machadoassociados.com.br
Luis A. Hernandez (Coordinator)	Uruguay	598 96207050	lhernandez@lataxnet.net
Cristian E. Rosso Alba	Argentina	5411 48933366	crossoalba@rafya.com.ar
Ramiro Guevara	Bolivia	5912 2770808	rguevara@gg-lex.com
Luis Rogério Farinelli	Brasil	5511 30934855	lfarinelli@machadoassociados.com.br
Paul Tadros	Carribbean	1 514 6970901	paul.tadros@sympatico.ca
Jorge Espinosa	Chile	562 2632803	jepinosa@epcyc.cl
Alfredo Lewin	Colombia	5713 125577	alewin@lewinwills.com
Adrian Torrealba	Costa Rica	506 2565555	atorrealba@fayca.com
Norman Decastro	Dominican Republic	809 5415200	n.decastro@phlaw.com
Cesar R. Holguin	Ecuador	5934 2562908	cholguin@lawnetworker.com
Roberto Flores	El Salvador	503 25055555	rflores@romeropineda.com
Eduardo Mayora	Guatemala	502 23662531	emayora@mayora-mayora.com
Jorge Salles-Berges	Mexico	5255 1084 7017	salles@osy.com.mx
Gloria Alvarado	Nicaragua	505 2278 7708	gmaivara@alvaradoyassociados.com.ni
Said Acuña	Panama	507 2691127	saidacuna@riveboca.com
Cesar Luna-Victoria	Peru	511 6117048	cesarl@munizlaw.com
Fernando Goyco-Covas	Puerto Rico	1 787 2811802	goyco@amgblaw.com
Emilio Tuneu	Uruguay	5982 9170045	emiliot@cht.com.uy
Peter Byrne	USA	1 703 387 3009	pbyrne_taxlaw@attglobal.net
Federico Araujo Medina	Venezuela	5821 29050293	faraujo@tpa.com.ve