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Transfer Pricing Forum

Transfer Pricing for the International Practitioner

APRIL 2019

Argentina

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1. Briefly describe the transfer pricing documentation and tax return disclosure requirements in your jurisdiction.

Transfer pricing tax compliance is certainly cumbersome in Argentina. The relevant reportable transactions include not only related party transactions and deemed related party transactions but also certain data on cross-border unrelated party transactions. A summary of the relevant reportable information in each case is provided below.

As a general rule, no tax filing is due only in the following cases: (i) the taxpayer has not performed any international transactions with affiliated companies (i.e., including those with counterparties domiciled in countries considered by the Argentine Revenue Service ("ARS") as non-cooperative for tax-information exchange and low-tax jurisdictions); or (ii) it has performed cross-border transactions with unrelated parties that do not involve commodities and/or are not material enough to exceed the minimum reportable threshold.

ARS General Resolution 1,122/01 ("GR 1122") regulates the reportable information for transfer pricing. Sections 6 and 8 include the following list of data and sworn statements due by taxpayers:

Documentation Requested for International Transactions between Unrelated Parties:

Annual Return for Transactions with Unrelated Parties (F-741)

This tax return is known as Form Number 741. It must be submitted by taxpayers that either import or export commodities with unrelated third parties. The term "commodities" refers to goods with listed or well-known prices on international boards of trade or major stock markets (e.g., grains, oil, gas, etc.). This tax return must be filed annually during the fifth month after the end of each fiscal year. It contains data as to volume of commodities traded, types, and relevant market prices.

Annual Return for Transactions with Unrelated Parties (F-867)

Form Number 867 is filed by importers and exporters of goods other than commodities, who trade with unrelated parties, provided the transaction amounts to at least ARS 10 million during the relevant fiscal year. This return for material cross-border transactions with unrelated parties is filed seven months after the end of each fiscal year. It contains information about the traded prices, profit margins, market of destination, and payment terms.

Related-Party Documentation Requirements:

All taxpayers that perform international transactions with "affiliated parties" (i.e., a broad definition included in local laws and regulations, which includes common control of capital, management, and even main supplier/main client commercial relationships) must first register in the "Related Parties Registry" on the ARS website.

Taxpayers that perform international transactions with affiliated parties — including those with counterparts domiciled in countries considered by the ARS as non-cooperative for tax information exchange purposes and low-tax jurisdictions — must report and maintain robust documentation regarding their transfer prices and profit margins.

GR 1122 includes two core reporting obligations. Form Number 743 is due eight months after the end of the fiscal year. This form provides details of the transactions with related parties and figures and names, as well as indicating the best method selected for the transfer pricing report, the comparables, and the relevant adjustments. Form Number 969 is due within 15 days of the filing date of the annual income tax return. This form includes both related party transactions and deemed related party transactions. The information required on the form is similar to the information required for customs clearance.

In addition, GR 1122 provides that taxpayers should file the complete transfer pricing report with the ARS within eight months of the end of each fiscal year. The report is filed in PDF format through the annual return F-4501.

Finally, on September 20, 2017, the ARS issued GR 4130-E, implementing the Country-by-Country report through forms F-8096 and F-8097. The new reporting system is effective for fiscal years beginning on or after January 1, 2017, and it follows the OECD model.

TP FORUM ISSN 2043-0760

2. In recent years, have the tax authorities changed or modified their audit approach? (e.g., increase in staffing and/or increase in funding with respect to the transfer pricing audit function; use of risk assessment tools or data mining tools to identify audit targets; use of joint or coordinated audits, etc.). If risk assessment tools are used, what factors are typically analyzed?

Transfer pricing controversy is by and large the most sensitive topic for local and foreign multinationals due to the ARS's devotion of material resources to domestic and international audits and litigation.

Currently, more than 100 transfer pricing cases are being litigated before the Tax Court, the Federal Courts of Appeal, and the Federal Supreme Court. These cases involve the services industry, industrial manufacturing, the pharmaceutical industry, and the commodity export sector. In addition, a number of transfer pricing adjustments made by the ARS have ended up in Mutual Agreement Procedures before treaty competent authorities. These controversies are grounded in the violation of double tax treaties, like the ones with Brazil, Chile, Switzerland, and the Netherlands, among others.

The latest tax controversies involving industrial manufacturing industries are focused on the adequate profit level indicator. Argentine courts have sustained a preference for the return on capital employed (ROCE) over the mark up on total costs. In this regard, last year the Federal Court of Appeals ratified the previous Tax Court decision in the case *Acindar Industria Argentina de Aceros SA* (April 5, 2018), upholding the ARS's position regarding the ROCE. This case illustrates that any change in the taxpayer's transfer pricing methodology should be carefully evaluated prior to its implementation to ensure that proper arguments are available to support the change. The ARS will always look at such a change as a red flag.

In 2018, new controversies arose regarding debt-to-equity recharacterization based on the non-arm's length terms of a loan agreement between affiliates, despite the fact that the leading case is still pending a decision from the Federal Supreme Court (*TESA SA*). After 10 years of controversy, the case received a decision by the Attorney General that sustained the taxpayer's argument as to the existence of actual debt rather than equity, regardless of the lack of timely repayment of principal and interest. In reaching the decision, the Attorney General noted that the taxpayer's economic performance was compromised by governmental action, a substantial factor that should be properly pondered to correctly evaluate the appropriate solution to the controversy. Although the decision is not binding on the Court, an agreement by the Court is the most common outcome.

As for commodity exporters, local taxpayers are also expecting a major decision from the Federal Supreme Court as to the constitutional validity of Decree 916/04, which expanded the Argentine sixth method on international triangular transactions between affiliates beyond the legal terms. The decree made the method applicable to even unrelated party transactions in cases where the trader was considered unsubstantiated. In December 2018, a leading case received a decision from the Attorney General that sustained the taxpayer's argument in this regard (*Vicentin SA*).

The tax reform passed as Law 27,430 amended the Tax Procedure Act to speed up MAPs. Historically, the ARS' position had been that once a tax assessment is debated in court, competent authorities may not intervene. The tax reform includes a new MAP process aimed at overcoming this restriction and appoints the Ministry of Finance as the relevant competent authority for MAP proceedings. Law 27,430 also includes "joint transfer pricing assessments," namely advanced pricing agreements, despite the pending implementing regulations.

3. Do the tax authorities focus on certain types of transactions? (e.g., intangibles, financing transactions, commodities, etc.).

Transfer pricing audits conducted by the ARS involve companies from almost every economic sector - services, goods, and financial transactions. Nevertheless, since Argentina is a major exporter of agricultural commodities, and in an effort to increase revenue from transfer pricing controversies, the ARS has audited and made assessments on commodity export transactions more frequently than other types of transactions. In fact, for this type of analysis, the Argentine legislation provided for a special methodology, referred to as the "sixth method" of transfer pricing.

In line with OECD regulations and the BEPS action plan, the sixth method, which was incorporated in 2003, was eliminated by the December 2017 tax reform. For commodities exports in which an international intermediary intervenes, taxpayers must register the export agreement with the ARS to provide certainty as to the contract date. The taxpayer's failure to make a proper and timely filing allows the ARS to benchmark the export on the shipment date rather than the contract date.

In light of the Law 27,430 tax reform, it is envisioned that international triangular transactions, be they commodities or not, will be a core focus of ARS audits. This is due to the fact that the reform also requires Argentine taxpayers to demonstrate that the compensation paid to intermediaries is aligned with the functions, assets, and risks involved in the transactions. This provision applies when: (1) the intermediary is a related party of the Argentine taxpayer or (2) the foreign counterparty in the transaction is a related party of the Argentine taxpayer.

4. Do the tax authorities rely on BEPS-related concepts during its audits? (e.g., DEMPE analysis, new approach for hard-to-value intangibles, expanded use of profit splits, use of risk assessment framework, etc.).

The influence of BEPS-related concepts has increased remarkably, as has the ARS's training on BEPS terms, best practices, and recommendations. For example, in the transfer pricing field, the Law 27,430 tax reform adopted BEPS Action 4 to completely amend Argentina's thin capitalization rules. In addition, BEPS Action 7 resulted in a new definition of permanent establishment, and the BEPS Action 10 report inspired the previously-mentioned repeal of the sixth method and a complete overhaul of the transfer pricing standards to better align them with the OECD Transfer Pricing Guidelines. The BEPS Action 14 report resulted in a change to the Argentine Tax Procedure Act to regulate mutual agreement procedures for use in resolving double tax treaty controversies, which are quite common in the transfer pricing field. Further, Law 27,430 in-

troduced the advance pricing agreement to provide more certainty to taxpayers, despite implementing regulations not yet being provided.

This legislative trend highlights the importance of BEPS-related initiatives, despite the ARS's delay in implementing the relevant regulations and properly training its officials to properly implement the legal mandates.

5. Do transfer pricing penalties apply in your jurisdiction? If so, what can be done to mitigate these penalties?

Transfer pricing penalties apply to transfer pricing matters, and they are actually cumbersome. If the ARS determines that there was taxpayer willful misconduct, criminal proceedings could also be filed, provided the assessment exceeds the minimum thresholds. Law 27,430 includes a new set of penalties for failing to submit a CbC report or otherwise failing to comply with related data requests from the ARS. In addition, the standard penalties for neglecting to pay taxes or fulfill tax compliance obligations do apply in the transfer pricing field. Law 27,430 fines can amount to up to 100 percent of the neglected tax for taxpayers who do not pay taxes or fail to act as withholding agents. More specifically, in the transfer pricing context the potential fine increases to up to 200 percent of the neglected tax when the omissions involve cross-border transactions. In the case of tax evasion, the tax reform decreases the previous penalty from two to 10 times the evaded tax down to two to six times the evaded tax. The same fines apply to taxpayers that willfully take advantage of tax benefits, reimbursements, recoveries, or refunds.

6. Please describe any challenges taxpayers face in preparing their transfer pricing documentation in light of these changes in the audit process.

Law 27, 430 introduced Advance Pricing Agreements. Taxpayers who had been exposed to uncertainties as to the proper methodologies now have an opportunity for transfer pricing certainty. Yet, proper staffing at the ARS level will be key for the success of this new procedure. The reform bill also amends the Tax Procedure Act to accelerate MAPs, and the terms and conditions are fully legislated. Again, this may provide taxpayers with more certainty in the double tax treaty context, e.g., the long-standing incompatibility between the Brazilian and Argentinean transfer pricing frameworks, which is material for the car manufacturing industry and for trading as a whole between the two countries.

The reform also increases compliance burdens, such as CbC filing and the related penalties. Taxpayers should focus on the consistency of locally reported related party transactions with centralized CbC data. The exchange of CbC reports is expected to result in more complex and numerous transfer pricing controversies. Robust and consistent documentation, both in Argentina and by related parties abroad, is certainly necessary to deal with the new BEPS-influenced environment.

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ISSN 2043-0760