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Non-taxation of technical assistance under Art. 12 Double Tax Treaty Argentina-Japan: a multiple unintended cascade activation of the Most Favored Nation Clause?

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i. The problematic

In June 2019, the Japanese and Argentine governments signed a Double Tax Convention for the Elimination of Double Taxation on Income Taxes and the Prevention of Tax Evasion and Avoidance (hereinafter Argentina-Japan DTA).[1]

Although the goal of this international instrument, like all double tax treaties, is to generate an environment conducive to attracting investments and granting certainty regarding the level of taxation between both contracting states, the Argentina-Japan DTA has a particular impact on Argentina's tax policy that deserves further examination. In effect, the Agreement does not include the concept of "technical assistance" in the definition of royalties provided for in Article 12, which means that this type of income will fall within the scope of Article 7 and, therefore, will not be taxed in the source country unless there is a permanent establishment. As a result, there is a clear deviation from a longstanding Argentine policy on this matter. Nonetheless, it is worth saying that the position taken by Argentina with Japan is out of the ordinary since, subsequently, Argentina has maintained its previous policy, signing DTAs that include technical assistance within the definition of royalties. For example, technical assistance is allowed to be taxed at the source in the DTA signed between Argentina and Austria in December 2019.[2]

This particular situation with Japan might entail a significant fiscal cost for Argentina that goes beyond the Argentina-Japan DTA itself. In effect, the non-taxation of technical assistance at the source triggers the so-called most favoured nation clause (MFNC), which extends Japan's preferential treatment to residents in many other countries that have signed agreements with Argentina, including the United Kingdom, Belgium, Holland, Italy, and Canada, among others.

Within this context, if, on the one hand, almost the entire Argentine tax treaty network allows taxation at the source of payments in consideration for technical assistance, and, on the other hand, some DTAs contain the MFNCs linked to royalties, it is reasonable to question what will occur to the remaining DTAs in force and how it will impact in future DTAs.

ii. Treatment of technical assistance treatment in Argentina's double tax treaty policy

Even though Argentina has included this concept in the majority of its tax treaties, to retain some rights at the source, it has to be noted that there is no clear link with the tax treatment provided according to its domestic laws.[3]

a. The meaning of technical assistance under Argentina's domestic tax law

Technical assistance is not defined under domestic tax law. However, tax law refers to the term in specific cases. For example, when it comes to determining the source of income from services rendered outside Argentina, which according to the general rule would be deemed to be a foreign-sourced income and, therefore, when derived by non-residents, is out of the scope of Argentina's taxable income, article 12 of the Argentine Income Tax Law (hereafter AITL) states specific cases where this income is deemed to be sourced in Argentina[4]. To this extent, article 12 AITL defines that income derived from technical assistance[5] rendered from a foreign country must be subjected to taxation in Argentina provided it is economically used within the Argentine territory.[6]

Furthermore, numeral 1) of literal a) of Article 104 AITL presumes that "… 60% of the amounts paid for services derived from technical assistance, engineering or consultancy that were not obtainable in the country in the opinion of the competent authority in matters of technology transfer…", constitutes Argentine sourced income, provided that it is derived out of a duly registered contract for the transfer of technology as defined according to the relevant law. Besides that, subparagraph i) of said article presumes that "…90% of the amounts paid for profits not foreseen in the preceding paragraphs" constituted Argentine sourced income, understanding that it includes payments for technical assistance services that were not being included in numeral 1 of literal a) mentioned above.

However, a definition of technical assistance can only be found in Resolution 328/05, issued by the National Intellectual Property Institute (Instituto Nacional de Propiedad Intelectual, NIPI), but restricted to the income falling within the scope of numeral 1) of literal a) of Article 104 AITL (namely, technical assistance rendered in the context of contracts for the transfer of technology) and not necessarily all kind of technical assistance. In Article 5, such Resolution defines technical assistance as "a technical knowledge applied to a productive activity of the local contracting party and transferring that knowledge to it or its personnel, either in whole or in part, through training, advice, guidance, insuring, or other means" *(Author's unofficial translation)*. Additionally, Resolution 328/05's article 1 (1) a) stipulates that a technology transfer is not regarded to have taken place if technical know-how has not been effectively incorporated and directly applied to the productive activity of the local contractor.

In sum, technical assistance in the context of contracts for the transfer of technology must involve the application of the technology to a given activity and the transfer of expert knowledge applied to that activity.

b. The meaning of technical assistance under Argentina's double tax treaties

Most Argentine DTAs don't include a definition of the term "technical assistance" included within the scope of royalties. Accordingly, the general interpretative rule contained in those treaties applies. In this context, paragraph 2 of Article 3 of the OECD/UN Model Tax Conventions -on which the Argentine tax treaty network is based-, establishes that "…any term not defined therein

shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State."

In the absence of a definition mutually agreed upon by competent authorities following the ability provided for in paragraph 3 of Article 25[7], and given the lack of a precise definition in the Argentine domestic tax law concerning the broad concept of technical assistance -and not necessarily the one performed in the context of contracts for the transfer of technology- it is reasonable to conclude that the Argentine tax treaty network does not provide any certainty as regards what type of services are liable to tax at source in the form of royalties.

However, the latest DTAs concluded by Argentina address this situation by including some protocolar language defining the scope of the payments considered to be technical assistance, and therefore, subject to source taxation. In general terms, already in force DTAs with Brazil, Chile and Mexico, as well as those not yet in force signed with Austria, China and Luxemburg, define technical assistance as the rendering of customized services involving the application by the provider of any non-patentable specialized knowledge, ability or experience, and not necessarily requiring the transmission of such knowledge to the client. It is understood, however, that the rendering of standardized services is not covered by the term "technical assistance".

iii. Implications of the Argentina-Japan DTA after it enters into force

The Argentina-Japan DTA will become completely applicable for payments made starting on January 1 of the year after its ratification and entry into effect, following parliamentary approval.[8] This means, as anticipated before, that it will no longer be possible to withhold at source for technical assistance payments made from Argentina to beneficiaries residing in Japan.

Many of the agreements that allow taxation at the source of the income from the provision of technical assistance services are currently in force (Belgium, Canada, Denmark, France, Italy, Norway, the Netherlands, the United Kingdom, and Sweden), as well as those that have been signed but are not yet in force (Austria, China, and Luxembourg), have in their protocols a MFNC under which Argentine committed to grant its counterparts the same treatment as that which it will agree concerning certain income -including royalties- and in a less burdensome manner than that provided for in the respective agreement, with a third State. To this extent, the entry into force of a DTA in more favorable terms than those previously concluded, implies, on the one hand, a practically automatic modification, due to the activation of the MFNCs mentioned above and, on the other hand, a review of the agreed text upon request that the counterparts would formulate in those cases in which no dynamic provisions have been granted.

iv. Takeaways

So, coming back to the question posed at the beginning, under each of those DTAs with a MFNC in their protocols, fees for technical assistance will be treated as business profits from the date the Argentina-Japan DTA enters into effect. Such payments by an Argentinian payer to a recipient resident in the treaty partner state are therefore automatically exempt from tax in Argentina in the absence of a permanent establishment situated in Argentina from which the activities giving rise to profits are performed. In the case of Austria, the activation of the MFNC is not automatic, the competent authority in Argentina shall inform the competent authority in Austria within six months that the conditions for the application of the MFNC have been met.

Given that Argentina may lose some of its tax revenue, tax authorities may scrutinize further transactions involving technical assistance payments. In this context, tax authorities may choose to consider payments for technical assistance for the transfer of know-how, because both may include the transfer of a specific knowledge applied to an activity. Technical assistance, on the other hand, must involve the use of skilled knowledge in an activity to ensure the intended result, but it is not necessarily unrevealed knowledge from previous experience, since it is a feature of know-how transfer.[9]

If a contract covers the provision of both know-how and technical assistance, following the guidance found in both the OECD and UN Model Tax Conventions[10], the total amount of the prescribed consideration must be broken down according to the various aspects of what is delivered under the contract and the appropriate tax treatment must be applied to each part. If one portion is the main objective of the contract and the other parts are just supplementary and substantially insignificant, the treatment accorded to the main part should normally be applied to the entire amount of the consideration.

Since tax certainty is one of the elements sought by States entering into international tax agreements, and initiatives to define terms and precise, the scope of relevant provisions is always welcomed, Argentina should unify the tax treatment of fees for technical assistance across its tax treaty network, at the same time that it provides for a general and precise definition of such concept. In consequence, Argentina would benefit from a more consistent and equitable tax treaty network -by avoiding discrimination based on the residence of non-resident providers-, while reducing uncertainty.

[1] Convention between the Republic of Austria and the Argentine Republic for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance (06.12.2019)

[2] Convention between Japan and the Argentine Republic for the Elimination of Double Taxation with respect to Taxes on Income and the Prevention of Tax Evasion and Avoidance (27.06.2019)

[3] For a detailed analysis in the matter *see* Protto, Carlos, *Particularidades de la red de convenios tributarios de la Repu?blica Argentina. El tratamiento de la asistencia te?cnica* in Debates De Derecho Tributario Y Financiero, Derecho Internacional Tributario, Issue 2 Number 4 (2022), pp. 168-175

[4] J. Salerno, J. Vazquez & J.M. Magadan, *An Overview of Key Tax Issues to be considered by Multinationals when Investing in Argentina: Part II*, Tax Strategies for Structuring Latin American Business Entities, Second Edition, World Trade Executive, p. 90.

[5] For the concept of technical assistance see AR: 69/1996 Administrative Opinion AFIP (DAT)

[6] The purpose of this rule was to avoid tax evasion on the part of companies which remitted significant amounts abroad in respect of technical and financial advisory services that were supposedly necessary for the running of the business.

[7] Under such provision of the main Models, The competent authorities of the Contracting States shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention.

[8]Article 31, literal (b) Argentina-Japan DTA

[9] For more detailed analysis on the topic *see* Screpante, M.S., *Cross-Border Software Transactions from a Technology Importing Country Perspective: The Case of the Argentina-Germany Income and Capital Tax Treaty (1978)*, Bull. Intl. Taxn. X (2013), IBFD Journals, pp. 460-465

[10] Paragraph 11,6 of the Commentary on Article 12 of the OECD Model tax Convention on Income and on Capital, Condensed Version, 2017, OECD Publishing; and paragraph 13 of the Commentary on Article 12 of the United Nations Model Double Taxation Convention between Developed and Developing Countries, New York, 2021, quoting the above-mentioned paragraph of the OECD Model Tax Convention.

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