

Overview of the Argentina-Russia Tax Treaty

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Reprinted from *Tax Notes Int'l*, March 4, 2013, p. 869

PRACTITIONERS' CORNER

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On October 15, 2012, after 11 years since the signing of the Convention for the Avoidance of Double Taxation between the Russian Federation and Argentina,¹ Russia notified Argentina that it had fulfilled its domestic requirements² for the treaty's entry into force. The treaty will have effect in both countries regarding:

- taxes withheld at source, on income derived on or after January 1, 2013; and
- other taxes on income, taxes on capital (and in the case of Argentina, taxes on assets), and for taxes chargeable for any tax year beginning on or after January 1, 2013.

From an economic standpoint, despite the low participation of Argentina in the Russian foreign exchange market,³ Russian sales increased more than 100 percent in one year and Argentinean purchases increased 20.7 percent in the same time period.⁴ After a peak in 2008, international transactions between the two countries decreased significantly, but recovered by the end of 2011.

¹The treaty was signed in Buenos Aires on October 10, 2001, and approved in Argentina by Law No. 26,185.

²Russian Federal Law No. 155-FZ, Oct. 2, 2012, with notification to the Argentine Ministry of Foreign Affairs by Note No. 578/12.

³In 2011 trade with Argentina represented 0.25 percent of Russian imports and 0.155 percent of exports.

⁴According to the Center of Studies for Production (Centro de Estudios para la Producción, or CEP) database based on information published by the United Nations Commodity Trade Statistics Database (U.N. Comtrade).

Argentina's fiscal year 2011 trade with Russia represented 0.91 percent of exports and 1.08 percent of imports, down from a peak in 2008. Meanwhile, foreign exchange with Russia represented 1.4 percent of Argentina's sales and 1.3 percent of its total purchases.⁵

The Argentina-Russia tax treaty should facilitate a substantial integration of both markets, because each country's export industries are complementary.⁶

This article summarizes the key provisions of the treaty, possible issues with practical application, and available benefits.

I. Scope of the Treaty and Residence

The existing Russian taxes to which the treaty applies are the corporate income tax, the personal income tax, the tax on property of enterprises and organizations, and the tax on property of individuals. The standard personal income tax rate of 13 percent applies to all resident income (with some exceptions, such as prizes or dividends) while a 30 percent rate applies to the income of nonresidents (with some exceptions, such as for earnings of highly qualified specialists or dividends). The tax on property of enterprises is paid by Russian legal entities, foreign entities carrying out business in Russia through a permanent establishment, and by foreign legal entities holding immovable property located in Russia. The tax rate is imposed by the

⁵*Id.*

⁶Argentina's principal exports are beef, apples, pears, quinces, citrus, cheese, curds, and wines; Russia's principal exports are mineral and chemical fertilizers, petroleum oils, and ferroalloys.

regional government and cannot exceed 2.2 percent; the tax base is the average annual book value of fixed assets recorded in accounts. The property tax on individuals is currently imposed only on some real estate and shared-in-common tenancy of that real estate; tax rates vary among regions and depend on the book value of assets. The Russian Tax Code does not provide for any tax on capital.

In Argentina, the treaty applies to the income tax, the tax on personal assets, and the minimum presumed income tax (MPIT). Besides the corporate income tax, foreign entities and individuals owning stock in an Argentine corporation are subject to a 0.5 percent personal assets tax on the proportional net-worth value (*valor patrimonial proporcional*) of their participation. The tax is assessed and collected by the Argentine corporation. Also, the MPIT is levied on Argentine corporations and nonresidents that maintain a PE in Argentina. The MPIT is levied on the taxpayer's total assets (with some exceptions) at a rate of 1 percent, to the extent that the value of total assets within Argentina (inventories included) exceeds ARS 200,000 (about \$40,000). If assets stay below this threshold amount, no MPIT is payable. The corporate income tax paid by the Argentine taxpayer may be credited against its MPIT liability. If the taxpayer's MPIT liability is greater than its corporate income tax liability, the taxpayer is required to pay the excess MPIT. This tax may be carried over and credited against the taxpayer's income tax liabilities arising in future years for a maximum 10-year period.

The treaty is patterned after both the OECD model treaty and the United Nations model treaty. The treaty is not in line with the OECD model regarding a dual resident company, since it does not refer to the criterion of effective management or to the place of incorporation. If a given company is considered to be a resident of both states, under article 4(3) it is deemed the resident of the state of which it is a national. "National" is very broadly defined in article 3(1)ii as "any legal person, partnership and association deriving its status as such from the laws in force in a Contracting State." If, however, it is not a national of Russia or Argentina, the competent authorities will, by mutual agreement, settle the question and determine the mode of application of the treaty.

Ambiguity might arise under domestic tax law for corporations, since there is no definition of "resident companies" in the Russian Tax Code, while Argentinean tax law uses the incorporation principle and a domestic concept of PE upon determination of the company's residence.⁷

⁷Individuals will find tiebreaker regulations based on the OECD model treaty provide for easy resolution to potential controversies (assuming the rules are not superseded by other domestic regulation).

II. Permanent Establishment

Article 5 states the concept of PE and provides not only for a broader definition of a PE, including a service PE, but also states wider rules for the allocation of a profit to a PE.

First, it provides for the service PE concept, when PE includes furnishing:

consultancy services, by an enterprise through employees or other personnel engaged by the enterprise for such purpose, but only where such activities continue within the country for a period or periods aggregating more than one month within any twelve-month period.

It is unclear what the practical output in Russia or Argentina will be. Either this provision will not work or tax authorities will scrutinize every service contract concluded with a nonresident service provider.

Second, following the U.N. model treaty, it mandates the six-month term regarding a building site, a construction assembly or installation project, or supervisory activities in connection therewith. This is atypical for treaties concluded by Russia, since most of the treaties follow the OECD model treaty and provide for the 12-month period, though it is a typical characteristic of treaties concluded by Argentina.

Likewise, the protocol directly states that the purchase of merchandise and export of goods performed in one state via a dependent agent of the enterprise of another state is treated as giving rise to a PE, despite article 5(4)(d) defining that activity as "auxiliary."

To summarize, it is possible to conclude that this article of the treaty is more strongly influenced by the U.N. model treaty because of the protection of the taxing powers of the source country.

III. Business Profits

Following the OECD model treaty, the treaty generally grants the power to the state of residence of a given enterprise to tax business profits, except when the enterprise has a PE in the source country.

In Russia, the standard corporate income tax rate is 20 percent — 2 percent is payable to the federal government, and a rate ranging from 13.5 to 18 percent is payable to the regional government. The regional governments define this rate independently. However, certain income and the income of certain industries are taxed at different tax rates. For example, a 0 percent rate may apply to dividends provided several conditions are met,⁸ and certain medical and educational organizations can also benefit from the 0 percent profits tax

⁸Dividends received from a Russian or foreign subsidiary are subject to a 0 percent tax rate in Russia if, at the date the decision to pay dividends is adopted, a Russian parent company holds at least 50 percent of the capital (or depository receipts giving right to at least 50 percent of dividend) for at least 365

(Footnote continued on next page.)

rate. Income received by a foreign company not acting via a PE in Russia is subject to a withholding tax rate of 20 percent, while a 10 percent rate applies on income from the operation, maintenance, or rental of vessels and airplanes in international traffic securities. (See below for discussion of taxation of dividends and capital gain income.)

In contrast, in Argentina, the headline rate of tax on corporate profits is 35 percent. Gross income for corporate tax purposes involves all income from whatever source derived regardless of its character — whether passive (investment) or active (business income) — unless expressly excluded or exempt.⁹

Note the protocol provision regarding article 7 of the treaty, which explicitly states that the treaty should not be interpreted as allowing deductions of expenses that are limited or disallowed by domestic tax law.

The Russian Tax Code provides for an open-ended list of deductible expenses, nevertheless imposing some limitations.¹⁰ Generally, expenses in Russia (including interest expenses) incurred by a Russian company are deductible for profits tax purposes, if expenses are:¹¹

- properly documented (that is, supported with sufficient duly formalized documentation);
- economically justified (that is, incurred through reasonable business purposes); and
- incurred by the taxpayer for income-generating purposes.

calendar days. In the case of a foreign subsidiary, this subsidiary may not be a resident in the country that is blacklisted by the Russian Ministry of Finance. In all other cases, dividends received are subject to 9 percent.

⁹There are several differences that may arise between commercial and tax accounts. Differences in asset valuation arise from differing depreciation methods used for tax and accounting purposes. There are also many expenses not giving rise to allowable deductions (for example, the Argentine income tax, trademarks and goodwill depreciation, or penalties for underpayment of taxes). Other differences arise from some transactions, which for income tax purposes derive in presumed taxable income.

¹⁰For example, it is prohibited to deduct remuneration to the employees or management of the company that are not mentioned in the labor agreement (article 270(21) of the Russian Tax Code), or negative differences arising from revaluation of securities at market value (article 270(46) of the Russian Tax Code), and so forth. The Russian Tax Code limits deductibility of some categories of expenses, including advertising expenses (for example, those associated with the purchase or production of prizes given out in the course of mass advertising campaigns). They are limited to up to an amount equivalent to 1 percent of a taxpayer's sales revenue (net of VAT, article 264(4) of the Russian Tax Code). Business entertainment and business meals expenses associated with board meetings or incurred regarding existing or potential clients can only be deducted in the amount not exceeding 4 percent of a taxpayer's total payroll cost in the reporting period.

¹¹Article 252(1) of the Russian Tax Code.

In Argentina, the general rule is that deductions are allowed for expenses incurred to obtain, maintain, and preserve Argentinean-source taxable income,¹² which is defined as those arising in Argentina.¹³ Expenses incurred abroad are presumed to result from foreign-source income but the tax authorities may allow a deduction if it is conclusively proved that they are earmarked for obtaining, maintaining, and preserving Argentinean-source income. Further, its cost must be reasonable and have the proper supporting documentation.

Allocation rules regarding a PE are stated more broadly than in the OECD model treaty and provide for the “force of attraction” principle:

the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to (a) permanent establishment; or (b) sales in that other State of goods or merchandise of the same or similar kind as those sold through that permanent establishment; or (c) other business activities carried on in that other State of the same or similar kind as those effected through that permanent establishment. . . . however, the provisions of subparagraphs (b) and (c) will apply if the selling process, respectively the business activities, has for the main part been carried out by the permanent establishment.

A complementary provision, found in the Russian Tax Code, determines a taxable base as 20 percent of a PE's expenses incurred regarding auxiliary and preparatory activity performed by a PE free of charge for the benefit of the third parties (not for its head office). The Russian Tax Code provides that upon allocation of profits to a Russian PE established under the tax treaty provisions, the following should be taken into account: functions performed in Russia, assets used, and economic (commercial) risks borne.¹⁴

To conclude, foreign branches in Russia and Argentina generally are taxed based on the same principles as resident entities. Neither country has a branch remittance tax in place.¹⁵ Nevertheless, the protocol allows both states to impose a branch tax in the future.

¹²Section 80 of the Argentine Income Tax Law (AITL).

¹³Section 116 of the Administrative Order.

¹⁴Article 307(3) and (9).

¹⁵However, some differences should be considered. Start-up losses of an Argentine subsidiary may be offset against subsequent profits over a five-year period rather than against the foreign parent's income. For local branches, start-up losses may be offset against not only the head office's other profits but also other members of the group's profits to the extent this procedure is consistent with the head office's home legislation. Upon disposition of the investment, foreign shareholders will not be taxed on the capital gains deriving from the sale of their participation in the Argentine corporation. Conversely, a foreign head office with a branch in Argentina may only dispose of its investment

(Footnote continued on next page.)

IV. Dividends

The treaty states that dividends paid by a company resident of a contracting state to a resident of the other contracting state may be taxed in the first country but the tax charged will not exceed:

- 10 percent of the gross amount of the dividends if the beneficial owner is a company that holds directly at least 25 percent of the capital of the company paying the dividends; and
- 15 percent of the gross amount of the dividends in all other cases.

Under Russian domestic legislation, the standard withholding tax rate on dividend income is 15 percent regardless of whether the recipient is a nonresident corporation or an individual. In Argentina, dividends distributed by Argentine companies are nontaxable regardless of the shareholder's residence. Nonetheless, distributions of untaxed corporate earnings and profits are subject to a 35 percent withholding tax (that is, the equalization tax). This equalization tax applies whenever accounting profits exceed taxable income at the corporate level. Thus, when applicable, the treaty would limit this equalization tax.¹⁶

V. Interest

Under the treaty the reduced interest withholding tax rate is 15 percent, the application of which requires the interest to be paid to the beneficial owner.

Note that the Russian standard withholding tax rate on interest income is 20 percent; certain exemptions are available under domestic tax law. The domestic tax rate in Argentina is either 15.05 percent or 35 percent. The general withholding tax rate on interest is 35 percent. However, a reduced effective rate of 15.05 percent applies if payments are made:

- by Argentine financial institutions; or

by selling the assets of the branch. Income deriving from the transaction would be taxed at the ordinary 35 percent corporate income tax rate.

¹⁶There are no statutory rules providing the application of thin capitalization rules to debt advanced by a third party but guaranteed by a parent company. However, under specific circumstances, Argentine courts and tax authorities could likely apply the economic reality principle (general antiavoidance provision) to recharacterize the transaction as if it were entered into between the local subsidiary and the foreign parent company. Facts generally determinative of these cases might include: the absence of credit risk by the third-party lender and its sole compensation by a fee or commission for acting as intermediary, the lack of borrowing capacity of the subsidiary, absence of a standard credit risk analysis of the borrower, first demand guarantees, and so forth.

- to nonresident suppliers of personal depreciable property¹⁷ except automobiles, nonresident financial institutions, and specific nonresident investors in privately placed corporate bonds.¹⁸

The protocol specifically stipulates that domestic thin capitalization rules can apply regardless of the treaty provisions. This is particularly important in light of the recent contradictory Russian court rulings¹⁹ concerning the correlation between treaty provisions and domestic thin capitalization rules.

Russian thin capitalization rules²⁰ state that only a portion of interest (calculated under the specific formula) can be deducted if a debt:

- is considered as "controlled"²¹; and
- the debt-to-equity ratio of the borrower exceeds 3 to 1 as of the last date of each reporting (tax) period

The excessive interest would be regarded as a dividend (nondeductible payment) and taxed at 15 percent. The Russian Tax Code provides for another provision that imposes additional restrictions on the deductibility

¹⁷Whether under a deferred compensation acquisition or a cross-border leasing agreement, provided specific conditions are met.

¹⁸Interest paid to a nonresident financial institution will benefit from the reduced presumed net basis to the extent that the recipient meets the following requirements:

- it is overseen by a Central Bank or an equivalent agency;
- it is resident in a jurisdiction that is not a tax haven for Argentine tax purposes, or, if so, the jurisdiction has entered into an information exchange treaty with Argentina; and
- it is not exempt from providing information to its tax authorities because of bank secrecy or other type of privacy laws.

¹⁹Federal Arbitration Court of the West Siberian District Rulings of Dec. 15, 2011, Nos. A81-698/2011, A81-699/2011, A81-700/2011, A81-701/2011, A81-702/2011, A81-703/2011, and A81-704/2011. Determinations of the Supreme Arbitration Court of the Russian Federation (SAC) No. VAS-14479/11 of May 5, 2011, No. VAS-13698/11 of Mar. 2, 2012, and No. VAS-17705/11 of Jan. 13, 2012.

²⁰Article 269(2) of the Russian Tax Code.

²¹Debt is considered to be "controlled" if one of the following conditions is fulfilled:

- debt financing is provided by a foreign legal entity that directly or indirectly owns more than 20 percent of the entity financed;
- debt financing is provided by a Russian entity that is an affiliate of a foreign entity that directly or indirectly owns more than 20 percent of the entity financed; or
- the foreign entity that directly or indirectly owns more than 20 percent of the entity financed or its Russian affiliate issues a guaranty, surety, or otherwise secures the debt.

In other words, a third-party bank loan guaranteed or otherwise secured by a foreign direct or indirect parent of the Russian borrower or its Russian affiliate could be deemed to be controlled debt.

of interest: interest rate limitations.²² Under this rule, interest on debts is deductible if the amount of interest accrued does not deviate by more than 20 percent from the average interest charged on debts issued under comparable conditions (same currency, comparable security, comparable term of finance, and comparable amount) within the same quarter. Alternatively, a taxpayer may determine the amount of deductible interest by applying the Central Bank refinancing rate.²³

Conversely, in Argentina thin capitalization rules apply to interest payable to “foreign related lenders” (as defined by the statute) when the Argentine borrower’s debt-to-equity ratio exceeds 2 to 1. In that case the full interest expense accrued on the debt exceeding that ratio would be disallowed as a deduction and recharacterized as a dividend distribution. For the thin capitalization rules to apply, interest must be subject to withholding tax at the reduced tax rate provided in the treaty. A foreign lender is considered “related” if either of the following conditions are met:

- it directly or indirectly manages or controls (or is managed or controlled by) the Argentine borrower; or
- it has the decision-making power to influence or define the activity or activities of the Argentine borrower, or vice versa, as a result of the level of equity participation, intercompany debt financing, or functional equivalent.

VI. Royalties

Under the treaty provisions, royalties arising in one state and payable to the resident of the other state, who is the beneficial owner of the income, are subject to the limit of a rate of 15 percent at the source country.²⁴

The Russian domestic withholding tax rate on royalties is 20 percent and in Argentina the royalty rate varies from:

- 12.25 percent for copyright;
- 21 to 28 percent for technical assistance or consulting unavailable in Argentina under specific regulations (the contract must be duly registered with the official authority); and
- 31.5 percent for other royalties.

According to the protocol of the treaty, to apply for the reduced withholding tax rate in Argentina, “qualifying agreements”²⁵ in accordance with domestic law must be registered with the Argentine competent authority, Instituto Nacional de Propiedad Industrial (INPI). The INPI issues a certificate indicating, among other things, that the agreement complies with the Technology Transfer Act and, if applicable, that the technical assistance is unobtainable in the country. Otherwise, a 31.5 percent effective tax rate would apply.

License agreements that provide the right to use a software program registered in Argentina as well as those allowing the sublicensing of software in Argentina are subject to an effective withholding rate of 12.25 percent if:

- the agreement and the software are registered with the National Copyright Bureau (Dirección Nacional del Derecho de Autor);
- profits derive from the exploitation of the software;
- income tax is levied on the authors or their successors; and
- the software is not developed upon demand.

In the context of license agreements that provide the right to use a software program registered in Argentina, the protocol recognizes the term “successor” as a synonym of “inheritor.”²⁶

VII. Capital Gains

The treaty, using different wording than the OECD model treaty, allows both countries to tax capital gains except for capital gains derived from the sale of ships or aircraft operated in international traffic. Those capital gains might only be subject to tax in the country of residence of the seller.

The Russian Tax Code does not provide for a separate capital gains tax. All capital gains (with some exceptions) are included in total taxable income and are

²²Article 269(1) of the Russian Tax Code.

²³As of February 19, 2013, the Russian Central Bank refinancing rate was 8.25 percent. Between January 1, 2011, and December 31, 2013, the interest deduction is limited to the refinancing rate multiplied by 1.8 for Russian currency debt obligations, while the deductions for foreign currency obligations are limited to the refinancing rate multiplied by a factor of 0.8.

²⁴The “royalties” definition contained in the treaty includes:

payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, dramatic, musical or other artistic work, any patent, trademark, design or model, plan, computer software, secret formula or process or other intangible property, or for the use of, or the right to use, industrial, commercial or scientific equipment, or for information concerning industrial, commercial or scientific experience, and includes payments for the rendering of technical assistance and payments of any kind for motion picture films and works on film, videotape or other means of reproduction for use in connection with television.

²⁵Qualifying agreements are established by Resolution P-328/2005 of the INPI.

²⁶Therefore, foreign purchasers or licensees are not successors and are not entitled to the reduced withholding tax rate. The tax authorities also limit the special tax treatment only to “authors.” As a result, the lower withholding rate would be denied for software license agreements when payments are made to foreign legal persons other than the author.

taxed at the 20 percent corporate income tax or 13 percent personal income tax rates. No rollover relief is possible. Capital gains realized by the Russian companies on the sale of some Russian shares are subject to a 0 percent tax rate.

Under domestic tax law the sale of shares of a Russian company by a nonresident company (in the absence of a PE) would not be considered Russian-source income and therefore would not give rise to any tax obligations in Russia, if the Russian company is not treated as a real estate company.²⁷ Capital gains from the sale of shares in Russian real estate companies, as well as financial instruments derived from those shares, are subject to a 20 percent Russian withholding tax, unless the income is received from sales executed at the foreign stock exchanges.

Alternatively, in Argentina there is not a special rule for capital gains. Gains from the sale or exchange of real estate and other capital assets (whether short- or long-term) by corporate taxpayers are taxed at the ordinary income tax rate (35 percent). Gains not realized are not taxed. Capital gains from the sale of stock in Argentine corporations are generally exempt from tax in Argentina (unless realized by an Argentinean corporate taxpayer).²⁸ A special reinvestment relief system is provided for depreciable assets (rollover transactions). Whenever a depreciable asset is sold and replaced, income derived from the sale transaction may be assigned to the new asset's cost, resulting in a deferral in the recognition of built-in gains. General depreciation rules provided in the income tax law would then be applied on the cost of the new asset reduced by the assigned income amount. This option is available to the extent both operations are performed within a one-year term.

VIII. Income From Employment

Patterned after the OECD model treaty, the Argentina-Russia treaty grants taxing powers to the source country of the income, and limits the taxation

of the employee's residence country.²⁹ This latter country will be allowed to tax salaries, wages, or other types of remuneration if:

- the employee is not present in the source state of the income for more than 183 days in any 12-month period;
- the remuneration is not paid by a resident in the source country; and
- the remuneration is not borne by a PE that the employer has in the source state.

The Russian Tax Code defines a "resident individual" as a person spending more than 183 days in a 12-month consecutive period in Russia. The term is not interrupted by short-term trips abroad (less than six months) for educational or medical treatment purposes.³⁰ Therefore, Argentinean nationals coming to Russia for a period of employment exceeding six months can be treated as Russian tax residents, benefiting from the 13 percent personal income tax rate on employment income. Nonresident employees qualifying for immigration purposes as "highly qualified specialists" will benefit from a 13 percent tax rate upon commencing employment.³¹

According to section 4 of the treaty and the Argentine Income Tax Law, Russian employees who can prove that they are in Argentina only for employment purposes, and who remain in the country for less than five years, are considered tax residents in Russia. As a general principle of the treaty, Russian residents for tax purposes are subject to income tax in Argentina only on their Argentinean-source income.³² The Argentine Income Tax Law applies to taxable income profits and salaries derived from the labor relationship in Argentina at the progressive rates from 9 to 35 percent. Under section 79 of the Argentine Income Tax Law, taxable income from employment includes all salaries and compensation (in cash or in kind). The concept of compensation subject to income tax includes any expense that would be charged to the employee if the employer did not assume it. The employee will be entitled to make deductions in amounts established by the income tax law.³³ The local employer

²⁷Article 309(1)(5) of the Russian Tax Code. A company is considered a "real estate company" if more than 50 percent of its assets are represented by real estate property located in Russia.

²⁸Corporate taxpayers are not allowed to offset operating income with losses arising from the disposition of some securities or derivative instruments. Those losses may only be applied against income from the same type of transactions. Thus, losses arising from the disposition of shares, quotas, or other corporate participations, including units of common investment funds, may only be offset against income from the disposition of the same type of assets obtained in the same year or in the subsequent five years. Likewise, losses arising from derivative instruments or contracts (except hedging transactions) may only be offset against income originated by this type of instrument/contract, within the same year or in the subsequent five years.

²⁹In this sense, according to section 15 of the treaty, salaries and any profit arising from a labor relationship are considered taxable income for the employee (including compensation earned in cash or in kind) in the country in which those personal services are rendered.

³⁰Article 207(2) of the Russian Tax Code.

³¹Article 224(3) of the Russian Tax Code.

³²The application of the treaty requires that the recipient of the payments qualify as a resident of the other state. This recipient must prove to be a Russian resident by providing to the Argentine employer a sworn statement, duly certified by the tax authority of the other treaty country.

³³In particular, the employee is allowed personal deductions (all of which are updated every year) as established in section 23 of the Argentine Income Tax Law:

- a minimum nontaxable income;

(Footnote continued on next page.)

must withhold from the total monthly salary the income tax arising from the services rendered under the labor relationship.³⁴ As a final point, the Russian resident will be granted a credit in Russia for the income tax paid in Argentina.

IX. Elimination of Double Taxation

The treaty, following both Russia's (in all treaties and in its domestic tax law) and Argentina's (in most treaties and in its domestic tax law) tax policy, establishes a credit method to eliminate double taxation. The amount of tax on that income or capital payable in Argentina or Russia may be credited against the tax levied in the other country, in the amount not exceeding the other country's tax on that income or capital computed in accordance with the applicable taxation laws and regulations.

The protocol also contains a tax sparing clause that allows Russian residents to credit the presumptive tax credit granted by current and future industrial promotional regimens, mining developments, and transactions in free trade zones.

X. Miscellaneous

The protocol of the treaty includes a general anti-avoidance rule, allowing a mutual agreement procedure by all competent authorities in order to deny the benefits of the treaty to a given taxpayer in cases of abuse of the treaty. Both countries are quite inactive on mutual agreement procedures. Based on OECD data, Russia did not initiate any mutual agreement procedures in 2006-2010, while Argentina initiated only three.³⁵

The treaty is silent on the use of domestic GAARs in the treaty context, except for thin capitalization rules as illustrated above.

In Russia relief prescribed by the treaty is not granted automatically to a tax resident; confirmation³⁶ should be granted to the Russian legal entity making payments. If it is provided before the actual payment, reduced tax treaty rates will apply at source. Special requirements regarding the application of treaty provisions apply to income paid on federal state issuance securities and to other issuance securities with mandatory centralized custody issued by Russian companies when the payments are made to for-

- family charges; and
- a special deduction (it is not absolutely clear that this amount is allowed to the employee).

³⁴If the employee receives any other Argentinean-source income, he will personally pay the income tax and file form F No. 711 with the Federal Tax Authority (AFIP-DGI).

³⁵See <http://www.oecd.org/ctp/disputeresolutioncountry/mutualagreementprocedurestatisticsfor2010.htm>.

³⁶The confirmation should be issued by the competent authority as it is defined in the respective double tax treaty. In the case of Argentina, it is the Ministry of Economy and Public Finance, and such confirmation should be translated into Russian.

foreign companies acting in the interests of third parties. From an Argentinean perspective, the sole conditions to the treaty's benefits are those stated in a domestic resolution holding that persons benefiting from withholding tax reduction in Argentina under the provisions of a treaty must submit an affidavit³⁷ to the local withholding agent to prove entitlement.

XI. Conclusion

The Argentina-Russia tax treaty, patterned after the OECD model treaty and the U.N. model treaty, provides benefits regarding the withholding tax rates of royalties and business profits. Russia has very few treaties with Latin American countries, and a new treaty with Argentina is welcomed to expand investment. In Argentina, local branches of Russian entities are deemed to be Argentine residents under the Argentine Income Tax Law. Therefore, they would be entitled to the benefits of the tax and customs treaties signed by Argentina. This consideration is relevant for the channeling of Russian investments in Latin America. In Russia, however, branches of foreign entities cannot be considered Russian residents and therefore are unentitled to treaty benefits.

Moreover, the treaty grants assurance to investors and trading partners from both countries, providing more certainty to residents, tax authorities, and courts. Although neither Russia nor Argentina are OECD member states (Argentina is an observer country of the OECD), local courts of both states widely cite OECD commentaries in their decisions.³⁸

We believe the treaty has tremendous importance to business between Russia and Argentina. We estimate that the treaty will help to strengthen both countries' economies. The main goal of the treaty will be to minimize tax barriers to the flows of trade, investment, technical know-how, and expertise. Through the provisions of the treaty, taxpayers engaged in cross-border business will enjoy certainty on the taxing rights of both countries, benefit from the elimination of double taxation, and gain access to a platform to settle tax disputes. ◆

³⁷The affidavit must include the name and tax address of the beneficiary, the origin of the income, and a declaration that it has no PE in Argentina. Also, the beneficiary must furnish an affidavit issued by the Russian tax authorities confirming its resident status for purposes of the treaty as well as the correctness of the claimant's statement about the absence of a PE in the country. This local regulation was enacted to attain a minimum degree of control over the use of treaty benefits.

³⁸In Argentina: *La Industrial Paraguaya Argentina S.A. s/recurso de Apelación. Impuesto a los Réditos*, Ruling of the Tax National Court, Mar. 11, 1980; *Volkswagen Argentina S.A. /apelación*, Ruling of the Tax National Court, Dec. 28, 2009; *Aventis Pharma S.A. s/apelación*, Ruling of the Tax National Court, Feb. 26, 2010. In Russia: Judgment of the Presidium of the Supreme Arbitration Court No. 8654/11, Nov. 15, 2011; Judgment of the Federal Arbitration Court of the Moscow District No. A40-58575/11-129-248, Aug. 2, 2012.