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# Global Tax Alert

News from Americas Tax Center

## Peru lifts suspension of general anti-avoidance rule

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On 6 May 2019, Peru's Minister of Economics issued Supreme Decree 145-2019-EF, which contains the regulations for the Peruvian general anti-avoidance rule (GAAR) for tax purposes. Supreme Decree 145-2019-EF went into effect on 7 May 2019.

The Peruvian GAAR was enacted on 19 July 2012, but was suspended until regulations were issued. With the issuance of Supreme Decree 145-2019-EF, the suspension has been lifted.

Supreme Decree 145-2019-EF establishes the following non-exhaustive list of situations/scenarios in which a tax auditor can apply the Peruvian GAAR:

- ▶ Acts, situations and business relationships in which there is no connection between the benefits and associated risks, or low or no profitability
- ▶ Transactions conducted that are not at fair market value or have no economic rationale
- ▶ Acts, situations and business relationships that are not related to the ordinary operations in achieving the desired legal, economic or financial effects
- ▶ The use of "non-business structures" to conduct business activities, instead of business structures
- ▶ Corporate restructures or corporate reorganizations with no economic substance

- ▶ Acts or operations with countries and jurisdictions that are considered tax havens or non-cooperative jurisdictions
- ▶ Zero-value or low-cost transactions or the use of structures that minimize costs or non-taxable profits for the parties involved
- ▶ The use of unusual legal and business structures, acts, or contracts that contribute to the deferral of profits and income or the anticipation of expenses, costs or losses

To apply the GAAR, the Peruvian tax authorities will analyze any situation, considering the following factors, among others:

- ▶ The way the act or acts were performed
- ▶ The form and substance of the act or acts
- ▶ The period in which the acts were performed and the length of time over which the acts are performed
- ▶ The result reached under the rules of the specific tax analyzed, if the GAAR were not applied
- ▶ The change in the legal, economic or financial position of the taxpayer or any related party, which resulted or would result from the performance of the acts or the configuration of the situations or business relationships
- ▶ Any other consequence for the taxpayer or any related party resulting from the performance of the act
- ▶ The nature of the relationship (business, family or other nature) between the taxpayer and any person affected by the act

With regard to the joint liability of legal representatives and members of the board of directors, Supreme Decree 145-2019 establishes the following:

- ▶ Joint liability might apply when the general manager, the financial manager or the one who conducts tax planning activities proposes the acts, situations or business relationships that expressly qualify as tax planning to the board of directors for approval.
- ▶ A director will not be jointly liable for the tax debt when the GAAR is applied, if the director expressly disagrees with the proposed tax planning, and the director's opinion is expressly established in a notarized letter that is dated before the notification of a tax audit.
- ▶ For the joint liability of legal representatives, the Peruvian Tax Administration will have to prove that the legal representatives collaborated in the design, approval or execution of the acts, situations or business relationships analyzed in applying the GAAR.
- ▶ Regarding GAAR, deceit, gross negligence and abuse of power for joint liability purposes are not criminal in nature; criminal law governs the acts or omissions that qualify as crimes.

The regulations also establish the special procedure for tax audits when the GAAR applies. A revision committee, however, must approve the use of the GAAR by the Peruvian tax authorities in each case.

For additional information with respect to this Alert, please contact the following:

**Ernst & Young Asesores S.C.R.L, Lima**

- ▶ Roberto Cores                      roberto.cores@pe.ey.com
- ▶ Ramón Bueno-Tizón              ramon.bueno-tizon@pe.ey.com

**Ernst & Young, LLP (United States), Latin American Business Center, New York**

- ▶ Ana Mingramm                      ana.mingramm@ey.com
- ▶ Enrique Perez Grovas              enrique.perezgrovas@ey.com
- ▶ Pablo Wejcman                      pablo.wejcman@ey.com

**Ernst & Young LLP (United Kingdom), Latin American Business Center, London**

- ▶ Jose Padilla                          jpadilla@uk.ey.com

**Ernst & Young Tax Co., Latin American Tax Desk, Japan & Asia Pacific**

- ▶ Raul Moreno, *Tokyo*              raul.moreno@jp.ey.com
- ▶ Luis Coronado, *Singapore*      luis.coronado@sg.ey.com

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