

Navigating tax developments in Latin America

Alberto Maturana, Ciro Meza, Martin Barreiro and Rolando Ramírez-Gastón of **Baker McKenzie** and **Clarissa Machado** of **Trench Rossi Watanabe** provide tax updates from Argentina, Brazil, Chile, Colombia, Peru, Mexico and Venezuela.

In response to the increased economic, social and political issues caused by the COVID-19 pandemic, Latin American jurisdictions have experienced innumerable changes to their tax framework in 2020 and 2021, which include increased tax audits and tax burdens, in contrast to the strategic tax incentives granted. But the changes did not stop there.

Some jurisdictions continue to experience broad tax reforms and others continue to discuss proposals of different tax changes in what tends to be a long-term process for the sustainable development of the region. This article provides an overview of relevant tax updates in Argentina, Brazil, Chile, Colombia, Peru, Mexico and Venezuela.

Corporate income taxes and other related matters

CIT rate increase and dividends taxation in Argentina and Colombia

Colombia and Argentina have recently increased their corporate income tax (CIT) rates and imposed taxation on dividends distributions.

In Colombia, after recurrent social protests, the government presented a tax reform bill, which was approved by Congress in September 2021. As a consequence, as of fiscal year 2022, the general CIT rate is 35% for national companies and similar entities, permanent establishments and foreign companies or non-resident legal entities required to file the annual income tax return.

Colombia also imposes a tax on distribution of dividends.

Dividends paid to non-resident entities or individuals paid out of profits taxed at the corporate level are subject to dividend tax at a 10% rate (unless a double tax treaty applies). Dividends distributed to non-resident entities or individuals paid out of untaxed profits at the corporate level are subject to the general income tax rate (35%). The net dividend will be subject to an additional 10% withholding tax.

Dividends distributed to local entities paid out of profits taxed at the corporate level are subject to dividends tax at a 7.5% rate. If profits were not taxed at the company level, the dividends will be subject to the general CIT rate (35%) and, then, to an additional 7.5% withholding tax. This withholding tax is not applicable when a control situation or business group is registered.

Dividends paid to resident individuals paid out from profits taxed at the company level are taxed at progressive rates ranging from 0% to 10%.

Argentina's income tax law was changed in June 2021 and new CIT rates were introduced for companies. The rates vary according to the companies' accumulated net profit, as follows:

- Up to AR\$ 5 million: 25%
- Between AR\$ 5 million and AR\$ 50 million: 30%
- More than AR\$ 50 million: 35%

Dividends and profits in cash or in kind distributed by companies in Argentina are taxed at a rate of 7%. Permanent establishments are also subject to the 25% to 35% tax rates and the additional tax rate of 7% at the time of remitting the dividends/profits to their home office.

'Envisioned' CIT reform in Brazil

The Brazilian National Congress and the government are discussing various proposals of broad tax reforms in Brazil. Bill of Law 2337/2021 is focused on CITs.

Among other changes, the proposal creates withholding income tax (probably at a 15% rate) on payment of dividends. In addition, it reduces the tax rates of the CIT (from 25% to 18%) and the social contribution on net profits (from 9% to 8%). At the time of writing (July 2022) the final approval has not been announced.

Considering different political issues and the presidential elections in 2022, it is unlikely that this proposal will be discussed further and approved this year.

Non-taxation of state tax benefits in Brazil

Based on the legislation in force in Brazil, state tax incentives related to the ICMS should not be subject to taxation by CIT nor PIS and COFINS because they are deemed subvention for investments and/or in view of the offense to the federative pact. Some favourable decisions have been issued on this matter, but there are still controversies under discussion, considering different interpretations of the necessary requirements for the application of this tax treatment.

Capital gains tax increase in Chile

Chile is among the jurisdictions in Latin America that made several changes to their tax legislation as of 2020. As a result of these changes, capital gains on the sale of widely traded shares acquired and sold in the Chilean stock market will



Martín J. Barreiro

Partner

Baker McKenzie, Argentina

T: +54 11 4310 2230

E: martin.barreiro@bakermckenzie.com

Martin Barreiro is experienced in various areas of tax law. His practice focuses on general tax planning, international private banking, global tax planning and transfer pricing. He also provides sound tax advice for mergers and acquisitions transactions.

He is a member of the Buenos Aires Bar Association, the American Chamber of Commerce in Argentina, the Tax Sub-Committee and the Argentine Association of Taxation Studies. His extensive list of publications include "New Argentine Social Security System" for the *International Company and Commercial Law Review* and "The S.R.L. in the tax planning of US investors in Argentina" for the *Economic and Tax Journal*.

be subject to a 10% income tax as of 1 July 2022, provided certain requisites are satisfied. Prior to this legal change, these capital gains were tax exempt.

Income tax treatment of silent partnerships in Peru

A controversial tax amendment was recently made in Peru relating to the silent-partnership agreement, one of the most common associative contracts in the country. According to this amendment, income distributed to the silent partner will be considered dividend and for the non-resident silent partners, the dividend will be considered Peruvian-sourced income, subject to income tax in Peru of 5%.

The Peruvian Tax Court had not adopted a final position regarding the theme until April 2021, when it published Resolution 02398-11-2021 (of mandatory application). The Court's position went against common business practice. Now, the new rules formalize the Peruvian Tax Court's position.

Deductibility of expenses in Peru and Mexico

In Peru, new rules were enacted to mitigate corruption and informality.



Clarissa Machado

Partner

Trench Rossi Watanabe

E: clarissa.machado@trenchrossi.com

Clarissa Giannetti Machado Miras joined Trench Rossi Watanabe in 1999 and became partner in 2007. She is the Head of the tax practice group in Brazil. Her focus is tax consulting on corporate income and other federal taxes.

Clarissa has extensive experience in the elaboration and analysis of global transfer pricing analysis and its effects vis-à-vis the local legislation and has a wide breadth of experience in the assistance of clients for the development of efficient structures in M&A transactions, local and international restructurings, real estate and financing transactions. She also advises individuals on wealth management matters.

Clarissa is the Head of the Pro-Bono Committee, being a member of the Social Responsibility team of the firm. She graduated from Universidade de São Paulo do Largo São Francisco – USP with a degree in Law and from Fundação Getúlio Vargas – FGV with a degree in business administration. She also holds a master's degree in Law (LLM) from Columbia University School of Law – New York/EUA, where she received the award “Harlan Fiske Stone Scholar” – Columbia University. Clarissa has been recognized for her work in the tax field by the main legal directories such as Chambers, International Tax Review (ITR), Legal 500, LACCA, Leaders League, Latin Lawyer, Who's Who Legal and *Análise Advocacia 500*.

Trench Rossi Watanabe and Baker McKenzie have executed a strategic cooperation agreement for consulting on foreign law.

The first one improves the rules in relation to using the Peruvian banking system. The most relevant change was the reduction of the threshold to be observed for taxpayers to route payments through the Peruvian banking system. The reduction was from PEN3,500 (\$1,000) to PEN2,000 (\$500).

Additionally, when the payment is made to a third party, as agreed by the payment recipient, the Peruvian tax authority should be notified before the payment. Failing to comply

with this formal obligation, would make the payment not deductible for tax purposes. It has been expressly established in the Peruvian Income Tax Law that bribery payments are not income tax-deductible.

Other important changes related to deductibility of expenses occurred in Mexico. As of the 2022 tax reform, deductions for the impairment of assets will be subject to filing a notice. In addition, deductions for the practical impossibility of collecting receivables will be subject to the definitive resolution of the competent authority (e.g. courts).

Expansion of anti-avoidance rules in Mexico

Mexico introduced a general anti avoidance Rule (GAAR) for the first time in 2020, when the concept of ‘business reason’ was included in the Federal Tax Code. The corresponding provision establishes that in general a given transaction has a business reason when the tax benefit is lower than the financial benefit expected in the transaction.

In this context, more recently, the Mexican tax reform for 2022 determined that major corporate restructuring procedures that would conceptually be income tax-free, including mergers and spin-offs, require evidencing the existence of a business reason. Otherwise, the tax authority will be able to determine sale and other taxable effects. In addition, interests derived from intercompany loans that lack a business reason would be deemed as dividends (back-to-back rules).

Thin capitalisation rules have also experienced recent changes in Mexico. The rules used to contain an exception for financial entities. However, from 2022, multi-purpose financial entities (SOFOM) will not be subject to this exception if they operate mainly among related parties.

Tax authorities have considered that SOFOM entities are subject to wider restrictions to apply the preferential 4.9% withholding income tax on interests paid abroad, especially when the lender is a related party.

VAT and other indirect tax matters

Increase of VAT in Mexico and Chile

As of 2022, the use or enjoyment of tangible goods in Mexico, regardless of where the material delivery of the goods is made or where the corresponding lease agreement is executed, will trigger VAT, not only for its importation into Mexico but also for the corresponding use taking into consideration the rental fee as the taxable base.

In Chile, from June 1 2020 a VAT of 19% is being levied on digital services delivered by foreign resident service suppliers, when performed or used in Chilean territory.

In addition, as a result of the continued tax reforms in Chile remunerations paid for all services will generally be subject to 19% VAT as of 2023, except for certain explicitly exempted services such as health services and professional services provided by individuals and certain professional firms.

Prior to this rule, all professional, technical and consulting services were exempt from VAT. Accordingly, entities will need to review their legal structure, to define how they will continue to provide services.

Tax incentives in Colombia, Argentina and Venezuela

In 2021 the Colombian government enacted Law 2,099 recognising new unconventional sources of renewable energy, such as green hydrogen, blue hydrogen and geothermal energy. This recognition allows the energies to access industry tax incentives, which are mainly related to income tax, VAT and customs duties.

Also in 2021 Argentina extended the tax and customs benefits set forth by Law No. 19,640 until December 31 2038 for the Province of Tierra del Fuego, Antarctica and the South Atlantic Islands ('regime').

In general, the tax incentives refer to the Tierra del Fuego free zone and include exemptions from federal taxes and customs benefits. An additional reimbursement has been established for incremental exports to third countries of goods originating in the Province of Tierra Del Fuego, Antarctica and Islas Del Atlántico Sur equivalent to 5% of the FOB value.

In addition, the Argentinian National Executive Branch approved the new regulatory framework for biofuels in August 2021 (Law No. 27,640) which will be valid from August 5 2021 until at least December 31 2030.

Biofuels will be exempted from the liquid fuel tax and the carbon dioxide tax, in all of their stages of production, distribution and commercialisation. The exemptions will operate until the end of the regime as long as the main raw materials used in the respective production processes are of national origin.

In Venezuela, as of December 2020 the National Executive issued various decrees establishing exemptions from the payment of VAT, customs duties and customs service fees for various categories of imported goods and economic sectors. In May 2022 the effects of the benefits were extended until 31 December 2022 by Decree No. 4,683.

'Envisioned' indirect tax reform in Brazil

There are currently three major projects regarding indirect tax reforms being discussed in two different legislative houses in Brazil. PEC 100/2019 and PEC 45/2019 refer to the changes and extinction of several indirect taxes (e.g. IPI, PIS, COFINS, ICMS, ISS) and the creation of a tax on goods and services (IBS"), of a contribution on good and services (CBS) and of the selective tax (IS).

A fourth broad tax reform proposal is PEC 07/2020 which is being discussed in the Chamber of Deputies. In summary, the intention of PEC 07/2020 is to radically change the national tax system and make it equivalent to the



Alberto P Maturana

Partner

Baker McKenzie, Chile

T: + 56 2 2367 7006

E: alberto.maturana@bakermckenzie.com

Alberto Maturana is a partner at Baker McKenzie, Chile. He advises corporations and individuals from a broad spectrum of industries on tax and corporate law matters.

Alberto is proficient in business structuring, foreign inbound/outbound investment, offshore intercompany transactions, as well as tax and estate planning. In addition, he counsels on mergers and acquisitions and matters involving contracts.

Alberto has a MBA from the Pontificia University Catolica de Chile.

US tax system. The proposal removes various taxes in force such as ICMS, IPI, PIS, Cofins, ISS, IPVA, ITCMD, ITR, IPTU, CSLL and social contributions and replaces them by taxes that would be levied on the three main taxable bases: consumption, property and income.

Considering that these proposals in general involve municipal, state and federal taxes (in addition to political issues and the presidential elections this year) it is probable that no approval will take place in 2022.

Tax litigation and audits

Colombia, Chile, Brazil and Mexico

In January 2022, the Colombian Congress approved a reform to the code that regulates the judicial phase of tax litigation. One of the main changes was the amount of claims for the designation of jurisdiction. Now most of the controversies will be analysed by local judges and not by the higher courts with more experience in tax matters. Congress also approved a bill, which originated during the COVID-19 pandemic implementing virtual procedures in the judicial sphere, such as in hearings and filings of briefs and motions.

In Chile, at the administrative stage, a new law introduced an administrative action to be filed before the IRS's National Director. This action aims to modify a resolution issued in the administrative reconsideration process, when it is against



Ciro Meza Martinez

Partner

Baker McKenzie, Colombia

T: +57 60 1 634 1557

E: ciro.meza@bakermckenzie.com

Ciro Meza is a partner at Baker McKenzie, Colombia. He has advised companies from the oil and gas, pharmaceutical, IT, consumer business, and mining sectors in Colombia.

Ciro's areas of practice include tax planning, tax advisory and tax litigation. He has also been involved in the restructuring of several companies and in various mergers and acquisitions which have involved local and international jurisdictions.

Ciro obtained a LLM in international and comparative law from Tulane University in New Orleans

the law and/or the administrative instructions (e.g. the IRS' rulings). The law also reinforced the list of taxpayers' rights and introduced a new action to protect them.

At the court stage, the law introduced a new action against the Tax Court decision (formal cassation). In addition, it declared that the burden of proof falls on both the taxpayer and the IRS.

Likewise, recent law changes in Chile strengthened new alternative dispute resolution mechanisms, such as the conciliation settlement (to be proposed and approved by the Tax Court in a conciliation hearing) and the direct settlement approved by the IRS' National Director.

In Brazil, the casting vote on the Brazilian Administrative Court of Tax Appeals (CARF) was extinguished by Law No. 13.988/20 which establishes that, in cases of tied trials, the dispute must be resolved favourably to taxpayers. The new regulation directly impacts the judgment of cases involving complex tax legislation (including transfer pricing (TP) matters and goodwill amortisation).

Furthermore, in Mexico, from the 2022 tax reform, a taxpayer's self-correction of omitted contributions can be relieved through off-setting positive tax balances, subject to certain formal requirements and to the filing of a request before the tax audit is concluded.

In addition, seizing assets for the collection of due tax credits can be performed through the taxpayer's electronic tax inbox and failing to demonstrate the capability (assets, infrastructure, personnel, etc.) to develop the activities supported in tax vouchers allows one to presume simulated activities (simulated activities could lead to criminal consequences).

Highlights of other relevant updates from 2022

In Chile, the newly elected government – took office in March 2022 – announced an upcoming structural tax reform as part of a “new, long-term fiscal deal”. But perhaps the biggest of all possible changes in the tax scenario is the new constitution proposal – prepared by a Constitutional Convention – that Chileans will vote for or against in a referendum set for September 4 2022.

However, other relevant changes were implemented in tax legislation as of 2022 and as of 2023. For instance, as of 2022, the amounts received by life insurance beneficiaries are subject to gift and inheritance tax, at a progressive rate between 0% and 25%.

As of 2023, the tax benefits on certain real estate property acquired before 2010 will no longer be valid and the real estate tax rate applicable to property worth more than approximately \$600,000 in total will be increased (the marginal tax rate applicable above the \$600,000 threshold will increase from 0.275% to 0.425%).

In case of Brazil, as part of its accession to the OECD, the tax on financial transactions ('IOF-exchange') rates are scheduled to be reduced in the coming years. There was an immediate reduction to zero of the rate of the IOF-exchange applicable to short-term foreign loan operations, as well as a gradual reduction for other transactions specified in Decree No. 10,997/22.

From a TP standpoint, in April 2022 the OECD and the Brazilian Federal Revenue (RFB) gave a presentation on the development of the project to potentially align the Brazilian TP rules with the OECD standards.

The OECD and RFB presented the series of rules that will guide the new Brazilian TP system, which include:

- General principle-based guidance based on the arm's-length principle in line with OECD standards;
- Introduction of the OECD-recognised TP methods;
- A comparability analysis becoming a cornerstone of the new system;
- Continued reliance on spontaneous self-administered adjustments;
- Definition of the concept of intangibles for TP purposes;
- Recognition of the importance of intra-group services through specific provisions;
- Introduction of comprehensive guidance on CCAs – considerations for both: development CCAs and services CCAs;

- Guidance to address the TP considerations resulting from business restructuring;
- Guidance on applying the arm's-length principle to deal with the challenges arising from various types of financial transactions; and
- TP documentation that follows international best practices.

As next steps, the OECD and RFB will collect feedback from the market players (e.g. companies and others) that are directly affected by the envisioned changes. A public event with this purpose was organized by RFB and the Inter-American Development Bank (IDB) on June 29 2022. After the public audiences, draft legislation will be presented to the National Congress, which will deliberate on the matter. The RFB and the OECD 'forecast' is that the bill will be ready for deliberation between 2022 and 2023.

In Argentina, the 'Integrated System for monitoring foreign payments of services – SIMPES', was created on January 7 2022, by means of which it is necessary to apply for the previous authorisation of the Federal Tax Administration to make payments to foreign providers of services via wire transfers.

Finally, Venezuela approved a reform to the Large Financial Transactions Tax Law (LFTT Law) that entered into force on March 28 2022. The reform introduces important changes regarding taxable transactions, applicable tax rates, exemptions and exonerations.

Simultaneously, the National Executive issued Presidential Decree No. 4,647, which exonerates certain transactions from the payment of the large financial transactions tax (LFTT). These transactions include: (i) debits connected to the assignment of Venezuelan securities; (ii) the settlement of the principal or interest thereof; and (iii) securities traded through the Stock Exchange in currencies other than legal tender or through cryptoassets or cryptocurrencies other than those issued by the Bolivarian Republic of Venezuela ('Exoneration Decree').

Further to the reform, the National Integrated Service of Customs and Tax Administration (SENIAT) designated special taxpayers as collecting agents of the LFTT. The guidelines entered into force on March 28 2022.

On April 20 2022, the SENIAT readjusted the tax unit (TU) value from VES 0.02 to VES 0.40, an increase of



Rolando Ramírez-Gastón

Partner

Estudio Eche copar

T: +51 1 618 854

E: rolando.ramirez-gastonhorny@bakermckenzie.com

Rolando Ramírez-Gastón is a partner at Estudio Eche copar, member firm of Baker & McKenzie International. He advises corporate and institutional clients on tax solutions for their business and financial transactions and on tax matters of major company mergers, corporate reorganizations and takeover processes.

Rolando advises on wealth planning matters, domestic and international tax planning, tax procedures with the National Tax Administration, the Municipal Tax Administration and the judiciary. He acts as a consultant on tax matters related to capital markets transactions, and to the mining, oil and gas, retail and construction industries.

Rolando holds an LLM from New York University and a law degree from Pontificia Universidad Católica del Perú.

2,000%. The TU adjustment will only be applicable for assessing national taxes administered and collected by the SENIAT. For taxes paid annually, such as income tax and high-net-worth tax, the applicable TU will be the one in force at the end of the fiscal year. For taxes that are paid in periods other than annually, such as VAT, the applicable TU will be the one in force at the beginning of the fiscal year.

We would like to credit as fellow contributors to this article Ronald Evans, Hector-Diaz Santana, and Roxana Orta-Gomez.



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