Double Taxation Agreement between Chile and Uruguay

The purpose of the Agreement is to eliminate double taxation on income and capital, and also prevent tax evasion/avoidance

Last April 1st, 2016, the authorities of both Chilean and Uruguayan Ministries of Economy signed a Double Taxation Agreement on Income and Capital, and for the prevention of Tax Evasion and Tax Avoidance (hereinafter the "Agreement") with its Protocol.

The Agreement reflects the aim of both countries in order to intensify its commercial relationships, eliminating distortions for investments and also strengthen its cooperation in tax matters and the actions against tax evasion/avoidance.

In the following paragraphs we will analyze the main contents of the Agreement.

Purpose of the Agreement

As it was referred, the Agreement recognizes as main purposes: (i) elimination of double taxation on income and capital, and (ii) prevention of opportunities for low or non-taxation through tax evasion/avoidance (including the abusive use of the treaty – treaty shopping – intended to allow the enjoyment of the benefits granted under the Agreement by resident of third States).

Persons covered

The Agreement shall apply, in principle, to Persons (individuals and entities) who are residents in Uruguay or Chile.

Notwithstanding, the Agreement provides for a clause in order to ensure the limitation of benefits (LOB clause) with the aim to avoid an unduly access to its benefits. According to this clause, it is necessary the fulfillment of certain requirements by the residents in order to obtain the right to the benefits granted under the Agreement (for example: the condition of "qualified person" in the sense of the Agreement, the active development of business under certain conditions, or the decision of the Competent Authorities when the referred requirements are not verified).

Taxes covered

The Agreement shall apply to taxes on income and on capital imposed by each State or its political subdivisions or local authorities.

There shall be considered as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the transfer of movable or immovable property, taxes on the total amount of wages or salaries paid by enterprises, as well as taxes on capital appreciation.

The current taxes to which the Agreement shall apply are the following:
In Chile:

The taxes established in the Income Tax Act.

In Uruguay:

(i) the Tax on the Income of Economic Activities (IRAE),

(ii) the Residents Income Tax (IRPF),

(iii) the Non-Residents Income Tax (IRNR),

(iv) the Tax for the Assistance to the Social Security (IASS), and

(v) the Capital Tax (IP).

Without prejudice of the above, the Agreement shall apply also to identical or substantially similar taxes – including capital taxes – that are imposed after the date of signature of the Agreement in addition to, or in place of, the current taxes.

Permanent establishment

The Agreement regulates all the concerning to the permanent establishment (PE), i.e. a fixed place of business through which the business of an enterprise is wholly or partly carried out.

The concept of PE is extremely important, considering that it depends of its configuration if only one or both States are entitled to tax the income.

Without prejudice of the above-referred general principle (PE as a fixed place of business) the Agreement provides for several situations that could entail a PE and other where said PE is excluded.

(A) Exemplary section.

It is provided that the term PE includes specially:

(i) a place of management,

(ii) a branch,

(iii) an office,

(iv) a factory,

(v) a workshop, and

(vi) a mine, an oil or gas well, a quarry or any other place of extraction of natural resources,

(vii) a building site or construction or installation project and the associated supervision activities, but only if said Project or activities last more than 6 (six) months,

(viii) the operation of a substantial equipment in the other State for a period or periods exceeding in the aggregate 183 (one hundred and eighty-three) days in any period of 12 (twelve) months,

(ix) the rendering of services, including consultancy, by an enterprise through employees or other individuals entrusted to said activity, when such activities within the country exceed a period or periods of 183 (one hundred and eighty-three) days, in any period of 12 (twelve) months.

In case of the situations described at (vii), (viii) and (ix) the Agreement states that the duration of the activities should be determined aggregating the periods during which the activities in one State are carried out by associate enterprises, provided that such activities in that State are substantially the same than the activities performed in that State by its associated.

(B) Exclusionary section.

It is considered that there is no PE, while the activity is of preparatory or auxiliary character:

(i) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the Enterprise,

(ii) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display,

(iii) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise,

(iv) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise, and,

(v) the maintenance of a fixed place of business solely for the purpose of advertising, supplying of information or carrying out scientific investigation, for the enterprise.

Notwithstanding the above, the exclusion is not applicable when there is a fixed place of business that is used or maintained by an enterprise if the same or an closely related enterprise perform its business activities in that place or in other place in the same State and: (a) that place or other place configure a PE for the enterprise or the closely related enterprise, or, (b) the combination of the activities rendered by both enterprises in the same place, or in different places, does not have a preliminary or auxiliary character.

In this respect, it is necessary to consider if the business activities performed by both enterprises in the same or different places could be considered as complementary functions that are part of a whole business operative.

(C) Agency section.

It is considered that an enterprise has a PE when a person is acting in a State on behalf of said enterprise and habitually concludes contracts or exercises a key role in the conclusion of contracts that are routinely concluded without substantial modifications by the enterprise, if such contracts: (a) are concluded on behalf of the enterprise, or (b) are intended to transfer the ownership, or to grant the right to use of property, owned by the enterprise or with respect to which the enterprise has the right to use, or (c) are intended to make possible the rendering of services by the enterprise.

The afore-mentioned does not apply when the activities rendered were limited to the referred at section "(B)" (exclusionary section) and that, if exercised through a fixed place of business, would not be considered the same as an EP in accordance with the Agreement.

In addition, agency section is not applicable when a person that is acting in a State on behalf of an enterprise of the other State renders its activity as an independent agent acting for the enterprise in the ordinary course of that business. Notwithstanding, when the person is acting in an exclusive, or close to exclusive, manner on behalf of an enterprise or more enterprises closely related, such person should not be considered as an independent agent with respect to the referred enterprise/enterprises.

(D) Exclusion in case of mere control of companies.

The Agreement states that the fact that a company which is a resident of one State control or is controlled by a company which is resident of the other State, or which carries out business activities in that other State (whether through a PE or otherwise) shall not of itself constitute either company a PE of the other.

Taxation of business profits

In which makes relation to business profits the Agreement provides, as a general rule, that such profits only can be taxed in the State of residence, unless the Enterprise performs its activity in the other State through a PE situated there.

In this last hypothesis, business profits that could be attributed to said PE will be subject to taxation in the State where it is situated.

Notwithstanding this general rule, the Agreement states that when profits include items of income which are dealt with a specific treatment, it should be considered such specific regulation.

Taxation of income from immovable property

With respect to income from immovable property, i.e. income obtained by a resident in one State from immovable property situated in the other State, such income may be taxed in that other State.

Taxation of dividends

The Agreement states that the dividends paid by a company which is resident in one State to a resident in the other State may be taxed in that other State.

However, such dividends may also be taxed in the State of residence of the company, but if the beneficial owner of the dividends is a resident of the other State, the tax shall not exceed:

(i) 5% (five per cent) of the gross amount of the dividends if the beneficial owner is a company which control or holds directly at least 25% (twenty five per cent) of the voting power or the capital of the company paying the dividends,

(ii) 15% (fifteen per cent) of the gross amount of the dividends in all other cases.

The Agreement states that the referred rule shall not limit the application of the Additional Tax payable in Chile provided that the First Category Tax is fully creditable in the determination of the amount of such Additional Tax.

However, the afore-mentioned is not applicable if the beneficial owner of the dividends, being a resident of one State, carries out business in the other State of which the company paying the dividends is a resident through a PE situated therein, or renders services in an independent a personal manner through a fixed base situated therein, and the holding in respect of which the dividends are paid is effectively connected with such PE or fixed base. In this hypothesis, the rules on business profits or independent personal services shall apply.

Finally, the Agreement contains a specific provision for the remittance of benefits made by a PE of a resident of the other State. In this sense, the Agreement states that:

(i) when a company that is resident in Chile has in Uruguay a PE the remittance of benefits (or what it is considered as benefits) made by the PE in favor of said company will be considered as "dividends" under the Agreement and therefore Uruguay will be entitled to tax such dividends up to 5% (five per cent) of its gross amount, and

(ii) in case of a resident in Uruguay with PE in Chile, the rules of the Agreement does not affect taxation in Chile over the benefits attributable to such PE (as much for the First Category Tax and the Additional Tax but only if such First Category Tax could be entirely deducted with respect to the Additional Tax).

Taxation of interest

With respect to interest arising in one State and paid to a resident of the other State, the Agreement states that such interest may be taxed in that other State.

However, interest arising in one State may also be taxed in that State, but if the beneficial owner is a resident of the other State, the tax shall not exceed:

(i) 4% (four per cent) of the gross amount of the interest arising from: (a) credit-sale of equipment made by the beneficial owner with respect to a purchaser, and (b) loans granted by banks, with a 3 (three) years term (at least), for financing investments' projects, or

(ii) 15% (fifteen per cent) of the gross amount of the interest in all the other cases (notwithstanding, it is possible a potential lower taxation in light of the most favored nation clause included in the Protocol, but in this hypothesis the minimum rate cannot be lower than 10% - ten per cent –).

The afore mentioned rules shall not apply if the beneficial owner of the interest, being a resident of one State, carries out business in the other State in which the interest arises through a PE situated therein, or renders personal services in an independent manner through a fixed base situates therein, and the credit in respect of which the interest is paid was incurred, and such interest is borne by such PE or fixed base. In this case, the

rules on business profits or independent personal services shall apply.

Taxation of royalties

The Agreement states that royalties arising in a State and paid to a resident in the other State shall be taxable in that other State.

Notwithstanding, such royalties could be subject to taxation in the State in which the royalties arises, but if the beneficial owner of such royalties is a resident of the other State the tax shall not exceed 10% (ten per cent) of the gross amount of the royalties.

The referred provisions shall not apply if the beneficial owner of the royalties, being a resident of one State, carries out business in the other State in which the royalties arise through a PE situated therein, or render personal services in an independent manner through a fixed base situated therein, and the right or property in respect of which the royalties are paid is effectively connected with such PE or fixed base. In this case, the rules on business profits or independent personal services shall apply.

Taxation of capital gains

In which makes relation to capital gains, the Agreement provides for different solutions on the tax treatment to be applied to the gains obtained through the transfer of: (i) immovable property (ii) movable property forming part of the business property of a PE or fixed base (including the transfer of said PE or fixed base in an isolated manner or together with the Enterprise) (iii) ships, aircrafts or vehicles for ground transportation (including also the goods used for the operation of the referred means of transport) (iv) shares or other rights for participation, (v) any other property other than the previously referred.

In general, taxation is limited to the State where the goods are located or where the activity (PE/fixed base) is rendered. However, in certain cases taxation is limited exclusively to the State of residence of the seller.

Taxation of independent personal services

The Agreement states that the income obtained by an individual who is a resident of one State in respect of professional services or other activities of an independent character shall be taxable only in that State. However, such income may also be taxed in the other State:

(i) if the individual has a fixed base regularly available in that other State for purpose of performing the activities, or

(ii) if the individual is present in that other State for a period or periods amounting to or exceeding in the aggregate 183 (one hundred and eighty-three) days in any period of 12 (twelve) months commencing or ending in the considered fiscal year.

In both cases, the State where the fixed base is situated or where the individual is present exceeding the referred term, is entitled to tax the income but only those which are attributable to such fixed base or was obtained within that State.

Taxation of fees in respect of technical services

The Agreement states that the fees in respect of technical services arising from a State and paid to a resident of the other State could be subject to taxation in that other State.

However, such fees may also be taxed in the State in which the fees arises but if the beneficial owner of the fees is a resident of the other State then the tax cannot exceed 10% (ten per cent) of the gross amount of the fees.

This rule is not applicable, however, when the beneficial owner of the fees, being a resident of one State, carries on business in the other State in which the fees arises, through a PE situated therein, or performs in that other State

independent personal services from a fixed base situated therein, and the fees are effectively connected with: (a) such PE or fixed base, or (b) the situation described in the Protocol (sale of goods/merchandises or rendering of business activities by an enterprise in a State, which are substantially similar or identical to the sales or activities performed through a PE in that State).

Taxation of income from employment

The Agreement States that the salaries, wages and other remuneration obtained by a resident of one State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other State. If the employment is so exercised, such remuneration as is derived therefrom may be – in principle – taxed in that other State.

Notwithstanding the above, remuneration obtained by a resident of one State in respect of an employment exercised in the other State shall be taxable only in the first-mentioned State (State of residence) if:

(i) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 (one hundred and eighty-three) days in any period of 12 (twelve) months commencing or ending in the considered fiscal year, and

(ii) the remuneration is paid by, or on behalf of, a person being an employer who is not a resident of the State where the employment is exercised, and

(iii) the remuneration is not borne by a PE or a fixed base which that employer has in the State where the employment is exercised.

Taxation of director's fees

Director's fees and other similar payments obtained by a resident of one State in that person's capacity as a member of the board of directors, supervisory board or other similar organ of a Company which is a resident of the other State may be taxed in that other State.

Different kinds of income. Other incomes

The Agreement includes specific rules for the income of international traffic, artistes and sportspersons, pensions, payments for government service, payments received by students or business apprentices with the purpose of maintenance, education or training.

With respect to international traffic, the Agreement shall prevail over the rules contained in the "Agreement between Chile and Uruguay in order to prevent double taxation on income obtained by Chilean and Uruguayan air traffic enterprises which operate in both countries" dated on March 23, 1992.

Finally, the Agreement provides for a residual rule applicable to other income not comprehended in any of the previous categories.

Taxation of capital

In which makes relation with taxation of capital, the Agreement states:

(i) that the capital represented by immovable property, owned by a resident of one State and situated in the other State, may be taxed in that other State,

(ii) that the capital represented by movable property forming part of the business property of a PE or fixed base which an Enterprise has in the other State may be taxed in that other State,

(iii) that the capital represented by ships, aircrafts and vehicles for ground transportation operated in international traffic (including movable property used in the operation of such ships, aircrafts and vehicles), shall be taxable only in the State of residence of the enterprise that operate such means of transport, and

(iv) that all other elements of capital of a resident of one States hall be taxable only in that State.

Elimination of double taxation

With the purpose to eliminate double taxation the Agreement provides for a credit method (tax credit) that entails the granting of a credit for taxes paid in one State that could be used in the other State against taxes to be paid in that other State.

In this sense, it is stated:

(i) residents in Chile, obtaining income or capital which has, in accordance with the Agreement, been subject to taxation in Uruguay, may credit the tax so paid against Chilean taxes payable in respect of the same income or capital, subject to the applicable rules of Chilean legislation, and

(ii) residents in Uruguay, obtaining income or capital which has, in accordance with Chilean legislation and the provisions of the Agreement, been subject to taxation in Chile, may credit the tax so paid against any Uruguayan tax payable in respect of such income or capital. However, the deduction cannot exceed the part of the Uruguayan tax on income or capital calculated prior to the granting of the deduction.

Exchange of information

As is usual in this kind of Agreements, it is included a provision related to the exchange of information between the Competent Authorities of both States. The Information to be exchanged is those foreseeably relevant for the application of the Agreement or for the administration and enforcement of both States' domestic legislations.

The information that could be exchanged includes Banking Information as well as Information regarding ownership interests in a Company or other entities.

In Uruguay, in order to proceed to the exchange of Information, it would be necessary to take into consideration the applicable current domestic regulations.

Assistance in the collection of taxes

The Agreement permits to both States to cooperate each other in the collection of taxes, following the proceedings that they mutually agreed.

Entry into force. Termination

The Agreement shall enter into force 15 (fifteen) days after the date of the last notification exchanged between the States in the sense that all the domestic requirements for the entry into force were complied.

The Agreement shall have effect:

In Chile:

In respect of taxes on income obtained and amounts paid, credited to an Account, put at the disposal or accounted as an expense, on or after the first day of January next following the date on which the Agreement enters into force.

In Uruguay:

(i) In respect of withholding taxes, amounts paid or credited on or after the first day of January next following the date on which the Agreement enters into force, and (ii) in respect of other taxes, in relation to fiscal periods beginning on or after the first day of January next following the date on which the Agreement enters into force.

With respect to the exchange of Information, the Agreement shall have effect:

(i) in relation to tax crimes, on the date on which the Agreement enters into force, and

(ii) in relation to other matters, on the date on which the Agreement enters into force but only with respect to fiscal periods beginning on that date, or in case when there is no a fiscal period, to the taxable events occurred on or after that date.

Finally, in which makes relation to the termination of the Agreement, it is stated that it shall continue in effect indefinitely, but either State may terminate it no later than June 30 of each year after its entry into force, giving notice to the other State through the diplomatic channel.

In general terms, it is stated that the Agreement shall cease to be effective after the first day or January next following the date on which the termination was communicated.

Further information?

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