CHAPTER 1

Taxation of Mergers and Acquisitions in Argentina

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1.1 INTRODUCTION

Mergers and acquisitions activity in Argentina developed rapidly under both corporate law and tax law. Economic globalization, the allowance of free foreign investments, and the numerous privatizations since the late 1980s precipitated these mergers and acquisitions changes. We refer to mergers and acquisitions activity as encompassing mergers, spin-offs, and acquisitions of assets within the same economic group.

This chapter analyzes the tax effects of mergers and acquisitions in Argentina. In examining these materials, consider that the manner in which the parties have structured transactions involving the sale of a business historically has been influenced by four major tax factors:

1. The seller's desire to carry out a nontaxable stock sale rather than an asset sale subject to tax at standard corporate rates
2. The buyer's desire to obtain as high a basis as possible for the entity's assets, particularly inventory and depreciable property
3. The ability to avoid recognition of gain at the entity level
4. The possibility to cut off the assumption of past liabilities by the acquiring entity

Tax results are not the only factors that influence the form of a sale and purchase of a business. In many cases, tax results are of lesser importance than nontax factors. A single purchaser for all of the entity's business activities often cannot be located, and one line of business is sold to one purchaser while another line of business is sold to a second purchaser.

In other cases, a purchaser might be unwilling to acquire the stock of a corporation because of its concerns regarding contingent or unascertained liabilities. On the other hand, an asset purchase might be ruled out if the acquired business owns rights that are not assignable. In such a case, the acquisition must be structured as a sale and purchase of stock. Other important factors to consider include rights of dissenting shareholders, securities laws, and the authority of regulatory agencies to approve or disapprove a transaction.

Finally, it must be taken into consideration that, according to Article 31 of the Argentine Companies Act (ACA), no company can take over or maintain participation interest in one or more other companies for an amount exceeding its free reserves and half of its issued capital and legal reserves. A legal reserve is a portion of accumulated earnings that cannot be distributed. To form this reserve, the company must reserve 5 percent of its annual statutory earnings up to 20 percent of its issued capital.

This limitation established by the ACA precludes companies from having participation interest or ownership exceeding its free reserves, generally accumulated earnings. This provision does not apply to financial or investment entities or when such excess in the participation interest or ownership derives from the payment of dividends with shares or through a capitalization of reserves.

If such participation limit has been exceeded, the excess amount will have to be transferred within six months from the date of approval of the balance sheet that demonstrates that the participation limit has been exceeded. Otherwise, the shareholder will lose its ownership rights coming from the exceeding participation interest, such as a right to vote or right to receive dividends.

1.2 TAX LAW

The Argentine Constitution provides three governmental levels—Federal, Provincial and Local, all of whom have tax powers. Constitutional provisions determine the scope in the following way:

- Federal government:
  - —On an exclusive and permanent basis: Customs duties.
  - —On a permanent basis and together with provincial governments: Value-added tax (VAT) and excise taxes.
  - —On a temporary basis: Among others, income tax, tax on minimum presumed income, and tax on personal assets.
- Provincial governments:
  - —On a permanent basis: Direct taxes (e.g., stamp taxes).
  - —On a permanent basis and together with the federal government: Turnover tax.
- Local governments:
  - —In general, their tax power applies only to service fees.

The following is a brief summary of the relevant Argentine federal and provincial taxes.

(a) Income Tax

The Income Tax Act (Law 20628, as amended) is a federal tax. The statute establishes that Argentine residents are subject to tax on their worldwide source income. Non-Argentine residents are subject to tax only on their Argentine-source income through income tax withholdings.

Progressive income tax rates on individuals range from 9 percent to 35 percent. The corporate tax rate is 35 percent, applicable to the net income determined according to the Income Tax Act (ITA).

Resident taxable entities deriving capital gains from the sale of shares are not subject to any special tax nor are they subject to preferential rates. Instead, capital gains are included within the income tax and, consequently, these capital gains are subject to a 35 percent rate, as in the case of ordinary income; however, the gains obtained by individual residents of Argentina from the sale of these shares are not subject to income tax.

(b) Tax on Minimum Presumed Income

The Argentine Tax Reform of 1998 included within its provisions a new tax—the tax on minimum presumed income (TMPI). This tax, which functions similarly to an assets tax, is assessed at a rate of 1 percent over the value of a taxpayer's worldwide assets at the end of the taxpayer's fiscal year, although certain assets are excluded from the tax basis.

The TMPI operates in conjunction with the regular Argentine corporate income tax. Taxpayers are allowed to credit their regular corporate income tax liability against their TMPI liability. In other words, the TMPI is payable only to the extent that a taxpayer's liability under the TMPI exceeds its liability under the regular corporate income tax. The TMPI law also allows for a taxpayer who is required to pay the TMPI in any given year (because its TMPI liability exceeded its income tax liability) to credit the amount paid against its income tax liability in any of the 10 immediately succeeding taxable years.

(c) Value-Added Tax (VAT)

The value-added tax (VAT) is a general tax on consumption that applies within the Argentine territory. VAT is levied on the delivery of goods and/or the providing of services by any individual or legal entity conducting an economic activity in Argentina. VAT applies to the importation of goods and on the importation of services to be used or exploited in Argentina. The tax general rate is 21 percent.

Under the VAT system, the tax is levied at each stage of the manufacturing and distribution process on a noncumulative basis. The accumulation of tax is avoided through the deduction of VAT invoiced to the entity. The entity collects VAT on the total amount invoiced in each monthly tax period, but the entity is entitled to recover the imputed VAT that was invoiced to the entity during the same period.

The credit for imputed VAT may be higher than the amount of VAT due on output. In that event, the entity is not entitled to a refund unless the refund is related to exports. Instead, the excess is credited against future VAT liabilities.

(d) Turnover Tax

Provincial governments impose turnover tax on the gross revenues of businesses. The tax rate varies depending on the type of activity:

- Farming and cattle raising, mining, and other primary activities are taxed at a rate of 1 percent.
- Industrial activities are taxed at a rate of 1.5 percent.
- Commerce and general services are taxed at a rate of 3 percent.
- Financial and intermediary activities are taxed at a rate of 4.9 percent.

The rate is applied to the total amount of gross receipts accrued during the calendar year.

(e) Stamp Tax

Each Argentine province levies its own stamp tax. In the City of Buenos Aires, the federal government levies the stamp tax only on sales of real estate. Consequently, documents entered into within the City of Buenos Aires are not taxable. Transactions that apply elsewhere may be taxed in other jurisdictions. Tax rates vary for each province; the most common rate is 1 percent calculated on the economic value of the instrument.

1.3 TAXABLE ACQUISITIONS

This portion of the analysis deals with the tax aspects of a taxable purchase and sale of the corporate business. The various techniques for tax-free reorganizations are considered in section 1.4.

(a) Asset Acquisitions

The materials in this section deal with the sale of a business that takes the form of a sale of corporate assets. This analysis explores the problems that this form of transaction historically has generated, as well as the currently applicable rules. If a taxable entity sells its business by selling its assets to the purchaser, the transaction is deemed to be a "transfer of a going concern."

Transfers of going concerns are governed by Law 11,867 Transfer of Going Concerns Act (TOGC Act), which sets forth special rules to protect the seller's nontax creditors. The TOGC Act provides a list of elements that constitute a "commercial establishment or going concern for the purpose of any type of transfer thereof." Such items would include the following:

- premises
- inventory stock
- trade name
- logo
- customer portfolio
- right to use the sales premises
- invention patents
- trademarks
- industrial blueprints and models

- honors awarded
- any other rights deriving from the commercial and industrial or artistic property

Under certain circumstances, the transfer of certain assets may be construed as a transfer of a going concern if, upon the sale, the seller is deprived of the means necessary to carry on its business or cannot continue to do business in the same way as it did before such sale.

Notice of the transfer must be published in the *Official Gazette* and in one or more newspapers for a five-day term in order to cut off the assumption of the seller's nontax liabilities to the buyer. The seller's nontax creditors have 10 days as from the last publication to make objections to the transaction. The acquiror is jointly liable for the undetermined federal tax liabilities of the seller. Such joint liability expires at the applicable time frame:

- As from 3 months after the transfer, if the taxpayer notifies the Argentine Revenue Service (ARS) no fewer than 15 days before the transfer
- At any moment in which the ARS considers the seller is solvent enough to settle any unpaid tax, or when the ARS accepts the guarantees offered by the seller

Taxpayers and the Argentine tax authorities must follow the TOGC Act procedure. A tax audit is likely to take place shortly after the taxpayer notified the transfer to the ARS. The purchaser will be jointly liable together with the seller if the transfer is not notified to the ARS; however, in case the seller and purchaser are jointly responsible, the ARS must claim against the seller first, and only afterward make claim against the buyer. Provincial tax laws provide for specific procedures to cut off the buyer's liability for past provincial tax contingencies.

(b) Income Tax

The taxable entity that transfers a going concern must recognize gain or loss from the bulk sale.

(c) Value-Added Tax

The seller must allocate the purchase price to the various assets transferred for VAT purposes. This allocation is generally relevant from the buyers income tax and VAT standpoint. These allocations generally present no problem if the parties have bargained on an asset-by-asset basis, but that is rarely the case. More commonly, the parties bargain for the sale and purchase based on a lump sum price. After the total purchase price has been determined, the parties often then bargain about the allocation among all of the assets. The parties' objectives in this ex-post allocation are largely determined by tax considerations.

If the seller is in a large VAT credit position, it is more desirable for the seller to allocate purchase price to VAT taxable assets and then maximize the utilization of VAT credits. Regarding tangible assets, VAT is applicable at a 21 percent rate on the sale price of the assets that form part of the going concern, including inventories and so on.

When an improvement is sold within a period of 10 years from the completion of the work, any VAT credits generated by the acquisition of such construction (or by the construction by the taxpayer itself) would have to be refunded. Land does not form part of the base for calculating VAT. As regards the intangible assets that form part of the going concern, such as goodwill, the transfer is not generally subject to VAT. The conditions of the bulk transfer should be analyzed in detail because the transfer of such intangibles might be subject to VAT under certain circumstances.

Two credit situations must be considered:

1. *Credits that produce interest:* VAT must be paid on the amount resulting from the difference between the final value of the receivable and the value at which it was transferred. Therefore, VAT would have to be paid in advance on the credit's total interest not yet accrued.
2. *Credits that do not produce interest:* If the transfer is made at face value, such transfer shall not trigger VAT; however, if the transfer is made at a discount, such difference is taxable.

(d) Turnover Tax

The sale of assets is subject to the turnover tax. In this case, the taxability of these assets depends on the nature of each asset being transferred. Thus, the transfer of the inventory that forms part of the going concern would generally be subject to this tax at approximately 3 percent of the value of such inventory.

The transfer of fixed assets is generally not subject to turnover tax. The exclusion is specifically provided by the law in some jurisdictions, such as the City of Buenos Aires and the provinces of Buenos Aires and Santa Fe. Fixed assets are excluded from the turnover tax base because the fixed assets are those goods the company affects to its own productive development. As such, the sale of these fixed assets does not form part of the company's normal course of business (i.e., of its habitual taxable activity).[1]

Whether the transfer of intangible assets is taxable is debatable. The approach for fixed assets is applicable to this case because the sale of intangibles (like goodwill) does not form part of the company's normal course of business activity. The tax treatment of intangibles may create price allocation inconsistencies between seller and buyer. The seller may benefit from larger amounts being allocated to intangibles. In contrast, the buyer may lose income tax deductions.

(e) Buyer's Income Tax

The seller's allocation of the sale price for VAT purposes is relevant to the buyer because the allocation establishes the tax basis for each of the newly acquired

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[1]Enrique Bulit Goñi, *Turnover Tax.* Copyright Depalma Buenos Aires, 1986 (page 109).

assets. Goodwill is amortizable under Argentine generally accepted accounting principles (GAAP), but it is not possible to amortize goodwill for income tax purposes. Therefore, purchasers attempt to allocate all or part of a "premium" payment in excess of the value of the assets among all of the assets, rather than allocating the premium solely to goodwill or going concern value.

The purchase and sale of a business is often accompanied by the shareholders' agreement not to compete with the buyer in the specific business field. A covenant not to compete, even though created in the sale transaction, is amortizable over the asset's life. The ARS, however, is not restricted from challenging the taxpayers' allocations.

When the transfer price assigned is higher than the current market price of the related assets, the value considered for tax purposes is the market price. The treatment given by this law to goodwill is applicable to the surplus. Such goodwill is nondeductible. The taxpayer must consider the criteria followed for accounting purposes in order to value the transferred assets. The taxpayer must follow Argentine GAAP in order to determine the taxable results unless an alternative treatment is specially provided for by the tax law. In such a case, the taxpayer must follow this tax treatment.[2]

In other words, the Argentine procedure to value the transferred assets works as a "residual method." Once the market price is determined, the difference between the amount paid and the market price of the transferred assets is treated as goodwill. It is advisable that the tax base of each asset be carefully disclosed in order to avoid potential challenges from the ARS.

(f) Buyer's VAT

VAT paid in an asset transaction does not represent a cost for VAT taxpayers. Instead, the VAT amount is an input VAT to be offset against future output VAT. VAT may result in a real cost if the buyer conducts VAT-exempted transactions or if it is a "time-money value expense." The taxpayer expects to offset the input VAT of the going concern, but it may not be able to do so in the immediate future. Thus, purchasers may prefer to minimize the amount of the price allocated to VAT-taxable assets. Depending on the jurisdiction where the company is located, bulk transfer agreements may be subject to stamp tax.

1.4 STOCK ACQUISITIONS

This section focuses on the alternative form for the sale of a corporate business—the sale of the shares of stock of the corporation. We focus on the tax rules designed for this form of transaction.

One of the prime motivations for a stock sale is that nonresident sellers are accorded an income tax exemption on the entire realized gain. Capital gains on stock sales are accorded other various tax advantages. For a variety of reasons,

[2]"Industrias Plásticas DíAccord S.R.L. c/ DGI," TFN Sala A, 12/17/97 confirmed by CNCAF, Sala 1 7/6/00.

however, the purchaser often does not want to purchase the stock, but prefers to purchase the assets directly.

- The corporation may have liabilities that the purchaser does not wish to assume indirectly.
- If the assets have a basis lower than their market value, and hence lower than the price to be paid for the business, the assets retain that low basis when ownership of the corporation changes hands. This basis result may be unsatisfactory to the purchaser, especially with respect to inventory or depreciable property.
- A stock purchase involves taking over other tax attributes, such as the tax basis, tax credits, net operating losses carryforwards, and so forth.

(a) Acquisition of Shares of an Argentine Company

From an income tax perspective, the capital gains obtained from the sale of the shares of an Argentine Sociedad Anónima (SA) by non-Argentinean residents are exempt from income tax according to the rules of Decree 2284/91, ratified by Law 24,307. This exemption applies even when the beneficiary transfers such gains abroad. Therefore, the capital gains deriving from this transaction are exempt from income tax for the foreign beneficiary.

In general, real estate transactions are outside the scope of VAT if the entity is not involved in the construction activity. In addition, certain transactions are exempt, such as the sale of shares and other securities and certain sales of intangibles. Consequently, the sale of shares is exempt from VAT. The sale of shares is exempt from turnover tax in the City of Buenos Aires. The transfer of shares of an Argentine SA domiciled in the City of Buenos Aires is not subject to stamp tax.

(b) Tax Treatment of the Purchase of Shares for a Foreign Company

The purchase of an Argentine company's shares by a foreign corporation does not generate any tax effects in Argentina for the foreign corporation. Assuming that the Argentine corporation is an SA by virtue of Executive Order 2284/91[3], the results deriving from the sale of the Argentine corporation's shares by the foreign corporation are expressly exempt from income tax.

Dividends paid by the Argentine corporation to the foreign corporation are not subject to withholding tax in Argentina, regardless of whether paid to residents or nonresidents, as long as the dividends do not exceed accumulated taxable income with certain adjustments. To the extent that a dividend exceeds the payor's accumulated taxable income, the excess amount is generally subject to a 35 percent withholding tax.

The change of ownership of an Argentine corporation's shares does not release the company from any tax and social security liabilities not barred by the statute

[3]Ratified by Law 24,307.

of limitation that may exist. In other words, upon purchasing shares from a company, the new investors "acquire" all the tax and social security contingencies of such company. In this regard, and according to local legislation, the actions and powers of the tax authorities to determine and demand the payment of federal taxes are barred by the statute of limitations after five years. The statute of limitations for social security purposes is ten years.

(c) Tax Treatment of the Purchase of Shares by an Argentine Company

The purchase of an Argentine company's shares by an Argentine company does not generate any tax ramifications in Argentina for the purchaser, other than the issues addressed as follows. Special attention should be given to the limitations provided for in the ACA regarding investments made by local companies in other entities.

As explained previously, article 31 of the ACA provides that no company can take over or maintain participation interest in one or more other companies for an amount exceeding its free reserves and half of its issued capital and legal reserves. This limitation established by the ACA precludes companies from having participation interest or ownership exceeding its free reserves, which generally are accumulated earnings. This provision does not apply to financial or investment entities or when such excess in the participation interest or ownership derives from the payment of dividends with shares or through a capitalization of reserves.

The highest value paid on the book value of a company is generally considered as goodwill for the purchaser for accounting purposes. Although this goodwill is not deductible for income tax purposes because this higher value is part of the tax basis of the shares, this amount is generally considered, from an accounting perspective, as an asset subject to amortization.

The effect of the recording of goodwill in the book of an Argentine company must be carefully analyzed because although it is not deductible for tax purposes, the accounting amortization of the goodwill reduces the company's net profits and thus the accounting amortization affects the capacity to distribute dividends to its shareholders.

1.5 TAX-FREE REORGANIZATIONS

In general, the Argentine tax laws permit business transactions involving certain corporate acquisitions and readjustments to be carried out without a tax being incurred by the participating corporations or by their shareholders at the time of the transactions.

(a) Definition of Reorganization

The application of the term *reorganization* is limited to three basic situations set forth in the ITA Section 77. These three situations are the only situations included within the term *reorganization.*

- Type (A) **mergers** of preexisting companies through either (1) forming a new company or (2) by absorption of one of them
- Type (B) **spin-off or division** of a company into another or others that jointly continue the operations of the first one
- Type (C) **sales or transfers** from an entity to another which, despite being legally independent, are part of the same business group

When a business reorganization qualifies for tax-free treatment, the tax rights and obligations of the predecessor entities are transferred to the surviving entities—subject to the fulfillment of certain requirements. According to Section 74 of the ACA, another legal type similar to reorganization is called *conversion.* Conversion takes place when a certain company adopts any of the other legal types provided for by the ACA through LLP, corporation, general partnership, and so on. Upon conversion, the company neither is dissolved, nor are its rights and duties altered. Although not considered a tax-free reorganization, conversions are nevertheless not subject to tax.

(b) Mergers

For purposes of the tax-free reorganization regime, a merger of entities is defined by the Income Tax Regulatory Decree as follows:

> *Merger of companies: when 2 (two) or more companies are dissolved without being liquidated in order to form a new company, or when an existing company absorbs another company/ies that is/are dissolved without liquidation, as long as, in the first case, at least 80% (eighty percent) of the new company's capital belongs—upon the merger—to the owners of the preceding companies; and, in the second case, the value of the ownership interest corresponding to the owners of the absorbed company/ies in the absorbing company must be that representing at least 80% (eighty percent) of the capital of the absorbed company/ies.*[4]

According to this definition, the Income Tax Regulatory Decree introduces a capital requirement (i.e., "at least 80%") to the definition provided by the ITA by which the owner of the entity or entities being reorganized must have in the surviving entity or entities in order to qualify for the tax relief.

(c) Tax-Free Reorganization Requirements

The ITA and its regulations establish certain requirements for mergers to be qualified as tax free. These requirements are generally designed to facilitate reorganizations so that tax considerations do not prevent companies from structuring themselves in an efficient manner; however, as with tax-free reorganization provisions in other countries, the rules also prevent taxpayers from using a tax-free reorganization to achieve what is in reality a true sale of business interests. The following section describes these requirements.

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[4] Article 105 of the Income Tax Regulatory Decree.

Article 77 of the ITA, along with Articles 105 and 108 of the Income Tax Regulatory Decree, establishes the requirements for a merger to be treated as tax free. These requirements are as follows:

1. **Active entity:** As of the reorganization date, the companies being reorganized must be going concerns. This condition is considered to be met when such companies are carrying out the activities stated in the company's charter or, if no longer performing such activities, when they have ceased the activities within 18 months before the reorganization date.

2. **Participation requirement:** The owner(s) of the predecessor entities must maintain an amount of participation in the capital of the surviving company of not less than the participation held at the time of the reorganization (i.e., the afore-mentioned capital requirement) for at least two years from the reorganization date.[5] This requirement does not apply when the surviving entity or entities list their shares on self-regulated stock exchanges. Those entities must maintain such condition for at least two years from the reorganization date.

3. **Holding requirement:** The carryover of net operating losses and the transfer of unused tax exemptions originated in the adoption of the special promotion regimes referred to in clauses 1 and 5 of Article 78 of the ITA tie in the preceding entities and the surviving entities. This relationship occurs because the reorganization is limited to the extent that the owners, partners, or shareholders of the preceding entities, during the two years before the reorganization date, have maintained at least 80 percent of their interest in the preceding entities. This requirement does not apply when the precedent entities list their shares on self-regulated stock exchanges.

4. **Continuity of business activities:** The surviving entities must continue—for a period not less than two years from the reorganization date—any of the activities of the reorganized company or companies or any other activity related thereto (i.e., maintenance of the exploitation within the same industry). Therefore, the goods and/or services produced and/or commercialized by the surviving company or companies must bear characteristics that are essentially similar to those produced and/or commercialized by the preceding company or companies.

5. **Prior activity requirement:** The companies must have carried out the same or related activities during 12 months immediately before the reorganization date or the cessation of such activities, if such cessation occurred within the term of 18 months or, in both cases, during its existence if such term is shorter.

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[5]This requirement was introduced by Law 25,063 (published in the *Official Bulletin* on December 30, 1998), applicable to the years ending subsequent to December 31, 1998 (following day after the publication of Law 25,063) and from tax year 1998 for individuals and undivided shares. Regarding this requirement, see the following ARS opinion: DICT. 19/85, DATJ (DGI) - 5/09/85.

Related activities are those activities that help or supplement an industrial, commercial, or administrative process, or that aim at a purpose or goal related to the other activity, including horizontal and/or vertical integration.

6. Reporting requirement: The reorganization must be reported to the ARS within 180 days of the reorganization[6] when, due to the nature of the reorganization, the full transfer of the reorganized company or companies is not made, except in the case of spin-off, the transfer of tax rights and liabilities remain subject to the tax authorities' prior approval.

7. Publication and Registration requirement: The following publication and registration requirements set forth in Article 83 of the ACA 19550, as amended, must be satisfied:

- *Publication formalities:* A notice shall be published for three days in the official gazette or legal publications of the province or federal district of each company and in a major newspaper of nationwide circulation in Argentina. The notice must state the following:
  - —Name and address of each merging company and data concerning the company's registration with the Public Registry of Commerce
  - —Capital of the new company or companies or amount of increase in the capital of the absorbing company
  - —Appraisal of assets and liabilities of the merging companies and the appraisal date
  - —Name, type of company, and address of the new company, if a new company results from the merger
  - —Dates of the prior merger commitment and company decisions approving it.

If any of the merging companies has a branch in another province, publication must also be made in that province to protect the interests of the creditors.

- *Registration:* the merger must be registered with the Public Registry of Commerce in the province of each merging company. As stated under Article 82 of the ACA, the merger takes effect from the date in which the final merger agreement and the new company's bylaws are in place or the absorbing company's capital increase are registered with the Public Registry of Commerce.

  If the reorganization provokes the dissolution of one of the predecessor companies, the company's dissolution must be registered with the appropriate Public Registry of Commerce.

[6]General Resolution of the ARS 2245 establishes the information to be supplied in a particular tax report to provide evidence that the requirements of the ITA and the Regulatory Decree have been complied with. Regarding this requirement, see the following ARS opinions: DICT. 48/84, DATJ (DGI)-10/03/84, DICT. 28/86, DATJ (DGI)-10/21/86, DICT. 46/93, DAL (DGI)-09/28/93, and DICT. 127/92, DAT (DGI)-12/10/92.

To comply with the afore-mentioned requirements, the reorganization date is that on which the surviving company or companies start(s) the activity or activities previously carried out by the preceding company or companies.

(d) Transfer of Rights and Obligations to the Surviving Companies

Among others, the more significant tax rights and obligations transferable to the surviving company or companies under the tax-free regime established in Article 78 of the ITA are as follows:

- Carryforward of net operating losses that were not barred by the statute of limitations
- The balances of tax exemptions or special deductions not used by virtue of the limitations on the computable amount for each tax period and that are transferable to future years
- Deferred charges that have not been deducted
- Unused tax exemptions to which the predecessor company or companies would have been entitled by virtue of using of special promotional regimes, provided that the basic conditions considered to grant the benefit are the same for the new company or companies. For these purposes, the applicable regulatory body appointed in the related provision shall issue a decision.
- The tax valuation of fixed assets, inventories, and intangible assets, whichever the value assigned may be for transfer purposes
- Applicable methods to charge income and expenses to the tax period
- Depreciation methods of fixed assets
- Amortization methods of intangible assets

In order to use criteria or methods different from those of the predecessor company or companies, the new company must request prior authorization from the tax authorities, provided that the legal provisions or regulations require so.

(e) Noncompliance

A purported reorganization might not comply with the technical requirements. In such a situation, the reorganization would be considered a taxable disposal of assets by the transferor company or a taxable acquisition of assets by the transferee company. The bulk sale tax treatment would apply. Consequently, the appropriate tax returns should be filed or amended, applying the legal provisions that would have been appropriate if the transaction had been made disregarding the tax-free regime. The taxpayer would need to pay the pertinent tax plus interest and fines.

(f) Other Consequences

For purposes of the TMPI, Article 3 of its Regulatory Decree establishes that when, as a consequence of a tax-free reorganization according to the ITA, the closing of both the reorganized and surviving entity's or entities' financial year occurs in the same fiscal year, the predecessor and surviving entities have to file their tax returns separately. Thus, these parties are taxed on their existing assets at the closing of their financial periods; however, the surviving companies would be able to credit the amount paid for the TMPI by the reorganized companies in proportion to the taxable assets transferred to each surviving entity. This would not generate, in any case, a credit balance in favor of the surviving entity or entities.

According to Article 2 of the VAT law, the transfer of goods made as a result of a business reorganization that qualifies as tax free for income tax purposes is not considered a taxable sale. Thus, tax-free mergers are not levied with VAT. Furthermore, the VAT law establishes that the accumulated VAT credits of the entities being reorganized could be used by the surviving entities. If the merger does not fall within the tax-free reorganization regime, the transfer of assets is subject to the general treatment of the law.

Generally, the stamp tax rules of most Argentine provinces provide that reorganizations that qualify as tax free for income tax purposes are not subject to stamp taxes. In some cases, stamp tax rules do not apply when the entities qualify as certain types of reorganizations for corporate law purposes.

Provincial turnover taxes do not apply to qualifying tax-free reorganizations. Whether a particular reorganization is tax free for turnover tax purposes depends on variables such as the law of the province involved and the details of the reorganization itself. For example, in the City of Buenos Aires, the transfer of assets as a part of a reorganization through mergers, spin-offs, and transfers of going concerns must meet the requirements for tax-free reorganization under the federal income tax law before they can be considered tax free for City of Buenos Aires turnover tax purposes.

(g) Divisions or Spin-Offs

For purposes of the tax-free reorganization regime, a spin-off is defined as follows:[7]

- *When a company destines a portion of its equity to an existing company or participates in the creation of a new company, as long as upon such spin-off or division, the value of the ownership interest corresponding to the spun-off or divided company in the existing company's capital or in the new company is not lower than that representing at least 80% (eighty percent) of the equity used for that purpose.*
- *When a company destines a portion of its equity to create a new company or it is split into new companies which are both legally and economically independent, as long as at least 80% (eighty percent) of the capital of the new company(ies), taken together, belongs to the owners of the preceding company. The spin-off or division implies in all cases the proportional reduction of capital.*

[7] Article 105 of the Income Tax Decree.

According to Article 106 of the Income Tax Decree, *in a tax-free division, the transfer of the tax rights (e.g., net operating losses) must be allocated based on the assets transferred on a pro-rata basis.*

The tax attributes that are transferable in a tax-free division are the same as those for mergers. As occurs with mergers, when the tax-free requirements are not complied with, this reorganization would be subject to the same income tax treatment as a taxable merger. This treatment would apply to the extent that the division implies a disposal of assets by one company and their acquisition by another company.

1.6 SALES AND TRANSFERS WITHIN THE SAME BUSINESS GROUP

The sale and transfer between entities that belong to the same economic group is the last kind of reorganization described under Article 77 of the ITA. According to Article 105 of the Regulatory Decree, a business group exists when:

> *80% (eighty percent) or more of the capital of the surviving company belongs to the owner, partners or shareholders of the company being reorganized. In addition, they must individually maintain in the new company, upon conversion, at least 80% (eighty percent) of the capital they owned as of the reorganization date in the preceding company."*[8]

(a) Tax-Free Reorganization Requirements

In the case of business reorganizations that qualify for the afore-mentioned definition, *only points **2, 3** (i.e., holding requirements), **4** (i.e., continuity of business activities), and **7** (i.e., publication and registration requirements set forth by the ACA 19,550)* of the requirements established for tax-free mergers and divisions must be met for intra-group transfers to be qualified as tax free (*see* 5.1.1.2). In other words, the tax-free intra-group transfers have fewer requirements than tax-free mergers and divisions.

A particular issue regarding an intra-group transfer is whether this is the sale/transfer of a "universe" of assets or, instead, the partial sale/transfer of assets from one entity to the other.

It is important to bear in mind in this regard that, as mentioned in Section 5, point 6:

> *When, due to the nature of the reorganization, the full transfer of the reorganized company or companies is not made, except in the case of spin-off, the transfer of tax rights and liabilities shall remain subject to **the tax authorities' prior approval.***

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[8]Regarding the controversial requirement of the 80 percent of the capital, see the following leading cases: Ponieman Hnos. SAICA, CNACAF (9/06/65) and Lagazzio, Emilio Francisco, CSJN (8/25/72).

Finally, secondary authority, jurisprudence, and ARS opinions maintain that a partial transfer of assets is also a "tax-free reorganization" because in the Argentine tax system, such concept has always comprehended both the transfer of a "universe" of assets and of certain isolated assets.[9]

(b) Transfer of Rights and Obligations to the Surviving Companies

The tax attributes that are transferable in a tax-free transfer of going concerns are the same as those described previously with respect to mergers. Also, *the transfer of the tax rights (e.g., net operating losses) must be allocated based on the net assets transferred (as opposed to assets) on a pro-rata basis.*

(c) Other Sales and Transfers

In the case of other sales and transfers (i.e., those that qualify as tax-free intra-group transfers), the tax rights and obligations are not transferred. When the transfer price assigned is higher than the current market price of the related assets, the value to be considered for tax purposes shall be such market price, and the treatment given by this law to goodwill shall be applicable to the surplus.[10] The consequences with respect to other taxes in this context are the same as those described previously for mergers.

1.7 CONCLUSION

Argentina has been going through a transformation since July 1989, including intense political changes triggered by the reinstatement of democracy in December 1983. The current government policy seeks to reverse six decades of economic decline, which was characterized by the nationalization of all public utilities and excessive regulation of private sector activities. A combination of legal framework, fiscal discipline, consistent monetary and financial policies, rescheduling of the foreign debt, and structural changes in areas including trade liberalization, privatization, and deregulation have strengthened the Argentine economy in recent years.

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[9] Giuliani Fonrouge, *Business Reorganizations from a Tax Point of View.* Copyright La Ley, Volume 92 (page 423) quoted in Rubén O. Asorey, *Business Reorganization in Argentina.* Copyright 1996 by La Ley, page 94. ARS opinion "Sofitur S.A.", D.A.T., August 1978.

[10] Special tax settlement terms: According to Article 109 of the Income Tax Regulatory Decree, the ARS may grant—at the taxpayer's request—special terms to pay the respective tax, which shall not exceed five years—with or without bond—plus the related interest and the adjustment provided for in Law 11,683 (as amended in 1998), considering the terms and formalities agreed upon for the collection of the credit.

The provisions set forth in this article shall be applicable to the extent that the publication and registration requirements provided for in Law 11,867 are met.

ANNEX I

Reorganization Type	Tax Free (1)	Assumption of Tax Contingencies	Transfer of Rights and Liabilities	Active Entity	Maintainance of Ownership	Two-Year Look-Back (3)	Continuity of Business	Prior Activity	Report to the ARS	Registration (Law No 19550) (6)	Prior Approval of the ARS
Merger Art 77	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	NO
Taxable Merger	NO	YES	NO	NO	NO	NO	NO	NO	NO	YES	NO
Spin Off Art 77	YES	YES	YES	YES	YES	YES	YES	YES	YES	YES	NO
Taxable Spin Off	NO	YES	NO	NO	NO	NO	NO	NO	NO	YES	NO
Intra-group Assets Transaction	YES	YES	YES	NO	YES	YES	YES	NO	YES	NO	YES (4)
Assets Acquisition (7)	NO	NO (5)	NO	NO	NO	NO	NO	NO	NO	NO	NO
Stock Acquisition	NO (2)	YES	YES	NO	NO	NO	NO	NO	NO	NO	N O
Conversion	YES	YES	YES	NO	NO	NO	NO	NO	NO	YES	NO

(1) Tax-free for purposes of Income Tax and VAT. In general terms, provincial turnover and stamp taxes do not apply to qualifying tax-free reorganizations.
(2) However, if the seller is not an Argentine resident, the transaction would be exempt from Argentine income tax (Decree 2284).
(3) Only required with respect to the transfer of net operative losses and tax incentives.
(4) In case of partial transfers (when, due to the nature of the reorganization, the full transfer of the reorganized company or companies is not made) the transfer of tax rights and liabilities is subjct to the ARS' prior approval.
(5) Only applicable to the transfer of a going concern if within three months after the transfer such transaction is notified to the ARS.
(6) The Argentine Companies Act establishes the fulfillment of this requirement regardless of whether the reorganization qualifies as tax-free or not.
(7) We refer to an assets acquisition that qualifies as a transfer of going concern.