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LATIN AMERICA

This month's issue of Global Tax Briefing is written entirely by members of the Latin American Tax and Legal Network (LATAXNET). LATAXNET, headed up by Miguel Valdés, of Valdés, Machado & Associates, LLC., is a network of top tax and legal specialists all over Latin America, Puerto Rico, the Caribbean and the United States. See back cover for more information about LATAXNET.

Tax Developments in Brazil

by Cristiane Magalhães, Erika Tukiama, Tatiana Villani, Luís Rogério Farinelli, Pedro Messetti, Machado Associados Advogados e Consultores, São Paulo, Brazil

Important decision on taxation of profits earned overseas – "Gerdau Case"

by Erika Tukiama and Tatiana Villani

One important case involving taxation of profits earned overseas has been recently decided by the Federal Administrative Court of Tax Appeals (Conselho Administrativo de Recursos Fiscais, referred to by its acronym, "CARF"). The ruling, which has yet to be published, reflects the understanding of the CARF (by way of its majority decision in the matter) that profits earned by the foreign subsidiaries of Gerdau (a major Brazilian steel company) should not be subject to taxation in Brazil.

Pursuant to the Brazilian tax rules, profits earned by foreign controlled and/or affiliate companies shall be taxed in Brazil on an accrual basis, every December 31, irrespective of actual distribution of dividends. Such rules differ from traditional controlled foreign corporation rules (CFC rules) applied in some countries as the Brazilian rules aim at reaching profits of any controlled/affiliate companies established abroad (making no difference whether the foreign invested company is located in a tax haven or not) and in spite of the income's nature (being irrelevant whether such profits are active or passive).

Brazilian tax authorities have, for several years, challenged the international corporate structures held by Brazilian companies and taxpayers have been subject to all kinds of tax assessments. In some cases, the substance-over-form principle has being alleged to disregard companies set up abroad with no sufficient infrastructures and/or economic reasons grounding their existence. In other cases, the IRS has taken nonsensical approaches and Brazilian rules have been distorted to justify the prevalence of domestic tax rules over provisions of Double Tax Treaties (DTT) executed by Brazil.

In the case of Eagle, for instance, CARF held that profits ascertained by Eagle's indirect foreign subsidiaries should receive the same tax treatment given to those coming from direct investments of the Brazilian company. As a result, Eagle's Spanish first tier holding company was disregarded for tax purposes and profits of their second tier subsidiaries were taxed in Brazil, on an accrual basis. Such understanding was absurd and even against rules of the Brazilian IRS itself, which typically determines that, for Brazilian tax purposes, the profits of a second tier subsidiary shall be first consolidated at the level of the first tier subsidiary to then being taxed in Brazil.

In Gerdau's case, CARF's most recent decision on the matter, the tax court accepted for the first time that holding companies could not be disregarded for having a minimal structure and no operational activities. Also, CARF decided that international tax structures, involving the application of DTTs, should not be challenged even if such structures were created for the purpose of avoiding tax. In relation to the profits of the indirect controlled companies, CARF understood that such profits should only be considered in Brazil after being consolidated at the level of the Spanish holding company.

Unfortunately, this decision is still not definitive and disputes concerning the subject remain far away from being settled.

New Transfer Pricing Legislation

by Luís Rogério Farinelli and Pedro L. S. Messetti

Several amendments to Brazil's transfer pricing rules have been introduced since September 2012 with mandatory effect as of January 1, 2013, with respect to transactions carried out between foreign related parties, or parties domiciled in tax havens or subject to privileged tax regime, as listed in the RFB regulation (provided that some requirements are met, the new rules may be applied to 2012 at the taxpayer's discretion).

Resale Price less Profit Method (PRL)—The PRL method has suffered significant changes, such as the creation of predetermined profit margins, varying from 40% to 20%, according to the legal entity's industry sector. From now on, there will be no more distinctions in predetermined margins for goods imported for resale or for those to be used as inputs in any manufacturing process. The new legislation also clarified that the price practiced for PRL calculation purposes must be the FOB price (provided that some conditions are complied with).

Quotation Price on Import (PCI) and Quotation Price on Export (PECEX) Methods—These new methods were created to be mandatorily applied for commodities. Benchmark is defined based on the daily average

amounts of the quotations in internationally recognized stock and futures exchanges, adjusted upwards or downwards to the average market premium on the date of the transaction. In the case of exports, they are also adjusted by variations deriving from costs of the transport to the destination port, and from climate influences. In case the imported goods are not listed in internationally recognized stock exchanges, the practiced price may be compared to the prices provided by internationally recognized sectorial research institutes or, in the case of exports, to the prices defined by agencies or regulatory bodies and published in the Official Gazette.

Concept of commodity—The IRS considers the goods listed in its regulations and other goods negotiated in the stock and future exchanges (also listed in such regulations) as commodities. However, the concept of "commodity" remains broad and is difficult to apply since the regulations contain abstract provisions (such as "Aluminum and its works," "Cocoa and its preparations," and "Eatable meats and offal") and transfer to the taxpayers the burden of searching/identifying their products in all the 22 different stock exchanges listed therein.

Safe harbors and divergence margin for commodities—Generally speaking, safe harbors provided in Brazilian transfer pricing legislation are not applicable to commodities exports. On the other hand, the calculation of transfer pricing adjustments is not required where the difference between the benchmark and the commodity's practiced price is 3% or less (for other goods, which are not subject to PIC and PECEX, the acceptable divergence margin is 5%).

Profitability safe harbor—In the revoked regulations, Brazilian exporters were released from calculating transfer pricing adjustments in cases where they demonstrated that their net profits from exports to related parties, before application of the IRPJ and CSLL income tax provisions, were equivalent to at least 5% of the total revenues accrued in such transactions, considering the annual average for the current tax base period and for the two preceding years. From now on, the minimum profitability will be increased to 10%, and it will only applicable in case the taxpayer's net export revenues to related parties do not exceed 20% of the total net export revenues. Export transactions with parties domiciled in jurisdictions considered as tax havens or subject to privileged tax regimes, as listed by RFB, still cannot benefit from this safe harbor.

Back-to-back transactions—New regulations expressively state that back-to-back transactions – meaning those where a Brazilian legal entity purchases goods from a supplier abroad and immediately sells them to a client abroad, without goods' physical circulation in the Brazilian territory – are subject to transfer pricing rules applicable both in import and export, as the case may be.

Loan agreements—Loan agreements entered into as of 2013 will now be subject to transfer pricing rules applicable to interest, irrespectively of their registration with the Central Bank of Brazil (such registration is still required for regulatory purposes). According to the new regulation, loan interest deductibility limits or minimum interest revenues shall be calculated by applying a certain rate (determined according to type of the transaction and verified on the date of the transaction), plus a spread to be determined by the Minister of Finance based on the market average. The criterion to apply these new transfer pricing rules for interest is still pending, as the Minister of Finance has not yet disclosed the spread. Loan agreements closed before December 31, 2012 are subject to the prior rule, i.e., if they are registered with the Central Bank of Brazil, no transfer pricing rules apply; if not, they shall apply the interest rate based on the Libor rate for 6 months deposits in US dollars plus 3% spread per year, calculated on a *pro rata* basis for the relevant transaction term.

Taxpayer's right to change the calculation method—The option for one of the transfer pricing calculation methods is to be made for the whole calendar year and cannot be changed after a tax inspection starts, except when the method, or some of its criteria,

is disqualified by the tax authority. In this case, the taxpayer shall present a new calculation based on any another method provided for in the legislation within thirty days.

Elimination of safe harbor for entering new markets—Exports for entering new markets, which were realized from transfer pricing control, must now comply with one of the available export methods. ◆

Recent Tax Developments in Argentina

by Cristian Rosso Alba, Rosso Alba, Francia & Asociados, Buenos Aires, Argentina

Last quarter, the Argentine Revenue Service ("ARS") introduced new information reporting regimes with respect to outbound payments and financial operations. This is the latest example of an ever-expanding policy favoring preemptive data collection imposed on both resident and non-resident taxpayers alike.

Several important controversies have also been settled by the Supreme Court, including relevant rulings on the principle of legality, factoring agreements and undocumented disbursements.

New Information Reporting Regimes

Resolution 3,417/2012—The ARS enacted Resolution 3,417/2012 on December 20, 2012 with effect as of February 2013[1]. The Resolution introduces new requirements for cross-border royalties, interest and dividend payments. The former regime, implemented as recently as April 2012, excluded the informational reporting of these outbound payments[2].

Once in force, Argentine residents—As defined by the Income Tax Law[3]- will be required to provide comprehensive information to tax authorities regarding outbound payments, prior to their execution, by completing the DAPE (Anticipated Declaration of Cross-Border Payments). Data shall be submitted through the ARS on-line system.

Although the Resolution does not abound on particulars, competent government offices that adhere to the regime, including the ARS, will have to control and approve the DAPE, eventually observing the existence of any irregularities.

According to Section 5, no access to foreign currency will be granted without an approved DAPE. The Central Bank is expected to provide additional regulations regarding foreign exchange issues.

The scope of DAPE is quite broad, including interest as well as royalties and dividend payments. In all cases, thorough information is required on contractual aspects and identification of the foreign beneficiary is compulsory. Copies of relevant supporting documents shall also be provided.

Payments of financial debts originated in the purchase of goods exported to third countries are also included in the Resolution, as well as those related to courier services and other special import regimes.

Resolution 3,421/2012—ARS Resolution 3,421/2012, which was published in the Official Gazette on December 26, 2012, merges existing tax information duties for financial activities. The scope of the Resolution includes a wide range of issues such as assignment of loans, financial documents and factoring. The Resolution also introduces new financial instrument and derivatives reporting requirements.

All income tax payers, apart from banks and other financial institutions, will be required to provide exhaustive information on all operations involving derivative contracts or instruments, before 10 working days of its initial execution, amendment, total or

partial liquidation, or anticipated termination. Under certain circumstances, taxpayers who generated taxable income from derivative contracts are required to obtain a special annual report from a CPA, in order to identify the total income derived from such operations as well as the proportion of it which is related to hedge contracts.

Moreover, Resolution 3,421/2012 includes specific rules on the fiscal treatment of derivative instruments and contracts for income tax purposes, especially those contemplating hedge (i.e. non-speculative) operations.

Resolution 3,397/2012—The ARS introduced VAT export refund scheme amendments with the enactment of Resolution 3,397/2012 on October 24, 2012[4].According to the new regulation, exporters may be excluded from the fast-track devolution regime, on the grounds of: (1) the existence of due and collectible debts arising from taxes, custom duties and/or social security payments; or (2) verified inconsistencies associated to fiscal behavior. Controversy is bound to arise regarding the meaning and scope of the term "inconsistencies," which has been widely deemed as excessively vague.

Judicial Decisions

A recent ruling by the Supreme Court upheld a strict interpretation of the fundamental principle of tax legality—that taxes may only be introduced by the enactment of Congressional legislation. In *Ypf S.A. vs. Estado Nacional-Ministerio de Economia*[5], the Court declared the invalidity of custom duties' imposed over oil and gas exports from Tierra del Fuego Special Customs' Area, by a mere resolution of the Economy Ministry. The Court ruled that export duties' can only be introduced by a law of Congress, and that the Ministry's resolution taxing those exports violated several sections of the Constitution, which recognizes the tax legality principle and protects private property. Furthermore, the Court decided that an exemption previously introduced by means of a law may only be abrogated explicitly, and by a subsequent legal instrument.

Another relevant decision by the Supreme Court pertains to factoring, a commercial agreement that is not specifically provided for in Argentine legislation. In *DGI (Whirlpool Argentina S.A. –T.F. 17.569-I)*[6], the Court rejected the ARS criterion that assimilates factoring agreements with credit assignments, thus excluding the former from the provisions of Section 93 c) of Income Tax Law with respect to the regulation of income tax withholding on interest payments due to foreign beneficiaries. The Court considered that factoring agreements are credit assistance operations, where the assignment is merely instrumental and therefore subject to the provisions of Section 93 c). According to the ruling, factoring-related payments shall be treated as interest for the aforesaid provision purposes because its broad scope expressly includes "interest paid for credits of any origin or nature, obtained abroad," comprising a wide range of credit assistance operations.

Further clarification on legal standards for the application of Section 37 of the Income Tax Law, regarding undocumented disbursements, was provided by the Supreme Court in *Antu Aplicaciones Industriales Integradas S.A.*[7]. Following its ruling in the renowned 2003 precedent, *Red Hotelera Iberoamericana*[8], the Court decided that the mere identification of the individual who issued the corresponding invoices does not exclude considering the payment an undocumented disbursement, as such circumstance does not necessarily means the former are the effective beneficiaries of the operation. The absence of proper documentation as well as the impossibility of proving the cause of the disbursement and its real beneficiary leads to the application of Section 37. ◆

ENDNOTES

1 Official Gazette, 20/12/2012.
2 ARS Resolution 3276/2012, Official Gazette 22/02/2012
3 Sections 119 to 126, as introduced by Law 25.063 (Official Gazette, 30/12/1998)
4 Official Gazette, 29/10/2012.
5 Supreme Court, 04/09/2012, file Y.29.L.XLVI
6 Supreme Court, 30/10/2012, file D. 598. XLV
7 Supreme Court, 31/07/2012, file A. 916. XLVI
8 Supreme Court, 26/08/2003, "Fallos" 326:2987

Offshore Services and VAT on Automobile Advertisements in Chile

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Tax Treatment Applicable to Fees for Offshore Services

The Internal Revenue Service issued Regular Ruling No. 2893, dated October 26, 2012, which addresses the tax treatment of fees for the performance of services relating to trademarks and patents abroad with respect to the following:

(a) Research trademarks and possible registration in which respect a professional report is prepared;
(b) Preparation, filing and processing of trademark and patent registration applications with the foreign competent agencies;
(c) Preparation and filing of trademark and patent registration opposition procedures and defense of appeals;
(d) Advice given to negotiate trademark and patent settlements and;
(e) Filing and processing of trademark and patent transfers.

GENERAL RULE: Pursuant to Article 59 of the Income Tax Law some payments on account of certain items are subject to a 35% withholding tax[1] if the payees are neither domiciled in or residents of Chile.

The tax authorities analyzed this matter and concluded that No 2, paragraph four, article 59, Income Tax Law states that a 15% withholding tax levies the amounts paid to natural or legal persons that are not residents of or domiciled in Chile on account of engineering or technical services and professional or technical services that a person or entity knowledgeable in a science or technique performs by means of advice, a report or layout, regardless of whether those services are performed in Chile or abroad.

However, the 20% rate will apply when the creditors or beneficiaries of the compensations are in any of the scenarios indicated in paragraph 1, article 59, for which proof is to be produced and the scenario declared as indicated therein[2].

The Internal Revenue Service also stated that compensation representing payments for integral services relating to the registration of trademarks and invention patents performed by means of advice or a report, are subject to the 15% withholding tax and to the 20% rate when the creditor or beneficiary is in any of the scenarios indicated in paragraph one, article 59, Income Tax Law.

Application of VAT to Services Posted on the Internet

Regular Ruling No. 2068 of August 9, 2012, analyzes whether or not the Value Added Tax levies fees charged with respect to certain car sales advertisements posted on a website. The advertisements must be published by a company that provides its customers with access to the site, prior to the acceptance of terms and conditions with respect to the contract, where information about the vehicle (as well as contact information) is provided on the published website for a specified time period.

This service allows those interested in the offer to contact the vendor and agree to the sales conditions. Publication is free, however, if the vehicle offered is sold while the advertisement is being published or within a subsequent period of 30 days, the customer must pay a fee equal to 1% of the vehicle's value, regardless of who acquires the same.

In performing this analysis, the Internal Revenue Service determined that article 2, number 2, Tax on

Sales and Services Law, provides for the following definition of "service": the action or performance by a person in favor of another person for which the former receives an interest, premium, commission or any other way of compensation, provided it derives from any of the activities mentioned in numbers 3 and 4, article 20, Income Tax Law[3]. In turn, number 3, article 20, Income Tax Law includes incomes derived from advertising activities.

In the opinion of the Internal Revenue Service, posting information for a specified amount of time on a web site created to that end in order to advertise the sale of vehicles and the sellers' contact information implies disseminating information on a specific product through a social network so that potential buyers know and acquire the products, which falls within the category of advertising. Advertising activities performed for compensation, such as the specified case where a fee is paid for the sale of vehicles, constitutes a service pursuant to article 2 No. 2 of the VAT Law.

Consequently, the service inherent in the publication of sales advertisements on such websites by automobile vendors is an advertising service performed for compensation subject to the Value Added Tax.

Denunciation of the Chile - Argentina Convention for the Avoidance of Double Taxation

On June 29, 2012, Argentina notified Chile of the denunciation of the Convention for the Avoidance of Double Taxation signed in November 1976 and confirmed by both States on December 19, 1985, amended by subsequent protocols, hence terminating the same.

Effective January 1, 2013, the Convention will no longer apply to individuals and companies with respect to fiscal years commenced after the denouncement notice date—for Chile, the year commencing after December 31, 2012.

The benefits stated in the Convention such as, the personal tax exemption applicable to residents in Chile who own assets in Argentina will no longer apply and they will be subject to a 0.5% tax on their shares or interests in Argentine companies.

A new Convention closer to the OECD model is expected to be negotiated. ◆

ENDNOTES

1 Withholding Tax levies Chilean source incomes derived by natural or legal persons who are not residents or domiciled in Chile. The general rate is 35%.

2 If the creditors or beneficiaries of the compensation are residents of or domiciled in any of the countries included in the list stated in article 41D (tax havens) or when they own or have an interest of 10% or more in the capital or profits of the payer or debtor and when they are under a common partner or shareholder that directly or indirectly owns or has an interest of 10% or more in the capital or profits of any one of them. The local taxpayer must prove these circumstances and file a sworn statement as and when established by the IRS.

3 Incomes from the industry, commerce, mining, exploitation of sea resources and other extracting activities, air lines, insurance companies, banks, loan and savings associations, mutual fund administrators, investment or capitalization companies, financial companies and other similar activities, construction companies, news companies, advertising companies, radio broadcasting and television companies, automatic data processing, and telecommunication companies.

4 Incomes derived by brokers, commission agents with an established office, auctioneers, customs agents, shippers and others involved in the sea, port and customs business activities, and insurance agents other than individuals, schools, private education academies and institutions, private clinics, hospitals, fun and entertainment companies.

Tax News in Panama

by Javier Said Acuña and Raúl González Casatti, Rivera Bolivar y Castañedas, Panamá

A series of changes occurred in Panama during the last quarter of 2012, directly related to the operation of Panamanian corporations. Other developments pertained to customs, migration, and a proposal to convert the Internal Revenue Directorate to the National Revenue Authority.

Executive Decree No. 871

Executive Decree No. 871 was issued on November 14, 2012, and published in the Official Gazette as No. 27,165 on November 16, 2012. The decree creates the Interagency Restructuring Technical Committee of the National Customs Authority and the National Immigration Service in order to create a merged, special unit to control and investigate customs/migratory matters under the Ministry of Public Security. The new agency will have the following responsibilities:

- The development and implementation of a master plan to execute joint actions on the land border of the Republic of Panama and the Republic of Costa Rica (Paso Canoas) and the International Airport of David, Chiriqui.
- Extent the application of this plan to several frontier points, in land, sea and air our Country with the necessary adjustments.
- The creation of several subcommittees or specialized technical (legal, technical, institutional and financial) for the development of each component of the restructuring project.
- Presentation of monthly progress reports to the Minister of Public Safety.

Law No. 85

Law No. 85 was issued on November 22, 2012, and published in the Official Gazette as No. 27,172 on November 28, 2012. The law introduces and develops a new chapter to the Commercial Code of the Republic of Panama related to the fragmentation or division of Panamanian corporations. The main purpose is to rule the division of a Panamanian corporation and the possibility to reactivate a dissolved corporation.

In the matter of corporate division, prior to the approval of the law, there were no law that established what happens with the transfer of assets (and / or liabilities) of Panamanian corporation, especially if this transfer shall pay or not taxes. The provision requires that any division of a Panamanian corporation should be approved by the partners or shareholders of the company being divided.

The partners or shareholders of the company being divided may agree that:

- The total or partial transfer of individual or bonded assets.
- The liability limitation regime of the company being divided and of the recipient company or companies.
- To transfer or not, company´s liabilities.
- The transfer of shares or participations to the recipient companies.
- The amount of shares or participation shares corresponding to each partner or shareholder of the company being divided in proportion to their capital share in it.
- The approval of the articles of incorporation of the company or of the new companies to be constituted.

The division takes effect from its registration in the Public Registry. The transfer of assets because of the division of a corporation shall not be considered as a sale for tax purposes, provided that such transfer should be made for an equal value to those assets in the accounting records of the company being divided.

The corporation that is going to be subject to a division according to this rules, must notify its intention to split to the General Revenue Directorate at least 30 days prior to the effective division date.

This law also allows that a corporation that has been previously dissolved by decision of its stockholders, could be reactivated in any moment prior to its liquidation.

Bill 28, 2012

Recently, the Presidential Cabinet discussed and approved Bill 28, 2012, which creates the National Revenue Authority. This Bill has been submitted to the National Assembly for their discussion and approval.

This Bill is intended to create the National Revenue Authority, as an autonomous governmental institution with jurisdiction in all the Country, with its own equity and full administrative, functional and finance autonomy.

This new governmental division will be subject to the policy and guidance of the Executive Branch and the supervision of the General Comptroller of the Republic. It shall be represented by the Ministry of Economy and Finance to the Executive Branch. It is intended that the National Revenue Authority should be the successor of the General Directorate of Revenues in all functions, duties and powers granted by law. ◆

The Mexican Federal Revenue Law 2013

by Miguel Ortiz, Iván Díaz-Barreiro, Juan Alberto Torres, Jorge R. Flores, Ortiz, Sosa, Ysusi y Cía, S.C. Asesores Fiscales, Distrito Federal, México

The Mexican Federal Revenue Law (Ley del Impuesto sobre la Renta) was passed in December, 2012, and entered into force on January 24, 2013. This article describes the main changes brought into effect by the law.

Introduction

According to an analysis conducted by the Federal Government, during 2012 the Mexican economy expanded at a rate similar to that registered in 2011, while demand for Mexican products grew moderately. The Federal Government estimates growth of 3.5% in the real value of GNP for 2013, accompanied by inflation of between 3% and 4%. It is estimated that federal revenues in 2013 will have a nominal increase of 7.9% compared to the revenues budgeted for 2012.

It is expected that the flat rate business tax collection will be 12% lower than that of 2012, whereas income tax is expected to increase by 9.4%. In terms of indirect taxes, such as value added tax and excise tax, federal revenues will increase by 11.9% and 15.1%, respectively.

Based on the argument that the global economic environment shows elements of uncertainty relative to the world's largest economies, the Government has chosen not to modify the 2012 income tax rates. Certain other changes which had been proposed have also been deferred, as explained below, including changes to the interest withholding tax regime, originally intended to come into effect in 2010.

As with the last change of President in Mexico, a tax amnesty is included which benefits taxpayers by forgiving tax liabilities incurred before 2007, as well as surcharges and fines generated on contributions incurred after 2007 and up to 2012.

From the beginning of 2013 those persons required to issue tax receipts must do so using digital forms,

eliminating the printed method, except for certain taxpayers in some cases, as established in the tax reform for 2010.

Federal Revenue Law For Fiscal Year 2013

Tax Amnesty—A time-limited provision establishes total or partial forgiveness of unpaid tax liabilities for federal taxes, countervailing duties, including government surcharges for both, as well as fines for noncompliance with federal tax obligations other than in respect of payments, regardless of whether the unpaid tax liabilities were determined by the tax authorities, or self-determined.

In order for the forgiveness to be considered valid under any of the conditions listed below, it will be essential for the taxpayers to file a request with the respective tax authorities, using forms to be prescribed by such authorities, at the latest in March 2013.

The amnesty scheme offers significant economic benefits to taxpayers who wish to regularize their situation regarding taxes due or withheld, fees and social security contributions.

Taxes prior to 2007—In relation to unpaid tax liabilities concerning federal taxes, countervailing duties and fines for noncompliance with tax obligations other than in respect of payments, which were incurred before January 1, 2007, the amount of the forgiveness will be 80% of such items, adjusted for inflation. In relation to surcharges for late payment, for extensions, fines and enforcement expenses relating to such taxes and countervailing duties, the forgiveness will be 100%.

In order for the forgiveness to be considered valid, it will be essential for the taxpayer to fully settle the part not forgiven in a single payment.

The forgiveness will be 100% of the tax, countervailing duty or fine, if a taxpayer has been audited by the tax authorities for the years 2009, 2010 and 2011, provided that it was determined that they complied fully with their tax obligations, and/or settled any unpaid taxes assessed.

We believe that the assumptions are unclear for purposes of taxpayers wishing to apply the additional forgiveness described above, because the wording of the law gives rise to a number of different interpretations. It might be thought that in order to apply this additional forgiveness, the authorities had to have audited the years 2009, 2010 and 2011, or alternatively that the authorities had to have conducted their audits during such years, independently of the year subject to review. It is also unclear whether the tax authorities should have conducted the audit during the aforementioned three years or for any of them, or even have reviewed another previous year during one of such years.

We expect that such lack of clarity must be corrected through general rules that will be issued by the tax authorities at the latest in March 2013.

Additional charges on taxes from 2007 to 2012—Total forgiveness (100%) is granted for the additional charges (surcharges and fines) in respect of unpaid tax liabilities for countervailing duties and federal taxes other than withheld, transferred or collected taxes, as well as fines for noncompliance with tax obligations other than in respect of payments, which were incurred between January 1, 2007 and December 31, 2012, provided that the restated taxes or countervailing duties are settled in a single payment.

Requirements to apply the amnesty—The payment of the part of the unpaid tax liabilities not forgiven under any of the assumptions discussed cannot be made by means of payment in kind, giving in payment, or offsetting.

The tax authorities must publish in the Federal Official Gazette, at the latest in March 2013, the necessary rules in order to apply the amnesty, as well as the forms which must be filed together with any request for forgiveness.

The amnesty will be considered valid even though the unpaid tax liabilities were challenged by the taxpayers, provided that at the filing date of the amnesty application, the appeal procedure has been concluded through a firm ruling; otherwise, an acknowledgment of abandonment of the lawsuit must be attached.

It is established that the amnesty does not apply to unpaid tax liabilities which have been settled, and that under no circumstances will the amnesty give rise to any refund, offsetting, crediting or favorable balance. The amnesty will not be applicable when a judgment for the plaintiff is issued in criminal matters.

The amnesty also establishes that the response to the request for amnesty cannot be challenged by the taxpayers.

If the unpaid federal tax liabilities are administered by the authorities of the States, the amnesty must be requested directly from such authorities.

Fines levied in 2012 and 2013—A 60% reduction of the fines levied during fiscal years 2012 and 2013 is established in relation to noncompliance with tax obligations other than in respect of payments, except in the case of fines for declaring excessive tax losses, provided that they are paid within the 30 days following their notification.

Income Tax Rate at 30%—A decree published on December 7, 2009 established that in order to deal with the decrease in collections that Mexico would suffer due to the global crisis at that time, the income tax applicable to Mexican entities and the maximum applicable rate for individuals, would increase from 28% to 30% during the years 2010, 2011 and 2012, and then drop to 29% for 2013.

Despite the macroeconomic indicators which show favorable growth rates in Mexico, the Purposes Article of the law establishes that due to the problems with the sustainability of public finances in different countries of the European Union and the USA, it would be advisable to maintain the rate and tariffs in effect in 2012 so as to avoid a structural weakening of public finances in Mexico.

The Purposes Article states that this measure reflects the international environment, because in the period from 2009 to 2012, almost one third of the member countries of the OECD have increased their income tax rate, more than half have maintained the rate and only a few countries have actually cut it.

Given the above, it is established that for 2013 the rate applicable to corporations, instead of that established in the aforementioned decree, will be 30%. It is also established that the tariffs applicable for individuals will be those in effect in 2012, which means that the maximum marginal rate remains at 30% during the year 2013.

The aforementioned reform establishes that the 29% rate will be applied in 2014. It is questionable however that a law in effect for one year should seek to regulate the rate applicable in a subsequent year.

In line with these modifications, it is established that the applicable rate to determine the tax generated through a real estate investment trust (Spanish acronym FIBRA), will be 30% only for 2013, instead of the 28% established in the Income Tax Law.

Interest Regime for 2014—Another one-year extension is established for the enactment of the new interest regime on income tax, so that it will begin to be applied as of January 1, 2014.

Previously, the enactment of this regime had been deferred to give financial institutions the opportunity to adjust their processes and systems, and to keep specific accounting records. However, for this year the Purposes Article also establishes that due to the change in the Presidency, the Mexican Treasury Department should review the interest withholding tax regime to determine whether it is applicable or, as the case may be, make appropriate changes.

We believe that the regime, whose implementation is now proposed for the year 2014, ought to be modified

before it goes into effect in order to correct the distortions that it presents.

Given that the regime for interest in effect for the year 2013 remains the same, the obligations for withholding and payment of the income tax related to interest, and the filing of information returns and compliance with other formal obligations are also unchanged.

Withholding on Bank and Stock Exchange Interest—It is established that institutions engaged in the financial system will continue to apply the annual rate of 0.60% on principal which gives rise to the payment of interest, in order to determine the withholding of income tax on any revenues obtained for this item, as had been the case in recent years.

As in previous years, we believe that current interest rates do not justify such a high withholding rate.

Real Interest on Mortgage Loans—The provision remains in effect whereby the amount of real interest effectively paid on mortgage loans will be determined in accordance with the procedure established in the tax provisions applicable to individuals resident in Mexico (nominal interest less inflation), pursuant to the interest regime that will be in effect in the year 2013.

4.9% Rate on Interest—The income tax withholding rate of 4.9% on the interest paid to foreign banks registered with the Mexican tax authorities remains in effect for fiscal year 2013, provided that they reside in a country with which Mexico has a current double taxation treaty and they comply with the requirements established in such treaty.

As already noted on previous occasions, we believe that in order to provide legal certainty for taxpayers, this provision should be included in the Income Tax Law, instead of a one-year statute such as the Federal Revenue Law.

Surcharge Rate—The surcharge rate established in the previous year, in relation to the deferral of the payment of unpaid tax liabilities, is maintained for the year 2013. In relation to due and payable tax liabilities on unpaid balances, the surcharge rate applicable is 0.75%. Consequently, the surcharge rate for late payments will be 1.13% per month.

In those cases where payment by installments is authorized the following surcharge rates will be applied: 1% per month for installment payments of up to 12 months; 1.25% per month for installment payments of more than 12 and up to 24 months; and 1.5% per month for installment payments in excess of 24 months or deferred installment payments.

Tax Incentives—The tax incentives related to the acquisition of diesel made by taxpayers who carry out business activities (except mining), agriculture, forestry and transportation of persons or freight, whether public or private, remain in effect for year 2013.

However, it is established that taxpayers engaged in agriculture or forestry activities will not be able to apply the incentive which consists of crediting a part of the expense for the acquisition of diesel, or requesting the refund of any tax which they were entitled to credit, when the excise tax that is transferred to them is either zero or negative.

Furthermore, the tax incentive applicable to expenses incurred in the use of the highway infrastructure is maintained for taxpayers engaged exclusively in the public and private transportation of freight or passengers, which use the National Toll Road Network.

Foreign Pension and Retirement Funds—The possibility remains in effect for business corporations which have foreign pension and retirement funds as shareholders, that comply with the requirements established in applicable tax provisions, to exclude from the calculation of their total revenue the income generated by inflation and the exchange gain derived exclusively from the debts contracted for the acquisition or to obtain revenues from granting the temporary use or enjoyment, of land or other constructions attached to it, which are located in Mexico.

The above is intended to determine whether these persons comply with the requirement of 90% of their revenues to be exempt from the payment of income tax, based on the shareholding percentage or the participation of such funds in the Mexican legal entity

Flat Rate Business Tax Credit—The provision which bars the application of the credit for excess deductions against income tax incurred in the same year in which such credit is determined, remains in effect; for this reason it may only continue to be credited against flat rate business tax determined in the subsequent 10 years.

Notwithstanding the adverse economic effect that this restriction generates for taxpayers, the Mexican Supreme Court recently ruled that this provision is not subject to the constitutional rights established in tax matters, because it refers to a benefit for taxpayers, which does not affect the essential or variable elements of the flat rate business tax.

The Supreme Court has also ruled that this provision does not violate the constitutional right of legal certainty, because it refers to a provision that is valid for one year, and the Flat Rate Business Tax Law does not have a fixed or determined duration.

Inspection and Oversight Fees Charged by the CNBV—The provision remains in effect whereby full-service banks, development banks, securities firms and investment funds (except investment funds specializing in retirement funds) may elect to pay the fee for inspection and oversight rendered by the National Banking and Securities Commission (CNBV), based on the provisions in effect for the year 2012, plus a margin of 5%.

If the aforementioned option is exercised and the annual payment is made during the first quarter of the year 2013, the 5% discount for the total payment of the annual fees established in the Federal Revenue Law will not be applicable.

As a result, such entities will be subject to a predetermined fee for the inspection and oversight services provided by the CNBV, which will begin to be incurred as of the business day following that on which they obtain registration with the Commission, or inform the National Commission for the Protection and Defense of Financial Service Users that they have been established, and will be incurred proportionately from that date until the end of the fiscal year. ◆

Uruguayan Tax Updates

By Isabel Laventure, Ferrere, Montevideo, Uruguay

VAT Reduction for Nonresident Tourists

As of November 15, 2012, the elimination of VAT went into effect on purchases of certain goods and services by tourists, as long as those purchases are paid for with a credit or debit card issued abroad.

The benefit will be in place for the 2013 summer season and ends on March 31.

VAT is eliminated in full, however, on certain transactions for use or consumption in Uruguay, for example: (1) gastronomic services, when provided by restaurants, bars, cafeterias, coffee shops, tearooms and similar establishments, or by hotels, motels, apart-hotels, hostels, tourist ranches, country inns, tourist farms, and camping hostels, provided that the said provisions do not constitute lodging; (2) catering services for parties and events; (3) services for parties and events not included in the foregoing category; (4) car rentals without a driver; (5) clothing; (6) leather or knit articles; (7) food; (8) beverages; or (9) national or foreign craftwork.

These transactions will be controlled by the National Customs Office, which will require exhibition of the tourist's foreign passport or identification document, as well as tickets or equivalent accrediting departure from Uruguay, and the merchandise which is the subject of the benefit and the pertinent invoice. Upon authorization, the Customs Office will upload the number of the credit card used for the purchase into the system in order to provide reimbursement of the amount.

This is expected to reduce the impact of the international economic situation on Uruguay and achieve a successful summer season.

This benefit is in addition to those already in effect:

- Vacation real estate rentals enjoy a tax credit equivalent to 10.5% of the gross amount of the price agreed. Payment must also be made with a credit or debit card.
- 25 dollars in free fuel for vehicles.

Uruguay Continues Approving Tax Treaties, Conventions and Protocols

- **Uruguay – Denmark:** Law 19,036 of December 27, 2012, approved the Tax Information Exchange Agreement between Uruguay and Denmark.
- **Uruguay – Argentina:** The Tax Information Exchange and Double Taxation Treaty with Argentina will go into effect on February 7, 2013, as approved in Law 19,032.
- **Uruguay – Mexico:** Law 19,049 approved the Protocol Modifying the Free Trade Agreement between Uruguay and Mexico, signed simultaneously in Mexico and Montevideo on October 1, 2012. With a view to facilitating trade between the parties and broadening export opportunities for industry, the list of products that enjoy tax and tariff benefits was expanded.
- **Uruguay – Finland:** Law 19,035 approved the Agreement for Prevention of Double Taxation and Income Tax and Net Worth Tax Evasion with Finland.
- **Uruguay – Faroe Islands:** Law 19,034 approved the Tax Information Exchange Agreement with Faroe Islands.
- **Uruguay – Korea:** Law 19,033 approved the Convention for Prevention of Double Taxation and Income Tax and Net Worth Tax Evasion with Korea.
- **Uruguay – Romania:** Law 19,020 approved the Additional Protocol to the Reciprocal Investment Promotion and Protection Agreement with Romania.
- **Uruguay – India:** Law 18,972 approved the Convention for Prevention of Double Taxation and Income Tax and Net Worth Tax Evasion with India.
- **Uruguay – Malta:** Law 19,010 approved the Convention and Protocol for Prevention of Double Taxation and Income Tax and Net Worth Tax Evasion with Malta.
- **Uruguay – Iceland:** Law 18,977 approved the Tax Information Exchange Agreement with Iceland.

Tax Benefits for Investments in Development and Implementation of System for Obtaining Electronic Tax Receipts (CFE)

The electronic invoice is the digital evolution of the traditional paper invoice, and consists of the transmission of invoices or other evidence of purchases by electronic means.

The new electronic invoicing system implies big savings for companies when it comes to administering and saving documents and invoices, as compared to paper. Electronic invoicing records are entirely digital and take the place of paper invoices and receipts.

The Tax Administration (DGI) will issue a document using a pre-established form, which will be used by companies who join the new system. These documents will have the same legal and tax value as documents on paper supports, providing more security and backup for commercial transactions by member firms.

The Tax Administration is promoting and providing incentives for companies to invest in this new system, which affords tax benefits.

Investments made through December 31, 2014, will be computable. Benefits apply for the Business Income Tax and the Net Worth Tax. ◆

Regulation of the Outbound and Inbound Transfer of Funds by the Central Bank of Ecuador

By Cesar R. Holguin, Lawnetworker S.A. Asesores Legales, Ecuador

The Central Bank of Ecuador issued Regulation N° 32, published in Official Gazette # 843 on December 3, 2012, to regulate the transfer of funds through the national Institutions of the Financial System.

The Regulation mandates that currencies corresponding to the transfer of monies outsourced from abroad to Ecuador by individual or corporate residents of Ecuador, or abroad, request to international financial institutions, through local financial institutions, on any account, must be deposited by the latter in their accounts in the Central Bank of Ecuador, maximum in one working day after the transfer.

After 24 hours, the Central Bank must reimburse the currencies to the local financial institutions, which will deliver, effective immediately, the funds to their clients or non-client beneficiaries, as applicable.

Effective November 15, 2012, local financial institutions began reporting to the Central Bank, the information regarding transfer of funds received by them from abroad ordered by their own account, by their clients or by non-client beneficiaries.

Simultaneously, the Central Bank of Ecuador issued the *Manual Procedure For The Execution Of Offshore Operations Requested By The Local Institutions Of The Financial System And Courier Services Companies*. This manual, among other things, establishes the following:

Remittances Abroad

Institutions in the local financial system that maintain accounts in the Central Bank of Ecuador will be enabled to make transfers to their accounts abroad, through the Central Bank.

Institutions in the local financial system shall, until 14h30 New York time, request the transfer from the International Banking Services Direction through SWIFT MT202 message. In the event that they do not have a SWIFT SYSTEM, they will do it through a communication duly signed by the authorized representatives registered in the Central Bank to mobilize funds.

Remittances From Abroad

The petitioner institutions must report on a daily basis to the International Banking Services Direction, until 16h30 Ecuador time, through the Central Bank mailbox, in the Trans_Internationals file, as ASCI file, the detail of the transactions sourced from abroad, made on their own account, by their clients or by non-client beneficiaries, or by any other concept. The amount reported by the petitioner institution will correspond to the amount that will be transferred to their account in the Central Bank the next working day.

Tax Brackets for 2013

The IRS has issued Resolution No. NAC-DGER-CGC12-00835, published in Second Supplement

of Official Gazette No. 857, dated December 26, 2012, releasing, effective January 1, 2013, the new tax brackets for individuals and undivided inheritances. The new tariffs are as follows: ◆

TAX BRACKETS FOR INDIVIDUALS 2013			
Taxable Income Exceeding	Taxable Income Not Exceeding	Tax on Lower Amount	% Rate on Excess
—	10,180	—	0%
10,180	12,970	—	5%
12,970	16,220	140	10%
16,220	19,470	465	12%
19,470	38,930	855	15%
38,930	58,390	3,774	20%
58,390	77,870	7,666	25%
77,870	103,810	12,536	30%
103,810	And on	20,318	35%

TAX BRACKETS FOR INHERITANCES, LEGACIES AND DONATIONS 2013			
Taxable Income Exceeding	Taxable Income Not Exceeding	Tax on Lower Amount	% Rate on Excess
—	64,890	—	0%
64,890	129,780	—	5%
129,780	259,550	3,245	10%
259,550	389,340	16,222	15%
389,340	519,120	35,690	20%
519,120	648,900	61,646	25%
648,900	778,670	94,091	30%
778,670	And on	133,022	35%

Features and Regulations of the Personal Income Tax

by Anibal Pangrazio and Beatriz Pisano, Ferrere, Asuncion, Paraguay

In July 2012, Congress enacted law No. 4673/2012 "Personal Income tax," in force as of August 1, 2012 (hereinafter "Law"). Regulation No. 80/2012 (hereinafter "Regulation") fleshes out further details for implementing substantial provisions of the Law. This article intends to briefly summarize key issues provided by the Regulation.

Key issues include a more specific definition of what is understood by personal services and specific matters related to registration of taxpayers before the national tax authority, compulsory records of income and expenses and other formalities applicable to the personal income tax (hereinafter "PIT").

Personal Services

Art. 1 of the Regulation provides a more detailed definition of what is understood by personal services — i.e. one of the activities levied by the PIT. Accordingly, personal services are defined as services performed by professionals (such as lawyers, doctors, accountants) personally and directly to its clients as well as services provided completely or in part by third parties whenever collaboration, complementation or any other type of personal services was provided to or in association with the latter.

Likewise, the Regulation provides that other professional services such as calculation, design, regularization or supervision of construction works that do not involve the actual execution of the work, are deemed to be personal services and under the scope of the Law. On the other hand, income arising out of services provided by construction companies that carry out the construction of an asset are not under the scope of the PIT but under the Corporate Income Tax.

Registration

Taxpayers must be registered before the national tax authority in the following manner: (i) individuals shall be registered within 30 days after they reach the threshold provided by the Law and (ii) partnerships shall be registered within 30 days after its constitution, regardless their annual income.

Income Tax Records

Income and expenses must be recorded in the following manner:

(i) Personal services rendered by independent contractors shall be recorded by means of legal invoices.
(ii) Personal services rendered by employees shall be recorded by means of salary receipts dully executed by the employer.
(iii) Dividends, profits, surplus obtained by the taxpayer shall be recorded by means of official receipts issued by the paying company.
(iv) Accidental sale of goods[1]: (a) by means of legal invoices, if the seller is a VAT taxpayer. (b) When the PIT taxpayer is not a VAT taxpayer, records shall be kept by means of a public deed when it comes to accountable assets, or by any available mean when it comes to other type of goods.
(v) Sale of immovable goods: by means of a public deed and the legal invoice whenever the PIT taxpayer is a VAT taxpayer.

Record of Expenses

According to Art. 4 of the Regulation, expenses incurred by taxpayers must be recorded by means of legal invoices and other related documents.

In regard to expenses incurred in a foreign country, they must be recorded by legal invoices issued in accordance with the laws in force in the country of issuance, and shall include the name of the taxpayer and its identity card number.

Foreign Exchange Transactions

Income recorded in a foreign currency shall be converted to domestic currency. The amounts must be converted at the buyer (in case of purchases) or seller (in case of sales) banking floating exchange rate in force at the time of the payment.

Travelling Expenses

Amounts given to employees as travelling expenses with an accountable plan are not charged by the PIT, provided that such expenses are dully recorded.

Independent professionals such as lawyers, public notaries, accountants or any other that may receive amounts for the performance of acts before public or private offices on their clients' behalf. In that case, professionals shall keep record of all the amounts received from its clients.

Non Deductible Expenses

The following Items may not be deducted from the PIT (Art. 12 *Regulation*):

(i) Expenses incurred for the sale of shares.
(ii) Expenses incurred for the adjudication of inheritance or donations.
(iii) Tax losses coming from previous taxable years.
(iv) Tax losses arising out of investments related to previous taxable years provided they do not exceed 20% of the gross income from the previous taxable year.
(v) Compulsory donation to charity or public interest entities in the frame of a criminal proceeding.
(vi) Accounted VAT, whenever the taxpayer declare such amounts as credit at the time of the assessment and settlement of the VAT.
(vii) Cash expenditures accounted as costs or expenses under other domestic taxes.
(viii) Expenses recorded in the name of a family that has more than one member in charge. In this case, taxpayers can only be deducted by one of the members.
(ix) Capital repayment.

Sworn Statement, Filing, Payment and Suspension

Taxpayers charged by the PIT must submit an annual sworn statement detailing gross incomes charged by the PIT and deductible expenses. Mandatory deadline for the filing of the sworn statement and the payment of the PIT is March of the next taxable year (Art. 12 *Regulation*).

On the other hand, Art. 14 provides that taxpayers must submit a request for suspension whenever their incomes do not reach the threshold in two consecutive taxable years.

Witholdings for Nonresidents

Whenever individual or foreign companies, entities, associations, corporations and any other private or public entity obtain incomes for activities performed in Paraguay; domestic companies paying for such services shall withhold the PIT. The applicable tax rate is of 20% over the 50% of the gross income remitted in consideration for the services. ◆

ENDNOTE

[1] According to the Law, accidental sale of goods exist whenever the taxpayer does no sale more than two immovable goods per tax year.

Legislative Updates From Peru

by Cesar Luna-Victoria Leon, Rubio, Leguia & Normand, Lima, Perú [1]

"Principales Contribuyentes" (PRICOS) Must Keep Electronic Accounting and Tax Books

The Peruvian Tax Administration (SUNAT) has disposed that effective January 2013, taxpayers designated as PRICOS must maintain their Sales and Income Registry, as well as the Purchase/Acquisitions Registry through the Electronic Books Program (EBP) that is provided by SUNAT.

Additionally, effective June 2013, PRICOS must keep all other accounting books in accordance with EBP.

Additionally, effective June 2013, PRICOS must keep all other accounting books in accordance with EBP.

Supreme Decree N° 258-2012-EF was published in the Official Gazette on December 18, 2012. The decree introduces amendments to the Income Tax Law Regulations with respect to a number of significant modifications incorporated in the Income Tax Law by the end of June and July 2012, through several Law Decrees as informed in previous publications.

Extension of Tax Benefits

Law N° 29666, published on December 18, 2012, extended tax exemptions contained in the Value Added Tax Law and the Income Tax Law for three additional years.

Additionally, the law also extends the periods for the application of certain special tax regimens such as the refund of taxes on the acquisitions of goods with resources coming from foreign donations and imports of diplomatic missions, as well as the tax refund regimes to developers of mining activity during the exploration stage, among others.

Tax Unit Value for 2013

It has been published the amount of the Tax Unit applicable for the year 2013. Said amount equals S/. 3,700 (US$ 1,500). Said value is used in Peru for different purposes such as: calculating tax fines, limits on tax expenses for Income Tax purposes, among others. ◆

ENDNOTE

[1] Please note that this section is intended to be a merely informative summary of the legislative news. It does not include or intends to provide any kind of legal advice.

Income Tax Entered Into Force in Guatemala

by Juan Carlos Casellas Gálvez, Ph.D. (Tax Law), Mayora & Mayora, S.C., Guatemala

Besides a new year, 2013 ushered in a new income tax. Although referred to as a new tax, the new income tax resembles several of the former, repealed taxes, mostly because the tax remains a territorial, objective, and scheduler tax. Therefore, all income generated in Guatemala will continue to be taxable according to its origin. The new tax, as the repealed one, provides an applicable cell to each kind of rent. In this order of ideas, one thing that we should point out is that this time the legislature was concerned enough to give us a more structured and orderly tax, which we are sure will be helpful in the beginning of their application.

As a matter of fact, the new income tax presents us with only four polls: (1) income of residents from profitable activities, which agglutinates almost all rents from Guatemalan commercial and service industry; (2) capital income, which agglutinates all passive rents; (3) labor income; and (4) income of non-residents. With these four polls, the Guatemalan legislature confirms the objective nature of our income tax sending it further away from a subjective tax, which under the light of the rule of law, we think is one of the most important characteristics of any income tax. It appears then, that the personal conditions of a taxpayer are not an important issue for our legislature; proof of that, for example, is that medical expenses are no longer deductible for labor income purposes.

Referring to an important poll of the tax: the poll related to the income of residents from profitable activities shows that the legislature following the structure of the repealed tax, offers us two different ways to pay it: a) a decreasing tax rate which in year 2015 will reach a 25% rate, for Income Tax on utilities (income from profitable activities regime); and b) the optional income tax on gross income (simplified income of profitable activities regime), which in year 2014 will reach a flat rate of 7% or 5% depending on the amount of the taxable income. Therefore, the legislature's opinion remains intact: gross income is a taxable wealth or in words from the Constitutional Court of Spain, is a present, real and effective manifestation of wealth. In agreement with that Court, we think that gross income doesn´t bring together all those attributes, and hence it cannot be considered a taxable wealth without violating the Constitution, mainly the rule establishing the principle of ability to pay. Not long ago, a similar argument led our Constitutional Court to declare the unconstitutionality of a tax created under these conditions. We are referring to tax on commercial and agricultural enterprises, best known as IEMA.

On the other hand, as an attempt to extend the source principle, the new income tax incorporates concepts and regulations never seen in Guatemala before, such as the regulations related with permanent establishment, transfer price rules and a concept of resident for taxable purposes. In what is referred to as the permanent establishment regulation, we can highlight that the Guatemalan income tax has completely adopted Article 5 of OECD Model Tax Convention on Income and on Capital. That is why we cannot find in the law a close definition on permanent establishments.

Although this is the first time that Guatemalan legislation formally adopts Transfer Pricing Rules, in our legislation we can find some precedents, such as the definitions of controlling and controlled entities described in article 9 of the tax on the distribution of beverages, which easily can be pointed as the seed of the arm´s length principle. In the same order of ideas, we cannot say that before Transfer Pricing Rules entered into force, taxpayers in Guatemala were free to assign any value to transactions entered into with related entities. At the limit, the deliberate simulation of transactions with the purpose to evade taxes partially or totally is specifically sanctioned by criminal law.

Nevertheless since January 2013, Guatemala has Transfer Pricing Rules applicable to all transactions between Guatemalan entities and non-resident foreign related entities. Such rules do not apply to related Guatemalan resident entities. Different methods to apply the arm´s length principle, as well as definitions of related parties are contemplated by New Income Tax Law.

However, the application of these new regulations do not appear to be as peaceful as shown by a recent Constitutional Court decision published in the Official Gazette on January 31, 2013, in which the Court ruled the suspension of the norm that gave Tax Agency the authority to requalify operations according to their nature hence to apply the substance over form principle. ◆

Nicaraguan National Assembly Approves Law No. 822 to Derogate Law No. 453

Nicaraguan National Assembly Approves Law No. 822 to Derogate Law No. 453

On December 12, 2012, the Nicaraguan National Assembly approved Law No. 822, "Law of Tributary Concertation," establishing material changes to the current income tax framework for both corporations and individuals. In addition to Nicaraguan nationals and residents, the changes will impact foreign corporations and individuals with business and investments in Nicaragua. Law No. 822, published in the Official Gazette, La Gaceta, on December 17, 2012, and enforceable effective January 1, 2013, derogates Law No. 453 "Tax Equity Law.". The Nicaraguan government also issued corresponding regulations, Decree No. 01-2013, "Regulations for Law of Tributary Concertation," on January 15, 2013.

Law No. 822 and Decree No. 01-2013 are the main fiscal regulations in Nicaragua. Below are comments pertaining to the most significant issues introduced by that law.

New Fiscal Year

The fiscal year for all taxpayers is between January 1 and December 31 of each year. Consequently, and in accordance with Article 300 of Law No. 822, each taxpayer must settle a balance sheet at December 31, 2012, submitting and paying the Income Tax Return (IR), no later than March 31, 2013.

New Conceptualization of Income

The new conceptualization of income tax includes:

1. Labor income / Personal Taxes;
2. Income from economic activities; and
3. Capital income, capital gains and capital losses.

Labor Income / Personal Taxes

Law No. 822 establishes a new method to calculate personal income (labor income) according to the following table:

ANNUAL INCOME		TAX BASE	APPLICABLE PERCENTAGE RATE	OVER
From C$	To C$	C$	%	C$
0.01	100,000.00	0.00	0.0%	0.00
100,000.01	200,000.00	0.00	15.0%	100,000.00
200,000.01	350,000.00	15,000.00	20.0%	200,000.00
350,000.01	500,000.00	45,000.00	25.0%	350,000.00
500,000.01	to more	82,500.00	30.0%	500,000.00

Other personal incomes are subject to the following withholdings:

CONCEPT	TAX RATE
Other personal income	
Compensations	10 %
Per diem	12.5%

Income From Economic Activities / Corporate Income Tax

The Law preserved the current statutory 30% income tax rate for corporations. However, in the next years this rate can be reduced.

Other forms of income are subject to the following withholding:

CONCEPT	TAX RATE
Income for activities	
Transaction with Tax Haven	17%
Insurance and reassurance	1.5%
Insurance prime and bond, guarantee	3%
Maritime vessel and aircraft	3%
International telephonic communications	3%
Other income	15%
Agricultural transactions, rice and rude milk	1%
Primary agricultural goods	1.5%
Other goods	2%
Investments funds	5%

Capital income / Capital gains / Capital losses

Capital income is income that is derived from capital—from the wealth itself, rather than any specific form of production or direct work. Capital gains are those gains derived by a resident or non-resident from the alienation of stock, participation or other rights, rights in the capital stock of a company as well from the alienation of immovable properties and/or assets.

CONCEPT	TAX RATE
Capital income, capital gain and capital losses	
Trust	5%
Others capital income for resident and non-resident	10%
Alienation of immovable properties, from US$1 to US$ 50,000.00	1%
Alienation of immovable properties, from US$ 50,000.01 to US$ 100,000.00	2%
Alienation of immovable properties, from US$ 100,000.01 to US$ 200,000.00	3%
Alienation of immovable properties, from US$ 200,000.01 to over	4%
Transaction in stock market	0.25%
Investment Funds	5%

Residents

An individual shall be considered a tax resident of Nicaragua if the individual is present in Nicaragua for a period or periods totaling in the aggregate at least 180 days in the fiscal year concerned. Additionally, a legal entity will be deemed as a resident, if its principal office or operations are in the country, unless such entity proves that its residency or tax domicile is in other country.

The new law also establishes that nonresident entities are subject to a withholding rate of 15%. However, if the non-resident entity belongs to a State that is considered a tax haven, the withholding rate increases to 17%. Non-resident individuals are subject to a 20% withholding rate.

Tax Havens

According to Law No. 822, a tax haven is a country or territory where the income tax is levied at a low rate (or not at all) under the Nicaraguan Income Tax. The Ministry of Treasury (Ministerio de Hacienda y Crédito Público) is authorized, through a special regulation or Decree, to define or to appoint a country as a tax haven. Nicaragua will now need to enter

into treaties to avoid double taxation and prevent tax evasion.

Permanent Establishments

Permanent establishments are subject to a monthly payment of 1% for Income Tax Advance. According to the Law of Tributary Concertation, the term permanent establishment indicates the place in which a non-resident carries on, wholly or partly, its economic activity, and includes:

a. The head office of management or administration;
b. Branches;
c. Or representative offices;
d. Factories;
e. The workshops;
f. A mine, an oil or gas well, a quarry or any other place of extraction of natural resources.
g. Construction, installation, supervision activities when such activity exceed six months;
h. The continue performance of professional services or activities for a period or periods exceeding six months.

Stamp Tax

Stamp tax is levied on different documents and/or instruments based on set tables, from C$1 to C$10,000.

Transfer Pricing Rules

The new law sets out Nicaragua's transfer pricing rules, as well as the comments and suggestions of the OECD. The rules, however, are not effective until January 1, 2016. Some of the most important characteristics are as follows.

Methods: The new law adopts all five OECD methods:

(i) Uncontrolled Comparable Price;
(ii) Resale Price;
(iii) Cost plus;
(iv) Profit Split method; and
(v) Transactional Net Margin Method.

Voluntary Studies: Transfer price studies conducted by taxpayers are voluntary. However, the requirement to keep all supporting documents relative to the methods used remains unchanged.

Adjustments made by the Taxing Authority: Under the new provisions, the Tax Authority may introduce any adjustments deemed necessary when taxpayers are not able to produce evidence that operations were made at regular market prices, values or profits.

Advance Agreements (APAs): The Law also allows taxpayers to enter into advance price agreements (APAs) with the Tax Authority for a specified period of time in which the Tax Authority will not challenge the values involved in the taxpayer's operations carried out under this agreement.

Tax-Free Capital Contributions of Property (Ambiguity)

Even though, article 37 of the Law establishes that either cash or capital contributions, as well as contributions of properties (assets) are exempted from income tax, it is our opinion that the way the article is written created an ambiguity or confusion because in a subsequent article 75, it is unclear whether or not the contributions of properties (real state/fixed assets) can be deemed as a capital gain. Furthermore, article 82 of Law No. 822 establishes the taxable basis for the capital gain on the transfer of properties considering as taxable basis the difference between the transfer value and acquisition cost. ◆

2012 Tax Reform: A New Tax Framework for Colombia

by Andrés González and Juan Pablo Wills, Lewin & Wills Abogados, Bogotá Colombia

On December 26, 2012, the tax reform approved by the Colombian Congress on December 20, 2012, (Act 1607/2012) entered into force. The 2012 tax reform encompasses material changes to the current income tax framework for both corporations and individuals, to the transfer-pricing regime and to the Colombian VAT rules. In addition to Colombian nationals and residents, the changes will impact foreign corporations and individuals with business and investments in Colombia.

In this article you will find a summary of the main changes that the Tax reform brings concerning the following aspects: **(1) in matters of corporate taxation** (1.1) the reduction of statutory rates for corporate income and capital gains taxes, (1.2) a new net income tax replacing certain wage-based employer welfare contributions, (1.3) adoption of domestic permanent establishment (PE) rules, (1.4) adoption of a branch-profits tax applicable to both branches and PEs (1.5) adoption of the "effective place of management" as a criteria to determine corporate residency (1.6) adoption of thin capitalization rules, (1.7) changes to the tax-free reorganizations framework (1.8) amendments to the tax credit (1.9) adoption of a General Anti-Avoidance Rule (GAAR), (1.10) changes to the depreciation rules; **(2) in matters of income taxation of individuals** (2.1) changes in expatriate taxation, **(3) in matters related with VAT** (3.1) the possibility to credit the VAT paid upon importation or upon acquisition of capital assets against the taxpayer's income tax, **(4) in matters related with the Colombian Transfer-Pricing regime** (4.1) amendments on the criteria to determine when a transaction is completed by related parties, (4.2) rules on transfer-pricing elements on business restructurings. (4.3) **appraisal method for sale of shares between related parties.** (5) **anticipated termination of current administrative and judicial proceedings.**

Please bear in mind that this is a selective summary for informational purposes only that focuses on certain topics of the approved tax reform. Therefore, it is not intended to be a detailed and comprehensive dissertation of the 2012 tax reform. Although not featured herein, there are other measures and changes enacted by the Act 1607/2012 in income and VAT taxation and in other areas, which are also important for our readers to keep in mind. Therefore, it is advisable that our readers do not exclusively rely on this document and thoroughly review the measures and changes that could affect them, seeking qualified advice from professional tax attorneys duly admitted to the practice of law in Colombia.

1. Corporate Income Taxation.

1.1. 25% Corporate Income Tax and 10% Capital Gains Tax.

The statutory **33%** income tax rate for corporations and similar entities (e.g. branches and PEs) was reduced to **25%**. The current **15%** reduced income tax rate for certain companies in free trade zones was kept.

The income tax rate applicable to non-resident corporations was maintained at 33% unless otherwise provided for in the statute. In this regard it is worth noting, that in many cases foreign entities are taxed in Colombia by means of a withholding upon payments completed by Colombian payers, the rate of the withholding will depend on the concept of the payment (e.g. interests 14%, technical services 10%)

The current general statutory **33%** long-term capital gains tax rate for the sale or exchange of property (including stock in Colombian corporations), was reduced to **10%**.

1.2. 8% Net Income tax C.R.E.E.

In an effort to reduce the current wage-based tax burden as a job creation incentive, the elimination of three material employer welfare contributions was introduced, coupling the statutory income tax rate 8 points reduction, with a new net income tax (C.R.E.E."). The C.R.E.E's rate is 9% for fiscal years 2013, 2014, 2015 and 8% as of fiscal year 2016.

The employer welfare wage-based contributions that were eliminated are the **8.3%** Health Care Plan contribution, the 3% Child and Family Protection Services contribution ("ICBF"), and the **2%** Public Training System contributions ("SENA").

Two additional features are worth noting. First, that the net income assessment for the C.R.E.E. is similar but not identical to that of the regular income tax liability assessment. For instance is not possible to carry forward tax losses against the C.R.E.E. Second, that the welfare contributions being eliminated are those covering employees earning up to 10 mandatory monthly wages. In this sense, not all taxpayers will be equally affected or benefited by the C.R.E.E., and each taxpayer should individually ponder the potential impact of this new tax vis-à-vis the compounded "benefit" of the 8 points reduction of the income tax statutory rate plus the elimination of the above-mentioned welfare contributions, Third. The C.R.E.E does not apply to free trade zone companies currently benefitting from the **15%** reduced income tax rate. Four, foreign entities are only subject to the C.R.E.E on their profits attributable to permanent establishments or branches.

The **C.R.E.E.** will certainly create noise, especially with respect to its application to taxpayers currently benefiting from Legal and Tax Stability Agreements in Colombia. Further, whether the C.R.E.E will be creditable in other jurisdiction should be reviewed for every specific case.

The revenue collected by the C.R.E.E. will exclusively fund the welfare entities that are currently funded through the collections of the three welfare contributions that will be eliminated. In order to avoid an interruption in the funding of said welfare entities, the C.R.E.E. is applicable as of January 1st, 2013, while the elimination of the welfare contributions to be replaced will be effective as of the moment the Government issues a regulation in this regard (July 1st, 2013 at the latest).

1.3. PE Taxation.

Before the 2012 tax reform, there was no domestic definition of permanent establishment. Nevertheless, the PE concept was relevant for Colombian tax purposes given that the treaties entered into by Colombia (i.e. Spain, Chile, Switzerland, Canada) include a definition of permanent establishment adopting features of OECD-MC and of the UN-MC depending on the case.

The 2012 tax reform establishes a definition of permanent establishment inspired on the PE definition included in the OECD-MC with some specific features: i) The project PE is not included in the Colombian PE definition, ii) There is not a list indicating which activities are presumed to be preparatory or auxiliary.

According to the new regulation, both PEs and branches are taxed on the profits attributable to them considering their assets, activities, functions and risks. Therefore, transfer-pricing considerations and the elements related with the "OECD report on the attribution of profits to permanent establishments" are to be considered.

The inclusion of a PE domestic regulation in Colombia has, among others, the following consequences: (i) certain taxpayers taxed by means of a withholding upon payment before the 2012 tax reform, will be required to present an income tax return and to have accounting records following the Colombian GAAP, (ii) considerations regarding transfer-pricing and PE's profits attribution will be applicable to both branches and PEs, (iii) The domestic provisions will facilitate the application of the tax treaties Colombia has entered

into. Nevertheless, it is worth noting that the rules governing PEs under each treaty should always prevail.

1.4. Branch profits tax.

In Colombia, in order to avoid domestic economic double taxation, profits are taxable only at the entity's level (exemption method) and not at the shareholder's level. Conversely, when pieces of income are not taxed at the entity's level (e.g. due to tax incentives or due to differences between the entity's accounting income and the entity's taxable income) they are taxed at the shareholder's level.

Since branches of foreign entities are not separate legal entities from their home offices. In principle, there is no dividends distribution when profits are transferred to the home office. Therefore, before the 2012 tax reform, profits that were not subject to income tax at a Colombian branch level could be transferred to the home office without triggering additional Colombian taxation.

In order to treat Colombian entities and foreign entities' branches equally, the 2012 tax reform establishes that transfers of profits from Colombian branches to their home offices are "deemed dividends". In consequence, transferring untaxed profits at the branches' level will trigger Colombian taxation. These rules also apply to PEs. The application of this rules under the tax treaties Colombia has entered into, should be carefully reviewed, considering each treaty's particularities.

1.5. Corporate Residency.

Traditionally, for Colombian Tax purposes, the place of incorporation of an entity and its corporate domicile, were the sole elements to be considered in order to determine its residency. The 2012 tax reform brought a very important modification in this regard, indicating that for an entity to be considered as a Colombian entity one of the following two criteria should be met: (i) The entity must be incorporated in Colombia and it is corporate domicile must be in Colombia or (ii) the entity must be "effectively managed" in Colombia. An entity is managed where the key managing decisions are taken.

In general, the tax treaties entered into by Colombia; establish that in case of dual residency, an entity is considered to be resident in the country where its place of effective management is situated. The Government indicated that this is one of the reasons for the modification.

Finally, it is worth mentioning, that in Colombia, resident entities are taxed on their worldwide income while foreign entities and foreign entities´ branches are taxed only on their Colombian source income.

1.6. Thin Capitalization Rules.

The 2012 tax reform establishes that only interest derived from indebtedness with an average value not exceeding three times the entity's net equity on December 31 of the preceding year are deductible.

The aforementioned interest deductibility limitation implies, among others, the following issues: i) it applies on both indebtedness between related parties and indebtedness between non related parties, ii) it applies on both cross-border inbound indebtedness and local indebtedness, ii) It does not apply on certain cases (e.g. when the debtor is a bank, when the loan is obtained to finance infrastructure related with activities considered of public interest).

The 2012 tax reform also establishes transfer-pricing rules regarding financing between related parties according to which, the conditions of the loan (e.g. principal amount, the loan's term, guarantees, interests) should be determined in accordance with the Colombian transfer-pricing rules in order for the interests to be tax deductible, under this transfer pricing provision, non-deductible interests are treated as dividends.

1.7. Tax-Free Reorganizations Redefined.

The statutes lacked clarity regarding the treatment of non-cash property transfers to corporations as capital

contributions, while offering an unrestricted tax-free treatment to all statutory mergers and spin-offs. The 2012 tax reform establishes a reorganizations chapter with specific anti-avoidance rules to address these issues, in an effort to curtail M&A transfer strategies that result in acquisitions of corporate assets and businesses in Colombia that due to current loopholes in the statutes avoided local taxation.

1.7.1. Tax-Free Capital Contributions of Property.

Before the 2012 tax reform, only capital contributions in cash were income tax neutral while contributions of property could potentially be subject to taxation upon transfer to a corporation. Due to the lack of regulation, the Colombian Tax Service has dealt with this situation through a series of cumbersome revenue rulings that the taxpayer had to navigate in order to mitigate unreasonable taxation. The new provisions intend to adopt clear rules regulating taxable and tax-free capital contributions of property.

According to the new applicable rules, unless otherwise provided by the statute, property transfers to corporations as capital contributions will be deemed tax-free. Therefore, the stock received by the transferor will inherit the tax basis in the transferred property, while the transferee corporation keeps the same tax basis in the property that the transferor had.

All capital contributions of property, including stock, where the transferor is a Colombian national individual or entity and the transferee corporation is an offshore entity, under the proposed statute **(a)** will be deemed as taxable without exception, and **(b)** must observe transfer pricing rules, regardless of **(i)** the existence of a "related-party" relationship between transferor and transferee and **(ii)** the value attributed to the contributed property.

1.7.2. Tax Free Statutory Mergers and Spin-Offs Restricted.

In an effort to prevent the use of statutory mergers and spin-offs as a means of achieving tax-free status for certain acquisitions of corporate assets and businesses in Colombia, the 2012 tax reform establishes statutory requirements for these types of reorganizations to qualify for tax-free treatment. In order to achieve the tax-free treatment, the applicable rules provide for a tax cost roll-over concerning both the transferred assets and the new shares issued to the shareholders.

These requirements are somehow similar to those in place in other jurisdictions, and are based on a continuity of interest ("COI") and on continuity of business enterprise ("COBE"), in absence of which the reorganization will not qualify for tax-free treatment.

The COI and COBE requirements introduction is coupled with a complex web of rules to curtail potential abuse and regulate the tax-free treatment eligibility and the benefit from related tax attributes for both transferor and transferee, that, if adopted, will pose a challenge for the taxpayers seeking to benefit from this tax regime, while mitigating tax leakage from not complying with such specific anti-avoidance rules.

In addition to the adoption of COI and COBE requirements, the new statute differentiates acquisition mergers and spin-offs as opposed to organizational mergers and spin-offs. For aquisitional reorganizations, the participating entities are not deemed related-parties under Colombian regulations while in the latter, the participating entities are deemed related-parties under Colombian regulations. The difference would be on the adoption of stricter COI and COBE requirements for the organizational mergers and divisions.

In a reorganization between foreign entities entailing the transfer of assets located in Colombia, the transfer of the Colombian assets will be deemed as taxable and will not be eligible for tax-free treatment. In this case, if the Colombian assets transferred as a result of the reorganization represent **25%** or less of the worldwide combined assets of the participating entities, the resulting transfer of the Colombian assets could be eligible for tax-free treatment observing the COI and COBE requirements and related rules as discussed above.

Already existing, joint and several liability for taxes between the participating entities in reorganizations, is being restated along with the newly proposed rules.

1.8. Foreign Tax Credit.

As previously stated, as a general rule, income taxed at a Colombian entity's level is not taxed when distributed to the shareholders. Conversely, income not taxed at the entity's level is taxed upon dividends distribution. In this regard, due to certain features of the formula established in the statute to determine the amount of income that could be distributed as non-taxable to the shareholders, the domestic foreign tax credit included in the Colombian tax code implied a double taxation relief only at the Colombian entity's level that could not be transferred to the shareholders. The 2012 tax reform modified the applicable regulation. Such modifications imply that the domestic foreign tax credit will benefit both the Colombian entity obtaining foreign source income and its shareholders.

In addition, the 2012 tax reform establishes the following amendments to the Colombian foreign tax credit: (i) the tax paid abroad could be credited against both the income tax and the C.R.E.E. (ii) foreign individuals considered as Colombian tax residents can benefit from the foreign tax credit (iii) excess tax credits can be carried forward for 4yr if certain requirements are met (iv) Certain conditions need to be met in order to benefit from the foreign indirect tax credit (i.e. shares no granting voting rights cannot benefit from the credit, a minimum 2yrs holding period is required).

1.9. General Anti Avoidance Rule (GAAR).

Traditionally, the Colombian tax service has attempted to challenge tax abusive transactions based on the constitutional principle of substance over form and based on general law abuse considerations.

The 2012 tax reform establishes a general anti avoidance clause according to which, if the tax administration manages to prove three of the following elements, the taxpayer will have the burden of proof in demonstrating that the transaction had a business purpose or that the prices or considerations related with the transaction meet the Colombian transfer-pricing rules: i) the transaction involves related parties, ii) the transaction involves a tax haven, iii) the transaction involves an entity covered by a favorable tax regime, iv) the price or consideration agreed differs in more than 25% from a fair market value, v) the transaction does not include a feature, an entity or an agreement common to similar transactions, with the purpose of obtaining a tax advantage in an abusive manner, If the taxpayer fails to furnish sufficient evidence of a business purpose or compliance with the transfer pricing regime, the tax administration can re-characterize the transaction and tax it.

It is worth noting that the anti avoidance rule, allows the tax administration to pierce the corporate veil of entities interposed for tax abuse purposes.

1.10. Depreciation.

The tax reform includes the following limits to de decline balance depreciation method: i) the salvage value cannot be lower than 10% of the asset's cost, ii) The depreciation rate cannot be accelerated applying additional shifts.

2. Income Taxation of Individuals.

2.1. Expatriate Taxation.

The 2012 tax reform establishes that Non-Resident Alien individuals ("NRA") that spend in Colombia 183 days or more in any 365 day-period, will be deemed as a Colombian resident for tax purposes and would be taxed on their **worldwide income**.

The difference, is that in the past an NRA becoming a resident of Colombia was taxed exclusively on its Colombian source income, while benefiting from an exclusion treating non-Colombian source income as non-taxable for the first **5-yr**. of residency.

2.2. Minimum Schedular Based Taxation.

In an effort to, arguably, simplify individuals' taxation, the 2012 tax reform adopted an Alternative Minimum Income Tax System for individuals (the "IMAN"), based on a special taxable income assessment arrived through the application of restricted statutory allowances towards the individual's gross income with rates, in general, lower than those applicable following the ordinary system.

A simplified version of the IMAN (the "IMAS") also applies for individuals with a yearly income inferior to certain thresholds

Both the IMAN and the IMAS will coexist with the regular income tax assessment method based on actual income.

3. VAT.

3.1. Income Tax Deduction of VAT Paid in the Acquisition or Import of Capital Assets.

According to the 2012 tax reform, the VAT paid upon acquisition or upon import of capita assets can be creditable against the taxpayer's income tax. The government by way of an annual decree will establish the amount of the 16% VAT rate that can be credited.

Finally, section 60 of the tax reform clarifies that this treatment is not applicable in the import of heavy machinery for basic industries, which will be regulated by pre-existing rules.

4. Transfer-Pricing.

4.1. Amendments to the criteria to qualify as a related party for Transfer Pricing issues:

The 2012 tax reform amends the Colombian Tax Code in reference to the criteria for qualification as a related party for transfer pricing matters. The former rule referred to the Colombian Commercial Code and to certain sections of the Colombian tax code.

Below please find the main changes made to the criteria to determine when a taxpayer is considered a related party:

Additional Scenarios for qualification as a related party:

i. When an individual taxpayer or an entity is entitled to receive 50% or more of the profits of a subordinated entity.
ii. Permanent establishments in regard to the entity whose business they conduct in whole or in part.
iii. Transactions between related parties through non-related entities.
iv. When more than 50% of the gross revenue comes individually or as a group from its partners or shareholders.
v. When specific types of association contracts are executed (collaboration agreements, joint ventures, etc.)
vi. Transactions between Colombian taxpayers and entities located in Free Trade Zones.

Finally, the related party assumption regarding the sale of 50% or more of an entity's production to a same company was eliminated.

4.2. Rules on Business Restructurings.

The 2012 tax reform establishes that whenever a Colombian taxpayer transfers functions, assets or risks to a related party abroad, it is expected to obtain an arm's length remuneration. This provision is based on the OECD report on business restructurings.

4.3. Appraisal Method for Sale of Shares Between Related Parties.

The 2012 Tax Reform includes an appraisal method for operations of sale of shares (not publicly traded) between related parties. This method establishes that for determining the Fair Market Value (FMV) of the shares, common financial methods must be used, specially the one in which the FMV is calculated through the present value of future income.

Additionally, this disposition establishes that under no circumstance will the equity or intrinsic value, be accepted as a valid appraisal method.

5. Appraisal Anticipated Termination of Current Administrative and Judicial Tax Proceedings.

The tax reform introduces a mechanism for anticipated termination of undergoing tax proceedings. Sections 147 and 148 of the reform, grant the Colombian tax authorities the ability to settle with the taxpayer, either the claims that are currently being studied in Court, or those which are still undergoing administrative review.

This method allows for a settlement of up to 100% of both the penalties and/or accrued interest owed for the tax matter being discussed. In order to access this mechanism, the taxpayer must commit to paying the entirety of the tax owed in said dispute. Also, please note that this mechanism applies only to judicial proceedings initiated before the entry into force of the reform as well as to administrative proceedings in which notification of the deficiency was served prior to the enforceability of the law.

Regulation regarding the procedure to follow in order to file for this mechanism is currently being drafted and is expected to be issued soon. Finally, please keep in mind that taxpayers interested in adhering to this mechanism must do so before August of this year. Additional consideration must be given in a case-by-case basis, as specific facts might alter the opportunities of a successful settlement. ◆

Bolivian Tax Developments

by Ramiro Guevara, Guevara & Gutiérrez S.C. Servicios Legales, La Paz, Bolivia

No significant legislative or regulatory developments were undertaken in Bolivia in the past three months with respect to tax matters. Law 291 (which modified the statute of limitations regime applicable to taxes and tax debts) and the creation of a tax on the sale of foreign currency (both detailed in a previous publication) were the last significant norms issued amending the current tax system.

The Board of Directors of the Tax Administration issued the following minor resolutions:

Administrative Resolution N° 10-0025-12

Administrative Resolution N° 10-0025-12, "Billing National Artists Without Fiscal Credit," was issued on September 21, 2012. The object of this resolution is to regulate the procedure to authorize the issuance of invoices "Without Fiscal Credit," for the production, presentation and broadcast of events performed by Bolivian artists, within Law No. 2206, dated May 30, 2001 and Paragraph I of article 4 of Supreme Decree No. 1241, dated May 23, 2012. The resolution regulates Law 2206 which created several tax incentives aimed to promote artistic manifestations by exempting the payment of the Value Added Tax ("IVA") and Transactions Tax ("IT") and the Corporate Income Tax ("IUE"). Strangely enough, although the law creates an exemption only on the IVA and the IT taxes, an exemption on the IUE tax is also mentioned in Supreme Decree No. 1241.

Administrative Resolution N° 10-0028-12

Administrative Resolution N° 10-0028-12, "Fiscal Procedure for 'Joint Ventures'," was issued on October 12, 2012. As a result of the joint venture's special characteristics (in Spanish "Asociaciones Accidentales"), it is necessary to modify and broaden the scope of Administrative Resolution N° 10-0009-11, dated April 21, 2011, in order to provide the procedure to be followed by such Associations in order to comply with their fiscal obligations. The regulation aims to

clarify existing legal gaps regarding the taxation of this kind of entities that are not deemed to be independent legal entities but merely contractual entities where each party is considered a separate taxpayer and the contractually entity created also becomes a taxpayer in order to comply formal and material obligations.

Administrative Resolution N° 10-0029-12

Administrative Resolution N° 10-0029-12, "Regulation for the Liquidation and Payment of the Tax on Flights Leaving the Country (Impuesto a las Salidas Aéreas al Exterior – ISAE)," was issued on October 18, 2012. The object of this resolution is to regulate the compliance, conditions, requisites and procedures for the collection, liquidation and payment of the Tax applicable on Flights Leaving the Country ("ISAE").

Administrative Resolution N° 10-033-12

Administrative Resolution N° 10-033-12 was issued on December 3, 2012 and modifies Administrative Resolution N° 10-0029-12, regarding the "Regulation for the Liquidation and Payment of the Tax on Flights Leaving the Country (Impuesto a las Salidas Aéreas al Exterior – ISAE)." The object of this resolution is to allow for a better exercise of Administrative Resolution N° 10-0029-12 by including a series of specific exemptions and requisites.

Administrative Resolution N° 10-034-12

Administrative Resolution N° 10-034-12 was issued on December 7, 2012, to revise the "Tax on Flights Leaving the Country (Impuesto a las Salidas Aéreas al Exterior – ISAE)" for the 2013 term. The object of this resolution is to increase the amount charged for the Tax on Flights Leaving the Country for the 2013 term to Bs. 266 (Two Hundred and Sixty Six Bolivianos 00/100), approximately USD38.- starting on January 1, 2013.

Administrative Resolution N° 10-039-12

Administrative Resolution N° 10-039-12, "Additional percentage charged as Corporate Income Tax to Financial Entities (AA-IUE FINANCIERO)," was issued on December 20, 2012. The object of this resolution is to regulate the filing and forms of payment of the Additional Percentage charged as Corporate Tax to Banking and Not Banking Financial Entities. As specified in a previous publication, law No. 211, dated December 23, 2011, also known as the Budget law -published at the end of every fiscal year in order to of authorize the Nation's General Budget regarding the public sector for the following year and to issue other specific regulations aimed to administer public funds- included in its Additional Norms a new taxable rate applicable on revenues obtained by entities carrying out financial activities.

The law has produced a new chapter to be included in the tax law creating an additional aliquot (bracket) applicable to any income obtained by those entities carrying out financial intermediation activities in the country and that are currently under the regulation issued by the Banking Regulation Entity ("ASFI", by its acronym in Spanish).

Consequently, any income obtained by a financial -banking or non banking institution- that exceeds thirteen per cent (13%) of the profitable ratio with respect to the its net patrimony, beginning on the fiscal year of 2012, will be taxed by an additional rate on the Corporate Income Tax ("IUE") of twelve point five per cent (12.5%). Such payment will not be able to be compensated with future monies owed pursuant to the Transaction Tax ("IT"). Please note that the IUE tax paid at the end of a fiscal year (at a rate of 25%) could be compensated with future IT taxes (with a rate of 3%) in the following fiscal year. ◆

LATAXNET®
LATIN AMERICAN TAX & LEGAL NETWORK

ABOUT US

We are a network of advisors composed of Latin American, Caribbean, U.S. and Canadian professional firms. The network was formed with the goal of offering the highest level advisory services in participating countries, with special emphasis on keeping our clients up to date on the latest developments.

Our organizational structure allows us to share experiences and professional know-how, always keeping in mind the perspective and reality of each individual country. Our experience with laws and tax cases at the Hemispheric level, along with constant information sharing regarding the latest tax trends, ensure that our clients are well informed and prepared to deal with their tax issues.

OUR MISSION

The Network's objective is to contribute to the investigation and analysis of tax policies and strategies, and share such information in both the public and private spheres. We will always seek to propose solutions that will improve the position of the business communities in Latin America, the Caribbean, the United States and Canada.

OUR VISION

We will continue to establish ourselves on a regional basis as the premier professional tax and legal organization, working in accordance with the highest standards of quality, integrity, and corporate efficiency.

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