

## Argentine tax reform: A review of key provisions

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### Executive summary

Argentina enacted a comprehensive tax reform (Law No. 27,430 (the Law)), through publication in the *Official Gazette* on 29 December 2017. The Law is generally effective 1 January 2018.<sup>1</sup>

Specifically, the Law introduces amendments to income tax (both at corporate and individual levels), value added tax, tax procedural law, criminal tax law, social security contributions, excise tax, tax on fuels, and tax on the transfer of real estate. It also establishes a special regime comprising an optional revaluation of assets for income tax purposes. This Alert discusses the main changes introduced by the Law.

Companies doing business and different stakeholders investing in Argentina should consider the consequences of the changes and evaluate the effect on their current or future Argentine operations.

## Detailed discussion

### Corporate income tax

#### Corporate income tax rate and dividend withholding tax

The Law decreases the corporate income tax rate from 35% to 30% for fiscal years starting 1 January 2018 to 31 December 2019, and to 25% for fiscal years starting 1 January 2020 and onwards. The Law also establishes dividend withholding tax rates of 7% for profits accrued during fiscal years starting 1 January 2018 to 31 December 2019, and 13% for profits accrued in fiscal years starting 1 January 2020 and onwards. The new withholding rates apply to distributions made to shareholders qualifying as resident individuals or nonresidents.

Even though the combined effective rate for shareholders on distributed income (corporate income tax rates plus dividend withholding rates on the after tax profit) will be close to the prior 35% rate, this change is aimed at promoting the reinvestment of profits. Additionally, the Law repeals the “equalization tax” (i.e., 35% withholding applicable to dividends distributed in excess of the accumulated taxable income) for income accrued from 1 January 2018.

#### Limitation to the deduction of interest

The Law eliminates the 2:1 debt-to-equity ratio and establishes a new limit for the deduction of interest arising from financial loans. The limit equals 30% of earnings before interest, taxes, depreciation and amortization (EBITDA) or a certain amount to be determined by the Executive Power, whichever is higher. The limit each year will be increased by the amount unused (if applicable) in the prior three years. In addition, if certain interest was not deductible in a given year due to the application of the limitation, it can be carried forward for five fiscal years. “Interest” will include foreign exchange differences.

The Law provides exemptions from the deduction limit for certain situations (e.g., interest derived on loans obtained by Argentine banks and financial trusts or when the beneficiary of the interest has been subject to tax on such income, in accordance with the Argentine income tax law). In addition, the limitation will not apply to situations in which it is proved that the ratio of interest to EBITDA of the Argentine borrower is equal to or lower than the same ratio for its economic group – regarding debt with unrelated lenders – for the same fiscal year.

### Permanent establishment

The Law establishes a permanent establishment (PE) definition, which did not exist until this reform. The definition generally follows the definition agreed to in many of Argentina's tax treaties, though it includes some provisions that would need to be reviewed on a case-by-case basis. For example, for a dependent agent PE, the Law establishes that the mere performance of a significant role leading to the conclusion of agreements will trigger a PE, as will situations in which the agent has and habitually exercises powers to conclude agreements on behalf of a foreign entity. With regard to independent agents, the Law stipulates that, if the agent acts totally or mainly on behalf of the foreign entity (or related entities), such agent would not be considered independent.

### Tax-havens policy

The Law introduces changes to the Argentine tax-haven policy, which up to now has only consisted of a list of “cooperating” jurisdictions for tax transparency purposes. As per the Law, the Executive Power will be required to publish a list of “non-cooperating” jurisdictions, which will include jurisdictions that do not have a TIEA (Tax Information Exchange Agreement) or a Convention for the Avoidance of Double Taxation in force with Argentina. The list also will include jurisdictions that have one of the agreements, but do not effectively exchange information with Argentina.

Additionally, the Law creates a category of low or no tax jurisdictions, which will be comprised of countries, territories or tax regimes that establish a maximum corporate income tax rate that is lower than 60% of the Argentine corporate income tax rate. For purposes of this calculation, the Argentine corporate tax rate will be 25%, which is the target rate for year 2020 and onwards.

Companies participating in transactions with parties located in “non-cooperating” or low or no tax jurisdictions may need to analyze the consequences of those transactions from an Argentine transfer pricing standpoint, as well as consider the special deductibility rules, exclusions from capital gains exemptions, among others.

### Transfer pricing

The Law introduces rules on analyzing transactions involving the import or export of goods with the participation of a foreign intermediary (which is not the actual importer at destination or exporter at origin, respectively), when at least one of the foreign parties involved (i.e., intermediary, importer

or exporter) is a related party. In these cases, the Law requires proof that the foreign intermediary's remuneration is in line with the risks it assumes, the functions it carries out and the assets involved.

In addition, for exports of goods with known prices and with the intervention of an intermediary (either related, or located in "non-cooperating" or low or no tax jurisdictions), the Law requires the Argentine exporter to file the agreements supporting the transactions with AFIP (Federal Tax Authorities). If the agreements are not filed, the Argentine-source income from the export will be determined considering the known prices on the date the goods are loaded into the transportation vehicle (with appropriate comparability adjustments, if applicable). This clause replaces a formerly existing transfer pricing method known in Argentina as the 6th method.

The Law provides for the issuance of additional regulations to establish the minimum thresholds for sales and transaction amounts at which the transfer pricing compliance obligations apply. Currently, all transactions must be included in the analysis and reporting.

### **Nonresident's capital gains tax**

The Law generally maintains the 15% capital gains tax rate (calculated on the actual net gain or a presumed net gain equal to 90% of the sale price) on the disposal of shares or securities by nonresidents. However, the Law establishes an exemption for foreign beneficiaries on the sale of shares that are publicly traded in stock exchanges under the supervision of the Argentine Securities and Exchange Commission (CNV). It also establishes an exemption for interest income and capital gains on the sale of public bonds (i.e., Government bonds), negotiable obligations (corporate debt bonds) and share certificates issued abroad that represent shares issued by Argentine companies (i.e., ADRs). The exemptions will only apply if the foreign beneficiaries do not reside in and the funds do not arise from "non-cooperating" jurisdictions.

In the case of ADRs, the Law defines their "source" by the location of the original issuer of the shares. However, the tax will not be due if the exemption described in the previous paragraph applies.

The Law establishes that LEBAC (Argentine Central Bank Notes) will not be covered by the exemption and, as a consequence, will be subject to a 5% tax.

Regarding transactions on non-publicly traded shares between two nonresidents, the Law establishes the foreign seller, through a representative appointed in Argentina, as

the responsible party for paying the tax. As per the rules in force prior to this tax reform, the foreign buyer was the responsible party.

For transactions carried out between September 2013 (when taxation on the sale of shares for nonresidents was introduced) and the effective date of the tax reform, the Law requires the capital gains to be paid. No tax, however, will be due for stock exchange transactions as long as the tax has not yet been paid and the stock exchange agents have not withheld or collected it due to the fact that there were no regulations that required them to withhold the tax at the moment of carrying out the transactions.

### **Indirect transfers made by nonresidents**

The Law establishes an income tax on the indirect transfer of assets located in Argentina. In particular, the tax will be triggered on the sale or transfer by nonresidents of shares or other participations in foreign entities when the following two conditions are met: (i) at least 30% of the value of the foreign entity is derived from assets located in Argentina (at the moment of the sale or during the 12 prior months); and (ii) the participation being transferred represents (at the moment of the sale or during the 12 prior months) at least 10% of the equity of the foreign entity.

The applicable rate will generally be 15% (calculated on the actual net gain or a presumed net gain equal to 90% of the sale price) of the proportional value that corresponds to the Argentine assets. Additional guidance about the calculation mechanisms has not been issued.

The Law provides that the tax on indirect transfers will only apply to participations in foreign entities acquired after the entry into force of the tax reform. In addition, the Law indicates that indirect transfers will not be taxable to the extent it can be proved that the transfer took place within the same economic group, in accordance with requirements to be established by additional regulations.

### **Controlled foreign corporations rules**

The Law modifies the regulations on the moment of recognition of foreign source income by resident taxpayers. The most significant changes are related to the participation of resident taxpayers in certain foreign entities where the income will be recognized as earned by the Argentine resident directly as if the foreign entity did not exist.

The above rule will apply to the extent certain conditions are met, including the following: (1) the resident taxpayer (together with related parties, if applicable) owns at least

a 50% participation in the foreign entity; (2) the foreign entity “does not have organization of material and personal resources to carry out its activity,” or obtains at least 50% of passive income, or its revenues constitute deductible expenses for resident related parties; and (3) the income tax paid abroad is lower than 75% of the tax that would have corresponded with Argentine income tax rules.

In addition, other new rules for foreign trusts, agreements and similar structures have been introduced by the Law.

### Tax revaluation option

The Law establishes an option for Argentine-resident individuals and companies to revalue for tax purposes their assets located in Argentina that generate taxable income. The revaluation option is applicable for the first fiscal period that ends after the Law’s entry into force (for example, for fiscal periods ending on 31 December, the revaluation option would be applicable to the year-end of 31 December 2017).

Under the Law, the new tax value of the assets will be determined by applying a “revaluation factor,” as established in the Law, to the tax value originally determined in each year or period of the asset’s acquisition or construction. In the case of immovable or movable property qualifying as fixed assets, the value may be determined by an independent appraiser under certain conditions.

In addition, the Law imposes a one-time special tax on the amount of the revaluation. The applicable rate will vary depending on the assets revaluated:

- ▶ Real estate (regarded as capital assets): 8%
- ▶ Real estate (regarded as inventories): 15%
- ▶ Shares, quotas and other participations in Argentine companies owned by resident individuals: 5%
- ▶ All other assets (except inventories and cars, which may not be revaluated): 10%

The Law requires taxpayers that opt for the special revaluation regime to withdraw from any judicial or administrative process in which they are claiming, for tax purposes, an adjustment for inflation and to desist from making a new claim.

Additional regulations about the optional tax revaluation are expected and should be monitored. Taxpayers should take action to evaluate the pros and cons of this option (payment of the special tax vis-a-vis the step-up of the assets) for each particular taxpayer and type of asset.

Finally, the Law allows entities required to prepare financial statements to revalue once for accounting purposes the asset values recorded in their financial statements, under rules to be established by the authorities.

### Inflationary adjustment

The Law re-establishes the adjustment for inflation procedures in the Income Tax Law with the following rules: (i) inflation adjustment of new acquisitions and investments carried out from 1 January 2018 and onwards; and (ii) the application of an integral inflation adjustment mechanism when the variation of the Internal Wholesale Price Index (in Spanish, *Indice de Precios Internos al por Mayor* or IPIM) supplied by the National Institute of Statistics and Censuses (in Spanish, *Instituto Nacional de Estadística y Censos* or INDEC), is higher than 100% for the 36-month period before the end of the fiscal period.

### Value-added tax

#### Digital services

The digital services are subject to value added tax (VAT) when the services are rendered by resident or foreign parties where the effective use of the services is conducted in Argentina. It will be presumed that there is an effective use in Argentina when the following are located in Argentina: the IP address, the device used by the client or country code for the SIM card, the client’s billing address or the bank account used for payment, the client’s billing address reported to the bank or financial institution issuing the credit or debit card used for payment.

The Law also contains a broad definition of digital services, including among others: website provision and hosting; digitalized product provision; remote system management and online technical support; web services comprising data storage and online advertising; software as a service (SaaS); access or download of images, text, information, video, music, games (including gambling games), including the use of streaming technology without downloading those items to a storage device; dating websites; internet services provision; and e-learning, and data handling and calculation through the internet or other networks.

In the case of digital services, the parties required to pay VAT are the service recipients. Any intermediary involved in the payment will act as a collection agent. The payment methods, terms and conditions will be established by the AFIP.

## Reimbursement of VAT credits related to fixed asset acquisition

The Law creates a new system to reimburse VAT credits resulting from the purchase, manufacture, preparation or import of fixed assets (other than automobiles) that remain as a VAT credit for the taxpayer after six months. The regulations will establish the method, terms and conditions for this reimbursement.

The reimbursement will be subject to the condition that the VAT credits would have normally been absorbed within a 60-month period, through VAT payable for local transactions or VAT reimbursements related to exports. If such condition is complied with, the reimbursement will be considered definitive (i.e., the tax authorities will not make a request to be repaid the reimbursement amount). Otherwise, the taxpayer will be required to reimburse to the tax authorities the amount that did not meet the condition, plus the related interest.

## Reimbursement of VAT credits for companies with subsidized prices

The Law creates a reimbursement method for taxpayers conducting activities that qualify as utilities the price of which is reduced through subsidies, price offsetting or financial aid funds granted by the Argentine government. These parties will be entitled to the reimbursement method established for exports and equivalent transactions.

## Import and export of services

The Law indicates that, to classify services as imports and exports, the evaluation of where the effective use takes place must be made in the jurisdiction in which the service is immediately used or operated by the service recipient.

The VAT amendments will be effective for taxable events occurring as from 1 February 2018. The reimbursement methods will be applied to VAT credits generated as from 1 January 2018.

## Excise taxes and tax on fuels

The Law includes amendments that contain rate changes and mechanisms for calculating taxes for many products, such as: fuels, mobile telephones, mobile and satellite telephone services, cigarettes, alcoholic beverages, caffeinated taurine drinks, beer, automobiles, vessels, aircrafts, electronic products and household appliances.

## Tax procedural law

### International tax aspects

The Law establishes:

- ▶ A Mutual Agreement Procedure, consisting of a mechanism for resolving disputes arising from the interpretation of tax treaties, as provided in most of the tax treaties signed by Argentina with other countries
- ▶ An Advance Pricing Agreement regime, whereby taxpayers will be able to agree with the Tax Administration, before the fiscal year start, about the fiscal criteria and methodology for the determination of prices, amounts of consideration and profit margins, etc., in accordance with transfer pricing rules, which will become binding for both parties; the conditions to access this regime still need to be defined
- ▶ Specific fines for not complying with Argentine transfer pricing documentation requirements for Country-by-Country reporting

### Other relevant aspects

The Law requires all taxpayers to establish an electronic tax domicile for the main purpose of receiving notifications from the Tax Administration.

The Law also extends the scope of joint liability for those responsible for other's tax obligations. Under the Law, the existence of a tax determination from the tax authorities is no longer necessary for joint and several liability arising from the debt of others.

Additionally, the Law allows the filing of amended tax returns for cases in which the tax basis is lower than indicated on the original tax return (previously prohibited unless particular exceptions applied), for a difference of up to 5%, as long as the amended tax returns are filed within five days of the original due date.

The Law allows taxpayers to enter into a voluntary conclusive agreement with the Tax Administration, if under certain factual situations, it is difficult to quantify the tax obligation, or if the situation is new or complex.

In relation to penalty matters, the Law increases the fine for tax omission from the 50%-100% range to 100% of the omitted tax, while the legal maximum for fines for tax fraud is reduced from 10 times the tax evaded to six times. The business closure penalty remains in the Tax Procedural Law, but without the joint application of fines. The Law also modifies the minimum and maximum days of closure, as well as the necessary conditions for the closure penalty to be applicable.



The Law introduces the concept of “recidivism,” which affects the application and graduation of fines. The graduation of economic fines and the causes to reduce or increase them are established.

## Criminal tax law

The Law changes the following thresholds for tax evasion:

- ▶ Simple tax evasion (carrying prison sentences from two to six years): The threshold of evaded tax in order to trigger simple tax evasion increases from ARS400,000 (about US\$21,622) to ARS1.5 million (about US\$81,081) for each tax and for each tax year, even in the case of an instant tax or tax period of less than one year, and from ARS80,000 (about US\$4,324) to ARS200,000 (about US\$10,811) per month for crimes involving social security obligations.
- ▶ Aggravated tax evasion (carrying prison sentences from three years and six months to nine years): The threshold of evaded tax in order to trigger aggravated tax evasion rises from ARS800,000 (about US\$43,243) to ARS15 million (about US\$810,811) for tax crimes, and from ARS400,000 to ARS 1 million (about US\$54,054) for crimes involving social security obligations.

A tax crime also may be considered an aggravated evasion when the taxpayer uses a natural or artificial person, structure, company, property, trust and/or non-cooperative jurisdiction to conceal or hinder the identity of the actual taxpayer. In these cases, the threshold of evaded tax stands at ARS2 million (about US\$108,108) for tax crimes and ARS400,000 for social security crimes.

The Law eliminates the fine of two to 10 times the tax evaded for artificial persons, when the criminal act has been performed in the name or for the benefit of a company.

The Law allows criminal actions to be dropped, provided the taxpayer accepts and settles, fully and unconditionally, the obligations evaded within 30 business days after the legal notification to the taxpayer of the criminal charge filed (formerly, criminal action could only be dropped to the extent the taxpayer made a payment before being notified). This benefit to drop the action by settling an obligation is granted only once to each natural or artificial person.

## Individual income tax and social security

### Individual income tax

The Law eliminates income tax exemptions for financial investments. Beginning 1 January 2018, interest income and capital gains obtained from different types of investments, such as fixed-term deposits, government bonds, financial trusts and investment funds, will be subject to a tax rate of 5% (for investments denominated in local currency without adjustment clauses) or 15% (for investments in local currency with adjustment clauses, or denominated in foreign currency).

The Law imposes a 15% tax rate on income derived from the transfer of real estate (except real estate for dwelling purposes). This tax applies to transfers of real estate, to the extent the real estate is acquired on or after 1 January 2018. The Law repeals the prior tax on the transfer of real estate (in Spanish, *Impuesto a la Transferencia de Inmuebles* or ITI - 1.5% on sale price) for such cases in which the 15% tax becomes applicable.

Under the Law, severance payments to management personnel will be subject to income tax on the portion exceeding the minimum legal severance amounts established by labor legislation.

### Social security

The Law gradually unifies the 17% and 21% social security rates paid by private sector employers, depending on the industry, on an employee's gross salary into a single rate of 19.5% beginning 1 January 2022.

The Law establishes a non-taxable base under which the amount of ARS2,400 (about US\$130) is expected to be subtracted monthly from each employee's tax base used for calculating employer contributions as from 2018. The non-taxable amount will increase to ARS12,000 (about US\$649) by 2022.

The Law gradually phases out employer contributions creditable against VAT based on the taxpayer's location until 2022.

In addition, the Law will gradually eliminate the reduced employer contributions for small and medium-sized entities established under Law No. 26,940.

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## Endnote

1. For information about the enactment, see EY Global Tax Alert, [Argentina enacts comprehensive tax reform](#), dated 29 December 2017.

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