



MERGERS AND ACQUISITIONS

# Argentina

Taxation of Cross-Border  
Mergers and Acquisitions

2010 Edition

TAX

# Argentina

## Introduction

From 2004 through to 2006 the Latin American economy has been growing at a rate not seen since the late 1970s. The region is erupting with strength and growth.

Inbound investment to Latin America and the Caribbean totaled more than USD 130 billion in 2008. There has also been substantial outbound investment from Latin America and the Caribbean to countries both inside and outside the Iberoamerica region. Since the region has achieved economic stability the absolute level of inward foreign direct investment has skyrocketed, suggesting that the region is becoming a more active participant in the globalization process.

Specifically, Argentina's economy expanded by 9.2 percent year-on-year in 2005 and by 9.0 percent in 2004, after contracting by 11.0 percent in 2002 following its financial crisis. The country now intends to repay its debt of approximately USD 960 million to Spain before 2012. Growth is expected to remain strong in Argentina.

Argentina has become an important player in mergers and acquisitions (M&A), so it is essential to understand the basic principles of the tax policies and processes of all countries in the region.

In principle, international acquisitions of Argentinean entities may take the form of either the purchase of an equity participation in a target resident company, or the purchase of the assets of such company. In practice, however, most acquisitions by foreign corporations take the form of purchases of equity in the target resident company, so tax due diligence is an essential part of the due diligence process.

In Argentina, the investor must bear in mind that M&A transactions are evaluated according to antitrust law as well as taxation rules. In addition, Argentinean laws establish control mechanisms over actions or events that threaten free competition.

This chapter will focus on M&A-related issues that should be taken into account by parties entering into an M&A transaction in Argentina.

## Recent Developments

### ***Statute of Limitations Extended***

Law 26.476 extended the term within which the tax authorities may file claims for national taxes for another year. This means that, for fiscal periods in which the statute of limitation was running on 26 December 2008, the referred term will be six years. For other fiscal periods, the term will be five years.

This amendment is important for the purposes of determining the extension of the fiscal periods to be reviewed as part of a tax due diligence analysis.

### ***Transfer Taxes in City of Buenos Aires***

From January 2009 stamp tax payable in advance applies to most economic transactions, including asset and share purchases completed in the city of Buenos Aires with a written agreement. Generally, the tax rate is 0.8 percent of the economic value involved in the transaction. The parties signing the agreement/instrument are jointly liable for payment of the tax.

### ***Deductibility of Interest and Exchange Gains/Losses***

By means of General Instruction Number 747 issued by federal tax authority (AFIP) the Argentinean tax authorities attempted to challenge the deductibility of interest and exchange gains/losses arising from loans in foreign currency between companies located in Argentina and foreign companies for such reasons as the lack of a formal agreement between the parties, the failure to state the terms for the repayment of principal and/or interest and the failure to include an interest rate in the loan agreement.

This is a relevant aspect of due diligence analyses, because there has been an increase in the applicable exchange rate from USD 1 = ARS 1 to USD 1 = ARS 3.81 for loans taken out before 31 December 2001 and the effect of exchange gains/losses is, therefore, very significant.

In addition, it is important to meet the aforementioned formal requirements in the event of leveraged buy-outs, so as to avoid the possibility that the tax authorities will

challenge the exchange gains/losses and interest derived from these loans.

## Asset Purchase or Share Purchase

An acquisition in Argentina more usually takes the form of a purchase of the shares of a company, rather than its business and assets, because capital gains on the sales of shares are tax exempt when shares are owned by individuals or when owners are foreign beneficiaries. An asset purchase will be subject to income tax (and other taxes, such as VAT and turnover tax), and the purchasers are jointly and severally liable, along with the tax debtors, for prior tax liabilities.

### Purchase of Assets

The acquisition of assets results in a stepped-up basis of the assets to the buyer. However, the step-up in tax basis is limited to the market value of the assets. The sale price is allocated to the assets, tangible and intangible, net of liabilities. Any additional consideration is attributed to goodwill. It is important to note that goodwill is not deductible for tax purposes.

The asset purchase establishes a limit on the co-responsibility of purchasers for non-declared fiscal and social security liabilities, as long as they comply with the requirements contained in Law No. 11867 to report the transaction to the national fiscal authority. However, in practice, sellers rarely agree to report the asset transfer to the tax authorities, because such notification may prompt the tax authorities to subject the seller to a tax examination.

Thus, it is advisable to perform a due diligence on the owner of the asset to be sold to estimate the contingencies that could be transferred to the purchaser. In defining the scope of the tax due diligence process, it is important to note that the statute of limitations for tax liabilities is, generally, five years apart from those fiscal periods in which the statute of limitation was running on 26 December 2008, in which cases the statute of limitation is six years (see earlier in the chapter). However, there is no statute or regulation that limits the tax authorities' power to examine open periods, even if such periods have already been subject to examination. In other words, the tax authorities may examine open fiscal years which have already been subject to examination. That being so, it is important to ensure the tax due diligence process covers all open tax years, whether or not such tax years have been examined.

### Purchase Price

For tax purposes, it will be necessary to apportion the total consideration among the assets acquired. It is generally advisable for the purchase agreement to specify the allocation. This will normally be acceptable for tax purposes, provided it is commercially justifiable. Purchase price of inventories and fixed assets should be calculated based on the market value of such goods. It is advisable that such valuation should be prepared by an independent valuer.

### Goodwill

The tax treatment of intellectual property and other intangible assets has generally been aligned with their accounting treatment. Amortization of goodwill, trademarks, and similar intangible assets is not deductible.

At the taxpayer's option, reorganization costs may either be deducted in the year in which they are incurred, or capitalized and then amortized over a period not exceeding five years.

### Depreciation

Depreciation of buildings used to generate taxable income may be deducted at a 2-percent annual rate on the cost of the buildings. Such depreciation expense must be indexed to account for inflation occurring between the month of acquisition or construction and the end of the tax year, but not beyond March 1992. Other depreciation rates may be used if they are technically supported.

Annual depreciation of all other depreciable assets used to generate taxable income is determined by dividing the acquisition cost of the asset by its estimated years of useful life, and then indexing the result to account for inflation in the same manner as for buildings and improvements. The tax law does not include standard depreciation rates.

Other depreciation methods, such as those based on units of production or time of use, may be used if they are technically justified.

### Tax Attributes

Tax losses and other tax attributes (such as industrial promotional benefits) are not transferred on an asset's acquisition. They remain with the seller, because the law does not permit their transfer, unless the asset deal is organized as a tax-free operation (that is, transfer of assets into the same economic group where the legal

requirements are duly met). For more details, see Tax Losses section in the Purchase of Shares section.

### *Value-Added Tax (VAT)*

VAT is levied on a large number of goods and services, although goods and services exported from Argentina are zero-rated. The seller will charge VAT (output VAT) to the buyer on the transfer of inventories, fixed assets, and movable goods. The buyer can use the input VAT as a fiscal credit to offset future VAT charged to customers on domestic transactions, as long as it is registered for VAT purposes in Argentina. The standard VAT rate is 21 percent. A reduced rate of 10.5 percent applies to the sale of certain capital goods.

Although goodwill is not subject to this tax, it may be taxed if it is tied to taxable services rendered as part of the general transaction.

Transfers of goods are exempted from VAT in the case of a tax-free reorganization.

The transfer of a business as a going concern could be treated as tax free if is organized as a tax free transfer within the same economic group and the legal requirements are duly met. Professional advice should be sought if buildings are being sold, because complications may arise if the sale occurs within 10 years of acquisition (or completion of construction). Section 11 of the VAT Law prescribes that tax credits computed on time will be refunded.

### *Transfer Taxes*

The sale of assets may also trigger a turnover tax for the seller. Generally, such tax applies to the transfer of inventories. The transfer of accounts receivable, fixed assets, and intangible assets is not usually subject to turnover tax in the same way as the transfers of goods when a tax-free reorganization treatment applies (see Reorganizations). The turnover tax is a state tax collected by the city of Buenos Aires and other provinces. However, there is the equivalent of a tax treaty among all local jurisdictions to avoid double taxation.

The tax base of the tax is similar to that of the value-added tax (VAT), but the turnover tax does not generate a tax credit. Turnover tax rates vary from province to province and range from 2.5 percent to 4.0 percent. A reduced rate of 1.5 percent or an exemption may apply in the province where a factory is located.

The stamp duty is a provincial tax levied upon legal transactions expressly provided for by statute. Such

transactions are documented with public or private instruments. Generally, the stamp duty is assessed at a rate of 1 percent and is applied on the economic value involved in the transaction. The parties signing the agreement/instrument are jointly liable for the payment of the tax.

Transfers of assets are generally subject to the stamp duty when the transfer is completed with a written agreement.

### *Purchase of Shares*

The purchase of shares in a resident Argentinean corporation may be made through an existing or newly-created local subsidiary of the foreign acquiring corporation. The acquisition may be financed by the subsidiary's own funds or through loans, either granted by the parent foreign corporation or by a third party, such as a bank.

Generally, a foreign entity acquires a target Argentinean company directly, as opposed to using a resident holding company, because capital gains arising from the disposal of shares of an operating company are taxable at the level of the resident holding company, and the availability of an interest deduction for acquisition debt may be in doubt when a resident holding company structure is used.

Purchasers of stock in an Argentinean company cannot obtain a step-up in the tax basis of the assets purchased.

### *Tax Indemnities and Warranties*

Most acquisitions in Argentina are stock purchases.

In the case of a stock purchase, purchasers become fully liable for the tax liabilities of the target company until the end of the statute of limitations period. It is customary for the purchaser to initiate a due diligence exercise, which would normally incorporate a review of the target's tax affairs.

When defining the scope of the tax due diligence process, it is important to note that the statute of limitations for tax liabilities is five years (see Recent Developments). However, there is no statute or regulation that limits the tax authorities' power to examine open periods, even if such periods have already been subject to examination. In other words, the tax authorities may examine open fiscal years which have already been subject to examination. That being so, it is important to ensure the tax due diligence process covers all open tax years, whether or not such tax years have been examined.

It is usual for the party acquiring the shares of a company to request a guarantee that, by buying its shares, the buyer is also inheriting the company's tax history. As a result, after the due diligence process – with a subsequent purchase audit – an escrow account is generally opened on behalf of the buyer in case of contingencies. The Argentinean tax authorities do not grant final certificates stating that a particular taxpayer has no tax outstanding.

## *Tax Losses*

Net operating losses may not be carried back, but may be carried forward for a maximum of five years.

Foreign-source losses are subject to an additional limitation, as they may offset only foreign-source income. A similar restriction applies to losses on sales of shares and certain derivatives transactions.

Changes in the shareholder will not remove the possibility of offsetting the tax losses with taxable earnings of the entity owner of the tax losses.

Under a tax-free reorganization, tax attributes, such as loss carry-forwards, can be conveyed from the predecessor company to the surviving company. Tax loss carry-forwards (and unused tax exemptions/promotional benefits) are only transferable to the surviving company or companies when the holders of record of the predecessor company or companies retained at least 80 percent of their capital contributions in these companies (unless the shares are traded under self-regulated stock markets) for at least two years prior to the date of the reorganization.

## *Transfer Taxes*

The stamp duty is a provincial tax levied on legal transactions expressly provided for by statute. Such transactions are documented with public or private instruments. Generally, the stamp duty is assessed at a rate of 1 percent and is applied on the economic value of the transaction. The parties signing the agreement/instrument are jointly liable for the payment of the tax.

Transfers of shares, or of interests held in business organizations (such as SRLs) are subject to the stamp duty, provided, in general, that the transfer is completed with a written agreement

## **Choice of Acquisition Vehicle**

The purchase of shares in a resident Argentinean corporation may be made through an existing or newly-created local subsidiary of the foreign acquiring

corporation and tax factors will often influence the choice.

There is no stamp tax on the introduction of new capital into an Argentinean entity.

## ***Local Holding Company***

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An Argentinean company could be used when the purchaser already owns another entity located in Argentina.

However, capital gains arising from the disposal of shares of an operating company are taxable at the level of the resident holding company, and the availability of an interest deduction for acquisition debt may be in doubt when a resident holding company structure is used.

## ***Foreign Parent Company***

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The foreign purchaser may choose to make the acquisition itself, perhaps to shelter its own taxable profits with the financing costs. This will not necessarily cause any tax problems, because Argentina does not tax the gains of non-residents disposing of Argentinean shares. However, it should be noted that, if the foreign purchaser is resident in a tax haven (offshore company), a 17.5-percent withholding tax (or, at the option of the taxpayer, 35 percent on actual gains) would apply in the event such offshore company sells the shares to a local company in the future.

## **Rules and Consequences to Foreign Shareholders**

### ***Supervisory Board of Companies***

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General Resolution No. 7/2005, issued by the Supervisory Board of Companies (IGJ), is intended to prohibit the registration of foreign companies that do not effectively conduct business or own assets outside of Argentina, but whose sole purpose is to conduct business activities in Argentina. Resolution No. 7 may require non-Argentinean companies to incorporate as Argentinean companies before those companies are registered with the IGJ as shareholders of Argentinean corporations domiciled in the city of Buenos Aires. Incorporation as an Argentinean company is required if the foreign investor cannot prove that the value of its non-Argentinean non-current assets is significant when compared to the value of its ownership interest in the Argentinean company.

It is important to note that there must be a minority shareholder holding at least 5 percent of the Argentinean Company, or the company can be re-classified as a branch.

## **Special Purpose Vehicles**

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Special purpose vehicles (SPVs) that do not strictly comply with Resolution No. 7 may still be registered as foreign, if they can demonstrate that the ultimate controlling company of the group complies with Resolution No. 7; that is, has significant assets outside Argentina.

The SPV must submit a certificate stating that its sole purpose in seeking registration is to serve as an SPV of the controlling company. The certificate must be accompanied by documents issued by the SPV's and the controlling company's boards of directors, management, or governing bodies. For this purpose, an affidavit executed by the legal representative of the SPV is required with:

- a corporate organizational chart of the chain of companies that control the SPV; and
- certain information about the shareholders of the SPV and the SPV's parent.

## **Equalization Tax**

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The treatment of the payment of dividends (and other type of profit) is as follows:

Dividends are non-taxable if the amount distributed does not exceed the cumulative taxable income. Any excess will be subject to a withholding of 35 percent as one-off and final payment. Stock dividends are not subject to withholding.

This limitation has been imposed in Article 69.1 of the ITL, as follows: "When individuals/entities included in paragraphs 1, 2, 3, 6 and 7 of subsection a) of section 69, as well as those indicated in subsection b) of the same section pay dividends or distribute earnings, in-cash or in-kind, exceeding income determined in accordance with the general principles of the Income Tax Law, accumulated at the end of the fiscal year prior to the payment or distribution thereof, 35 percent will be withheld over such excess as one off payment."

## **Tax Efficient Shareholders**

It is essential to structure the acquisition of a target company in Argentina so as to minimize taxes applicable to cash exchanges between the Argentinean target company and the foreign-related companies.

Currently, Argentina has 18 double taxation treaties in force with Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Finland, France, Germany, Italy, the Netherlands, Norway, Spain, Sweden, Switzerland, and the United Kingdom.

The treaties grant various tax benefits applicable to the foreign beneficiary generating Argentinean-source income, such as those relating to the applicability of income tax withholding on the payment of dividends or interest, and establish rules for determining the deductibility of such payments for the local taxpayer.

Some treaties may even grant additional benefits related to net-worth tax. This wealth tax is a tax on the net worth of individuals, but an assumed taxpayer, for purposes of the wealth tax, is created if the shareholder of a local entity organized under Law No. 19,550 is a foreign entity. Currently, domestic companies must pay the tax for their shareholders. The rate is 0.5 percent of the proportional annual value of the company. The local companies responsible for paying the tax are entitled to request reimbursement from their foreign shareholders.

Certain tax treaties, such as those with Spain, Switzerland, and Chile, contain provisions that prevent the application of wealth tax on the holdings of their residents in Argentina.

## **Non-Resident Intermediate Holding Company**

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If the foreign country taxes capital gains and dividends received from overseas, an intermediate holding company resident in another territory could be used to defer this tax and perhaps take advantage of a more favorable tax treaty with Argentina. However, the purchaser should be aware that Argentinean treaties contain treaty shopping provisions that may restrict the ability to structure a deal in a way designed solely to obtain tax benefits.

## **Local Branch**

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As an alternative to the creation of an Argentinean holding company, a foreign purchaser may structure the acquisition through an Argentinean branch. Argentina does not impose additional taxes on branch profits remitted to an overseas head office. Argentinean branches and corporations are taxed similarly at the national and provincial levels.

If the Argentinean operation is expected to make losses initially, a branch may be advantageous since, subject to the tax treatment applicable in the head's office country, there could be a timing benefit arising from the ability to consolidate losses with the profits of the head office.

## **Joint Ventures**

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This structure is not commonly applied in Argentina.

## **Choice of Acquisition Funding**

A purchaser using an Argentinean vehicle to carry out an acquisition for cash will need to decide whether to fund

the vehicle with debt or equity. The principles underlying these approaches are discussed below.

### **Debt**

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The principal advantage of debt is the potential tax-deductibility of interest (see Deductibility of Interest).

### **Leveraged Buy-Outs**

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In a leveraged buy-out, a new holding company, the acquiring company, typically does not have sufficient capital to acquire the target company and, therefore, avails itself of a loan from a financial institution or related party.

If the transaction is limited to the acquisition of capital stock, or the merger of the new holding company with the target company, and the acquiring company's indebtedness is transferred to the target company, then the transaction is characterized as a leveraged buy-out merger. Under these circumstances the target company seeks the interest deduction for the loan, provided that the target has high and stable cash flows. However, the tax authorities have determined that interest arising from loans taken out to finance the purchase of shares cannot be deducted for tax purposes.

The Argentinean tax laws do not have special provisions on financial leverage or leveraged buy-outs and, thus, the current provisions on the deduction of interest apply. As a general rule, interest is deductible to the extent that it is related to the generation of taxable income. However, there are also capitalization rules applicable to the loans granted by foreign-related entities under certain conditions.

In Opinion No. 62/03, the tax authorities concluded that interest accrued in connection with the purchase of the majority of the capital stock of a company that was then absorbed (leveraged buy-out merger) was not a part of the merged company's activities (operating activities) and was, therefore, not deductible.

In a recent decision, the National Special Tax Court held that "interest accrued from loans taken out to acquire the aggregate capital stock of a company before the merger of such company is an expense which is not necessary to obtain income or maintain the source of income of the company. Therefore, any such interest is not deductible. It is an investment made by the shareholder and, thus, it is the shareholder who will be subject to any applicable tax consequence."

### **Thin-Capitalization Rules**

Thin-capitalization rules only apply to interest on loans granted by foreign-related financial institutions to local

companies. Interest is not deductible when the debt/equity ratio of the local company exceeds a 2:1 ratio. Interest that is not deductible, as a result of the application of this rule, should be re-characterized as a dividend and treated accordingly. In the case of a treaty country inter-company loan, the thin-capitalization rules may not apply, even if the two-to-one equity ratio is exceeded, but opinions differ on this issue.

Although not necessarily a proper practice, the Argentinean tax authorities have previously sought to apply a regulatory decree stating that interest (other than on loans subject to the 35-percent withholding tax rate) is not deductible when the debt/equity ratio exceeds a 2:1 ratio, and should be re-characterized as a dividend. This means interest generated by a treaty country inter-company loan may be subject to thin-capitalization rules if the two-to-one equity ratio is exceeded.

Based on the above, leverage can be introduced to a target Argentinean company by borrowing capital from lenders in both treaty and non-treaty countries, as long as the 35-percent domestic withholding rate can be computed as a tax credit by the foreign treaty country.

### **Thirty-Percent Bank Reserve**

Currently, the Argentinean Central Bank (BCRA) imposes a 30-percent bank reserve requirement on foreign currency inflows. The reserve must exist for 365 days, be denominated in US. dollars, and cannot be used as collateral. Such reserves do not generate interest.

It is important to note that liabilities are exempt from the 30-percent bank reserve requirement as long as they are agreed and settled after two years, and the local company uses them to invest in non-financial assets, such as fixed assets and inventories.

### **Deductibility of Interest**

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#### **Temporary Limitation**

Pursuant to the provisions of section 18 of Argentinean Income Tax Law, since such interest payments are expenses incurred by local companies holding foreign capital and that such expenses become Argentinean-source taxable income for a foreign company which participates, either directly or indirectly, in its capital, control or management, and/or for an entity located in a tax haven, the relevant recording in the financial statements for tax purposes can only be made when the expenses are paid within the term fixed for the filing of the tax return of the fiscal year in which the

corresponding disbursement accrued (five months following year-end date).

Hence, if an Argentinean holding company does not pay the interest within the term fixed for the filing of the tax return, then it is not deductible in the financial statements for tax purposes (otherwise, they will be deductible in the year paid).

### *General Instruction Number 747 Issued by the Argentinean Tax Authorities (AFIP)*

With this Instruction, the Argentinean tax authorities attempted to challenge the deductibility of interest and exchange gains/losses arising from loans in foreign currency between companies located in Argentina and foreign companies for such reasons as the lack of a formal agreement between the parties, the failure to state the terms for the repayment of principal and/or interest and the failure to include an interest rate in the loan agreement.

As noted in Recent Developments this can be important in the due diligence analyses, because for loans taken out prior to 31 December 2001 the applicable exchange rate has been increased from USD 1 = ARS 1 to USD 1 = ARS 3.81.

In addition, it is important to meet the aforementioned formal requirements in the event of leveraged buy-outs so as to avoid the possibility that the tax authorities may challenge the exchange gains/losses and interest derived from these loans.

### *Payment of Withholding Tax*

A failure to pay withholding tax would imply that the expenses (interest) will not be deductible for tax purposes.

### *Transfer Pricing*

As per these provisions, the interests between a local company and a foreign related company must conform to normal market practices on an arm's length basis.

### ***Withholding Tax on Debt and Methods to Reduce or Eliminate***

A withholding tax is imposed on payments of interest to non-residents. The withholding rates for the payment of interest to beneficiaries abroad are:

- 15.05 percent when the borrower is a local financial entity, or when the loan is related to the financing of capital goods imports, or when the creditor abroad is a financial or banking institution located in a country that either a) is not considered a low-tax

jurisdiction, or b) has a treaty with Argentina that contains an exchange of information clause that has no local restrictions regarding said exchange between revenue services; and

- 35 percent for all other cases.

However, interest from the following portfolio investments is not taxed if paid to non-residents:

- Obligations of the Argentinean government
- Obligations (bonds) issued by resident corporations and other non-government entities through a public offer

The existing double taxation treaties may stipulate lower percentages, which will apply in the case of payments to recipients in the pertinent countries.

For the double taxation treaty provisions to be applicable, the foreign beneficiary shall submit an affidavit demonstrating that it is a foreign resident, according to General Resolution 3497. The data contained in the affidavit shall be certified by the related foreign tax authorities and shall be in line with the Hague apostille regime.

### ***Checklist for Debt Funding***

- The tax authorities have determined that interest arising from loans taken out to finance the purchase of shares cannot be deducted for tax purposes.
- The use of bank debt may avoid thin-capitalization and transfer pricing problems.
- Meet formal requirements of loans so as to avoid the possibility that the tax authorities will challenge the exchange gains/losses and interest derived from these loans.
- Deductibility of interest from related companies is conditional on the effective payments of such interest.
- For certain loans the Argentinean Central Bank (BCRA) imposes a 30-percent bank reserve requirement for 365 days, denominated in US dollars, which cannot be used as collateral. Such reserves do not generate interest. Liabilities that are agreed and settled after two years, and the local company uses them to invest in non-financial assets, such as fixed assets and inventories, are exempt from the bank reserve.
- Thin-capitalization rules only apply to interest on loans granted by foreign-related financial

institutions to local companies, and other loans where the applicable withholding rates are less than 35 percent.

### **Equity**

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The usual form of structuring inbound investments into Argentina by a foreign company involves the use of a portion of debt and a portion of equity.

Stamp tax is not applicable to new shares and/or to capital contributions.

A capital contribution is not subject to the 30-percent bank reserve requirement as long as it is registered before the Public Registry of Commerce, the registration is submitted to the banking authorities (a temporary deposit may be initially required by the banking authorities and subsequently released once the documentation is submitted), and the foreign investor holds more than 10 percent of the capital of the local entity.

The distribution of such dividends is not taxed, as long as the amount of dividend does not exceed the taxable income.

### **Reorganizations**

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Tax-free reorganizations may be structured under Argentinean law that allow tax attributes, such as loss carry-forwards, to be conveyed from the predecessor to the surviving company. Tax loss carry-forwards and unused tax exemptions are only transferable to the surviving company or companies when the holders of record of the predecessor company or companies held at least 80 percent of their capital contributions in these companies (unless the shares are traded under self-regulated stock markets) for at least two years prior to the date of the reorganization.

Under Argentinean law, reorganization is defined as:

- the merger of pre-existing enterprises;
- the breaking-up or division of an enterprise into another or others that continue, together, the operation of the first enterprise; or
- the sale or transfer of one entity to another which, although being legally independent, constitutes the same economic whole.

For a reorganization to qualify for tax-free treatment, certain requirements must be satisfied. For example, the holder or holders of record of the predecessor company must retain an investment in the surviving company equal to the investment in the predecessor

company for not less than two years from the date of the reorganization. The reorganized companies must have had the same or related activities during the 12 months preceding the merger, and each company must have existed for at least 18 months before the reorganization. The surviving entity must also continue its activities for at least two years after the date of the reorganization, so that the goods and/or services the surviving company or companies produce and/or trade possess characteristics similar to those which the predecessor company or companies produced and/or traded.

The reorganization must also be communicated to the tax authorities within six months of the reorganization date.

M&A transactions are evaluated according to antitrust laws when they involve economic concentrations through mergers, going-concerns transfers, acquisitions of interests in other companies that confer control over them, and transfers of assets that also confer control or a dominant influence on decision-making.

### **Hybrids**

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Hybrids (that is, instruments treated as equity for accounts purposes in the hands of one party, and as debt in the other) are not applicable for Argentinean income tax purposes.

### **Discounted Securities**

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There are no Argentinean tax special benefits in connection with the issuance of securities issued at a discount.

## **Other Considerations**

### **Labor Issues**

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When a business is transferred by whatever means, all the obligations arising from the employment contract between the transferor to the worker at the moment of the transfer, shall be transferred to the transferee or purchaser, including those resulting from the transfer itself. In such a case, the employment contract remains in full force and effect with the transferee or purchaser, and the worker retains the rights vested in all the years of service with the transferor. The transferor and the transferee of a business are jointly and severally liable for the related obligations arising from the employment contract at the moment of the transfer.

### **Sale of Shares of Stock Corporations (SAs)**

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According to Decree 2284, foreign beneficiaries are exempt from income tax on gains from the sale of shares, bonds, or other types of marketable securities.

As such, an on-shore foreign company's sale of shares would not trigger income tax in Argentina. Off-shore companies may be subject to different treatment, as noted later in the chapter.

### **Off-Shore Companies**

Off-shore companies are companies established outside Argentina, which are prevented by the legislation of the place of creation, from conducting all their activities or their main business in the place of creation. An off-shore company's primary objective is to invest in countries other than the country where it is organized. Off-shore companies cannot be registered as foreign shareholders before the IGJ. In such cases, the off-shore company must register as a local shareholder.

Although foreign beneficiaries are generally exempt from capital gains tax, it can be argued that capital gains to foreign beneficiaries that are derived from an off-shore company's sale of shares should be treated as capital gains to resident individuals, subject to a withholding tax of 17.5 percent on gross payments or 35 percent on actual gains.

The consequences of an off-shore foreign resident's sale of an Argentinean company's shares are as follows:

- If an off-shore foreign beneficiary sells shares of an Argentinean company to another foreign beneficiary, theoretically, the transaction should be subject to tax. However, in practice, the transaction does not fit within any of the withholding tax regimes established by the tax authorities. As such, it can be argued that withholding tax should not be applicable under such circumstances, but opinion is divided on this issue.
- If an off-shore foreign beneficiary sells shares of an Argentinean company to an Argentinean resident, a withholding tax of 17.5 percent on gross payments or 35 percent on actual gains would generally apply, but here too opinions on the right treatment differ.

### **Sale of Interests in Limited Liability Companies (SRLs)**

Decree 2284 does not apply to the sale of membership interests in SRLs, so the sale of SRL interests is subject to a withholding tax of 17.5 percent on gross payments or 35 percent on actual gains.

That being said, a foreign company's sale of SRL membership interests to another foreign company does not fit within any of the withholding tax regimes established by the tax authorities. As such, it can be

argued that withholding tax should not be applicable under such circumstances.

A foreign company's sale of SRL membership interests to an Argentinean resident is subject to a withholding tax of 17.5 percent on gross payments or 35 percent on actual gains.

### **Company Law and Accounting**

Merger procedures are regulated in Corporations' Law 19,550 (ACL) and acquisitions of shares/quotas are regulated by the Civil and Commercial Codes.

ACL foresees two types of mergers: a pure or simple merger where two or more companies are dissolved (without liquidation) in order to create a new one, or an absorption merger where an existing company incorporates another or other companies that are dissolved without being liquidated.

To effect a merger, several steps must be performed:

- Preparation of special merging financial statements
- Board of directors' meeting approving the merger
- Signing of a preliminary merger agreement (v.gr. Compromiso Previo de Fusión)
- Extraordinary shareholders' meeting
- Publication of legal notices in the Official Gazette and other main newspapers
- Signing of the definitive merger agreement (v.gr. Acuerdo Definitivo de Fusión)
- Registration before the respective Public Registry of Commerce of Buenos Aires City

ACL allows mergers of different types of companies. It is possible to merge corporations with limited liability companies or commercial and civil entities.

The practical advantage of carrying out a reorganization procedure (merger) rather than an acquisition of shares/quotas is that the companies involved do not need liquidity to merge. When acquiring shares/quotas, the purchaser must either have liquidity or obtain financing.

To effect a merger special merging financial statements must be prepared, which must be audited by a local CPA. Legal notaries and accounting documents must also be prepared.

Third parties and creditors are specially protected by ACL. Before signing the definitive merger agreement, creditors could oppose to the merger procedure and request their debts be paid, and corresponding judicial recourses are available to them.

Once all requirements have been fulfilled, the documents must be filed before the respective Public Registry of Commerce of Buenos Aires City. Once so registered, the merger can still be opposed by third parties.

One issue to bear in mind is that if a merger (or the acquisition of shares/quotas) amounts to an abuse of a dominant position in a specific market or is alleged to do so, the operation (merger or acquisition of shares/quotas) must be previously submitted to and approved by the Anti-Trust Commission. A failure to request the commission's authorization could lead to fines or the prohibition of the merger or acquisition of shares/quotas.

In the case of a shares/quotas acquisition, a purchase agreement must be entered into by the parties and the vendor must notify its participants so that they can modify and up-date their registrations.

In the case of an acquisition of quotas of a limited liability company, the purchase agreement must be registered with the Public Registry of Commerce of the relevant jurisdiction and a legal notice must be published in the Official Gazette.

If the minority shareholders/partners of the companies involved in a merger procedure or an acquisition of shares/quotas hold less than 5 percent of the registered capital, the Public Registry of Commerce of Buenos Aires City will deem the local company to be a branch of the main shareholder.

If foreign companies participate in a merger or acquisition procedure, they must be registered with the Public Registry of Commerce of the relevant jurisdiction under section 123 of the ACL (foreign entity registered to participate as a shareholder/partner of a local company) or section 118 of the ACL (branch of a foreign company) under the penalty of not registering the acts of the participated local companies. Every local jurisdiction also has administrative requirements for foreign companies.

From an accounting viewpoint, it is necessary to distinguish between transactions between unrelated parties – business combinations – and transactions within the same economic group – corporate

reorganizations – because the accounting treatment will rely on such distinctions.

In the case of a business combination, both assets and liabilities are stated at fair market value. If there is a difference between fair market value and the price paid, positive or negative goodwill arises. If the useful life of goodwill is indefinite, it is not amortized, but annual recoverability analysis is required.

In the case of a corporate reorganization (within the same economic group), assets and liabilities will be added to the book value and no goodwill will arise

### **Group Relief/Consolidation**

Consolidated filing is not permitted. Each entity, even if it belongs to the same owner or affiliated group, must file a separate tax return.

### **Transfer Pricing**

The 1998 income tax reform introduced transfer pricing regulations in Argentina that are broadly comparable with OECD Guidelines.

There is, however, no hierarchy for the application of the OECD accepted methods. The selection of the appropriate transfer pricing method in Argentina depends primarily on the availability of information and the number and magnitude of the adjustments necessary to achieve comparability.

In accordance with these provisions, the services between a local company and a foreign related company must conform to normal market practices on an arm's length basis. If they don't, the tax authorities may make appropriate adjustments, by applying methods and procedures prescribed by the law, to the tax return of the local company, and so increasing its taxable base.

The transfer pricing return (i.e. a report certified by a CPA) must be filed eight months after year-end date. Under the provisions of section 15.1 of the Income Tax Law, failure to file the tax returns and related transfer pricing analyses to the tax authorities may result in fines of up to USD 6,000 on each tax return not filed.

### **Foreign Investments of a Local Target Company**

For resident corporations, worldwide income is taxable, including the income of foreign branches and subsidiaries, even if such income is not repatriated. Income of foreign subsidiaries is taxable only to the extent of dividends actually paid, unless the subsidiary is organized in a tax haven country, in which case the Argentinean company is taxed on its allocated share of

the subsidiary's income, regardless of whether a dividend is paid.

## Comparison of Asset and Share Purchases

### ***Advantages of Asset Purchases***

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- Establishes a limit on the co-responsibility of purchasers for non-declared fiscal and social security liabilities, as long as they comply with the requirements of Law No. 11867 and the transaction is reported to the tax authority.
- The purchase price, or a portion of it, can be depreciated or amortized for tax purposes.
- It is possible to acquire only part of a business.

### ***Disadvantages of Asset Purchases***

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- May be unattractive to the seller, because a share sale is tax exempt, so choosing an asset purchase can result in an increase in the price to be paid.
- Higher transfer taxes apply (VAT, turn-over tax, etc.).
- The benefits of any cumulative tax losses incurred by the seller remain with the seller, because the law does not permit their transfer.

### ***Advantages of Share Purchases***

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- May benefit from tax losses of seller's company.
- Lower transfer taxes apply to the operation (no VAT, no turn-over tax, etc.) in comparison with an asset purchase.
- Lower capital payments, in comparison with a purchase of assets only.

### ***Disadvantages of Share Purchases***

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- The purchaser assumes all the tax and social security history of the company.
- The purchaser remains liable for any claims or previous liabilities of the entity, including tax, social security, labor, etc.

## Withholding Tax Rate Chart

The rate information and footnotes contained below is from the 2009 IBFD/KPMG Global Corporate Tax Handbook.

Country	Dividends		Interest <sup>1</sup> (%)	Royalties (%)
	Individuals, Companies (%)	Qualifying <sup>2</sup> Companies (%)		
Australia	15	10 <sup>2</sup>	12	10/15 <sup>3</sup>
Austria <sup>16</sup>	15 <sup>4</sup>	15 <sup>4</sup>	12.5 <sup>4</sup>	15 <sup>4</sup>
Belgium	15	10 <sup>2</sup>	12	3/5/10/15 <sup>5</sup>
Bolivia	<sup>6</sup>	<sup>6</sup>	<sup>6</sup>	<sup>6</sup>
Brazil	<sup>7</sup>	<sup>7</sup>	<sup>7</sup>	<sup>7</sup>
Canada	15	10 <sup>2</sup>	0/12.5 <sup>8</sup>	3/5/10/15 <sup>5</sup>
Chile	<sup>6</sup>	<sup>6</sup>	<sup>6</sup>	<sup>6</sup>
Denmark	15	10 <sup>2</sup>	0/12 <sup>9</sup>	15 <sup>5</sup>
Finland	15	10 <sup>2</sup>	15	3/5/10/15 <sup>10</sup>
France	15	15	20	18
Germany	15	15	10/15 <sup>11</sup>	15
Italy	15	15	0/20 <sup>8</sup>	10/18 <sup>12</sup>
Netherlands	15	10 <sup>2</sup>	0/12 <sup>8</sup>	3/5/10/15 <sup>5</sup>
Norway	15	10 <sup>2</sup>	0/12.5 <sup>8</sup>	3/5/10/15 <sup>5</sup>
Spain	15	10 <sup>2</sup>	0/12.5 <sup>8</sup>	3/5/10/15 <sup>13</sup>
Sweden	15	10 <sup>2</sup>	0/12.5	3/5/10/15 <sup>5</sup>
Switzerland <sup>15</sup>	15	10 <sup>2</sup>	12 <sup>89</sup>	0/3/5/10/15 <sup>514</sup>
United Kingdom	15	10 <sup>2</sup>	12 <sup>89</sup>	15 <sup>5</sup>

### Notes

- Many treaties provide for an exemption for certain types of interest, such as interest paid to government institutions or to state-owned institutions or guaranteed by public bodies, or in respect of commercial debt claims in the case of the supply of goods, in respect of a loan for development purposes or for the promotion of exports, etc. Such exemptions are not considered in this column.
- The rate generally applies with respect to participations of at least 25 percent of capital or voting power, as the case may be.
- The 10-percent rate applies to copyrights, patents, lease of equipment, the supply of know-how or information, and technical assistance.
- The source state has the exclusive right to tax.
- The 3-percent rate applies to news-related royalties; the 5-percent rate applies to copyright royalties (excluding films, etc.); the 10-percent rate applies to patents, trademarks, know-how, certain lease-related royalties, and technical assistance.
- The domestic rate applies; there is no reduction under the treaty. The source state has the exclusive right to tax.
- The domestic rate applies; there is no reduction under the treaty. Both states generally have the right to tax. However, the state of source has the exclusive right to tax interest paid by public bodies.
- The zero rate applies, inter alia, to interest paid by public bodies.
- The zero rate applies to interest paid to banks and financial institutions (under certain conditions).
- The 3-percent rate applies to payments for news; the 5-percent rate applies to copyright royalties (excluding computer software, cinematographic films, and works on film, videotape, or other media for television or radio broadcasting); 10-percent for patents, equipment, software, know-how, and technical assistance; and 15-percent for copyright royalties paid to someone other than the author or the author's mortis causa successor (including cinematographic films and works on film, videotape or other media for television, or radio broadcasting).
- The 10-percent rate applies to sales on credit of industrial, commercial or scientific equipment, and loans granted by a bank or for the financing of public works.
- The 10-percent rate applies to copyright royalties.
- The 3-percent rate applies to payments for news; the 5-percent rate applies to copyright royalties; the 10-percent rate applies to patents, designs or models, a plan, secret formula or process, know-how, leasing of equipment, and technical assistance.
- Zero provided that Swiss domestic law does not tax at source royalties payable to non-residents. Zero for royalties on the lease of equipment or machinery with a purchase option under conditions of the source state (protocol of 1997).
- The treaty provisionally applies as of 1 January 2001.
- Treaty terminated with effect from 1 January 2009.

## KPMG in Argentina

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