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Supreme Court rules on set off of losses incurred on sale of Mexican shares

Mexico's Supreme Court recently issued several decisions in which it reversed its previous position on the possibility of setting off losses incurred on the sale of shares against any type of income.

Background

Under Mexico's Income Tax Law, losses incurred on the sale of shares of any company (Mexican or foreign) may be set off only against capital gains. For a number of years, taxpayers had successfully argued that this rule violates the legality and proportionality principles in Mexico's constitution because the law required the tax authorities to authorize the setoff of such losses against other types of income on a case-by-case basis. Taxpayers argued that the losses were incurred in the course of income-producing activities and, therefore, should be deductible under the normal rules. In a decision issued in 2004, the Supreme Court ruled in favor of the taxpayers on the grounds that the ability to take a deduction for the relevant losses was at the discretion of the Mexican tax authorities, rather than based on the law.

The Income Tax Law was amended in 2008 to eliminate the ability of the tax authorities to allow/disallow such deductions, but a revised version of the rule specifically provides that losses incurred on the sale of shares may be offset only against capital gains.

Change in the Court's position

A group of eight taxpayers, comprised of Mexican subsidiaries of large multinational companies and Mexican corporate groups, challenged the 2008 rule, claiming that their constitutional rights still are violated because the revised rules result in undue taxation by not allowing taxpayers to set off losses incurred on the sale of shares against *any* income

In a surprising turn of events, the Supreme Court reversed its previous position and held that the limitation on the setoff of losses is *not* unconstitutional for the following reasons:

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- It does not offend against the constitutional principle that taxes should be levied taking into account the taxpayer´s economic capacity;
- A loss on the sale of shares is a loss resulting from an extraordinary transaction (and is not necessarily part of the natural course of a taxpayer´s trade or business);
- It is appropriate for the law to place a limit on the setoff of these kind of losses in order to maintain a sound tax base, and any conclusion to the contrary potentially would open the gates to international tax planning (and hence, the erosion of Mexico's tax base) by companies from Mexico´s main trading partners, since many countries restrict the use of these kinds of losses; and
- In light of the passive nature of any gain/loss associated with the sale of shares, it is appropriate for such losses to be treated differently from other kinds of losses.

The Court ruled that there is no violation of the equal treatment principle in the constitution; i.e. the mandate that all taxpayers in the same circumstances be treated equally. The law correctly treats these losses differently to prevent speculative transactions that potentially could result in the erosion of the tax base. In other words, losses incurred on the sale of shares should not be treated in the same way as other losses.

The Supreme Court's decisions in these cases constitute legal precedent that must be followed by lower level courts. The decisions appear to continue a recent trend under which the court generally confirms the constitutionality of most tax rules that have been challenged (there have been only a few cases in which the Mexican Supreme Court has determined that a tax law was incompatible with the constitution).

Positions of the justices

Ten justices on the Supreme Court voted in favor of confirming the limitation as constitutional, with one justice dissenting.

Some individual positions of the justices are consistent with an ongoing defense of the Mexican government´s inherent power to levy taxes. For the past eight years, the Supreme Court has upheld the constitutionality of all major tax amendments aimed at increasing the tax burden, despite the fact that many of these measures contained what would appear to be unconstitutional features. (Probably the most notable example is the Supreme Court's confirmation that the flat tax introduced in 2008 did not violate constitutional principles. Taxpayers had argued that the features of the flat tax were not sufficiently different from the income tax to support the elimination of deductions such as interest, wages and fringe benefits and related party royalties.)

Recently appointed Justice Gutiérrez (former head of the tax authorities) explained the reasons why the restriction on the setoff is in line with the objective of protecting Mexico's tax base: it eliminates the ability of a taxpayer to obtain an "additional deduction," first, by deducting the purchase price of the shares (tax cost) on the sale, and then deducting the resulting loss when the sale price does not exceed the tax cost. Justice Gutiérrez stated that the fact that what is accrued as taxable income is the gain and not the sale price allows the taxpayer to pay income tax on the right proportion.

The justice went on to state that this type of deduction is clearly not a "structural deduction," – i.e. a deduction considered to affect a taxpayer´s economic ability to pay taxes – as defined in accordance with criteria previously established by the Supreme Court and, therefore, the limitation has no bearing on that ability. A taxpayer can deduct the tax cost of the shares at the time of sale, and the additional deduction arising from a loss on the transaction should not be able to be set off against any type of income. In other words, it is sufficient that the loss may be set off only against capital gains.

Justice Zaldivar went even further by stating that the Mexican Income Tax Law is correct not to allow a loss incurred on the sale of shares to be set off against any kind of income and to allow such setoff only against capital gains, because such a loss is not considered to be related to a taxpayer's common trade or business. In other words, the taxpayer should be satisfied that the law allows only limited utilization of a loss of this type, since it should not be deemed to have any effect on the taxable basis.

Justice Luna – the sole dissenting justice – took the position that the fact that a capital gain is included as taxable income in the overall tax basis but that a capital loss (on shares) cannot be deducted from the overall tax base is, in itself, a breach of the taxpayer´s constitutional right and, therefore, the limitation should be considered unconstitutional. Justice Luna also stated that no distinction is made between losses incurred by regular taxpayers and those incurred by holding companies with no other activities other than the owning of shares. According to the justice, in the case of the latter, the limitation

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was clearly unconstitutional since losses incurred on a sale of shares do constitute losses directly related to the seller´s trade or business.

Comments

The recent decisions on the limitation of the deduction of losses derived from the sale of shares are another blow to taxpayers' defense of a just taxable basis and they exemplify an unfortunate trend in the Mexican judicial system. Constitutional challenges to tax matters have become a cumbersome and unsuccessful path for taxpayers, given that the Mexican courts seem to be prone to uphold the government's ability to tax in most cases, particularly those involving large corporate taxpayers. A recent example concerns Mexico's tax consolidation regime, which the Mexican authorities consider to have been abused by multinationals. There is some discussion about abolishing the regime, and the most recent amendments to the tax consolidation rules have been challenged before the Supreme Court.

Taxpayers should carefully analyze any share sale transactions in which they anticipate that a loss will be incurred to ensure that they have capital gains available for offset against the anticipated losses. Otherwise, account will have to be taken of the fact that the losses will be able to be utilized only when a relevant capital gain arises and that the ability to set off the losses will be forfeited entirely should they not be utilized within the 10-year limitation period to which such losses are subject.

— Ricardo González Orta (Mexico City)
Partner
Deloitte Mexico
rgonzalezorta@deloittemx.com

Mauricio Martínez D'Meza (Mexico City)
Partner
Deloitte Mexico
maumartinez@deloittemx.com

César Pensado (Mexico City)
Manager
Deloitte Mexico
cpensado@deloittemx.com

Brazil:
Supreme Court rules on constitutionality of including state VAT in calculation base for other taxes on imports

Brazil's Supreme Court ruled in March 2013 that it is unconstitutional for the state VAT (ICMS, the tax on the distribution of goods, interstate and inter-municipal transportation and communications services) to be included in the tax base of the PIS (the contribution to finance the funds for unemployment, child benefits and insurance allowances for low paid workers) and COFINS (the contribution to finance social security) levied on the import of goods into Brazil. As a result of this decision, taxpayers will be able to claim reimbursement of amounts unduly collected in previous years and their future tax burdens will be reduced.

Under the PIS and COFINS import rules, the ICMS levied on imports is calculated on a base that includes the amount of PIS/COFINS paid by the importer (as well as the ICMS itself paid, i.e. the amount of ICMS to be paid is included in its own calculation basis). This requirement has been subject to controversy, primarily because the computation of the ICMS does not comply with the concept of "transaction value" – this should be the PIS and COFINS import taxable base.

Since the Supreme Court decision was issued under the "general application" principle, it applies to all taxpayers in the same situation, although the temporal effect of the decision (i.e. whether it will apply to the last five years of all taxpayers, to taxpayers that were litigating the same issue before the decision was issued or only to future cases) is not clear. Historically, the Supreme Court has limited the effects of its decisions to taxpayers that already filed a suit before the decision was issued.

— Douglas Nogueira Lopes (Sao Paulo)
Partner
Deloitte Brazil
dolopes@deloitte.com

Marcelo Natale (Sao Paulo)
Partner
Deloitte Brazil
mnatale@deloitte.com

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Karina Roiuk (New York)
Senior Manager
Deloitte Tax LLP
karoiuk@deloitte.com

Chile:
Supreme Court allows tax authorities to request cross-border financial information from banks

Chile's Supreme Court issued a decision on 25 March 2013, in which it confirmed the right of the Chilean tax authorities (IRS) to require banks to disclose confidential information of certain customers.

The tax authorities issued rules (Resolution No. 120) in 2004 that require certain financial institutions to submit an annual sworn statement to the IRS about specified transactions. The statement requirement applies to banks, branches and representatives of foreign banks in Chile, exchange houses, financial institutions and other entities domiciled or resident in Chile that, in the preceding commercial year, engaged in transactions on behalf of third parties involving the transfer of USD 10,000 or more (or the equivalent in another currency) into or out of the country.

In 2005, a group of 21 banks filed a claim before the competent lower civil court requesting the annulment of Resolution No. 120. The banks argued that the Chilean tax authorities lacked the legal authority to impose the reporting obligation on banks because the relevant transactions were protected by the bank secrecy laws, under which banks are legally prohibited from disclosing the information unless the account holder actually consented to the disclosure.

Chile's banking law provides that deposits and other funds obtained by banks from the public are subject to strict banking secrecy; no information or data on such accounts may be disclosed to any person except the customer and his/her representative. However, transactions other than deposits carried out by banks are subject to a lesser form of bank secrecy, called the "bank reserve guarantee." Transactions falling within the scope of the bank reserve guarantee may be disclosed only to an entity or individual that can demonstrate that it has a legitimate interest in the transactions and that the disclosure will not cause an economic detriment to the bank's customer.

The tax authorities argued before the lower court that the transactions under Resolution No. 120 fell within the scope of the bank reserve guarantee, rather than the bank secrecy guarantee. Consequently, the IRS only had to demonstrate the existence of a legitimate interest to be entitled to obtain the information from the banks, which is self-evident in the case of the IRS since the IRS is legally responsible for overseeing compliance with the tax laws.

The lower court and subsequently the appeals court agreed with the banks' claims that they were not obliged to disclose transactions covered by Resolution No. 120. The Supreme Court, however, disagreed and overturned both decisions. According to the Supreme Court, the transactions referred to in Resolution No. 120 fall within the scope of the bank reserve guarantee, and because the IRS is legally responsible for ensuring compliance with the tax law, it has a legitimate interest in having access to such information.

The Supreme Court decision confirms that, except for deposits that are covered by the strict bank secrecy provision, the Chilean tax authorities are entitled to request and obtain from banks and financial institutions information on transactions performed for their clients, without having to evidence a legitimate interest, unless the information concerns one or more specific clients, in which case the tax authorities will have to provide justifications for the disclosure requirement.

— Joseph Courand (New York)
Client Service Executive
Deloitte Tax LLP
jocourand@deloitte.com

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Peru:
Update on reporting obligations applicable to indirect transfers

The Peruvian tax authorities (SUNAT) recently posted information on their website that addresses the requirement that resident legal entities notify the authorities when their shares or participating interests are transferred indirectly. The information aims to assist affected taxpayers with their compliance obligations until official guidance is issued.

Indirect transfers and capital gains tax

According to rules that apply as from February 2011, capital gains derived from certain indirect transfers of the shares of, or participating interests in, a Peruvian legal entity fall within the Peruvian tax net (taxed likely at a rate of 30%), as follows:

- Where the shares of (or participating interests in) a nonresident entity that, in turn, owns directly or indirectly shares of (or participating interests in) a Peruvian entity are transferred and either:
    - During the 12 months before the transfer, the market value of the shares (or participating interests) of the Peruvian company owned directly or indirectly by the nonresident entity is equal to 50% or more of the market value of all the shares or participating interests representing the equity capital of the nonresident. In addition, there must be a transfer (or transfers) of shares (or participating interests) representing 10% or more of the equity capital of the nonresident entity within the relevant 12-month period; or
    - The nonresident entity is resident in a tax haven or low tax jurisdiction for Peruvian tax purposes, unless it can be demonstrated that the previous condition is not satisfied.
- Where the nonresident (directly or indirectly) issues new shares or participating interests as a consequence of a capital increase (generated by a new capital contribution, capitalization of credits or a reorganization), and assigns them a value below their market value. This deeming provision will only apply, however, if at least one of the above circumstances is present.

In absence of a local acquirer, the Peruvian legal entity whose shares or participating interests are acquired is jointly and severally liable with the nonresident transferor for the payment of any capital gains tax that may arise from an indirect transfer if, in the 12-month period before the transfer, the parties are economically related.

To mitigate the practical difficulties in monitoring such transactions, the 2011 law requires resident legal entities to notify the SUNAT when their shares or participating interests are transferred indirectly. The SUNAT was asked to issue guidance on the appropriate form, terms and conditions for making the notification, but this has not taken place, so the SUNAT has posted information on its website that should help to facilitate compliance with the reporting obligation.

Format and deadlines

The income tax rules typically require that resident legal entities notify the SUNAT of any transfer, issuance or cancellation of shares (or participating interests) within the first 10 business days of the month following the month in which the transaction took place. A specific form is used for these purposes ("Issuance, Transference and Cancellation of Shares"). The minimum information required in the form is as follows:

- Identity of the transferor and acquirer;
- Number of shares or participating interests owned per participant after the transaction, their par value and the percentage they represent of the equity capital of the company; and
- Date of the transfer.

The form can be downloaded from the SUNAT's website and can be used to report direct transfers of shares or participating interests. According to the information on the website, this form also can be used to report indirect transfers of shares or participating interests.

Comments

The revised capital gains tax rules continue to give rise to practical implementation issues. Additional regulations to be issued by the Ministry of Economy and Finance are expected to provide workable provisions for both taxpayers and the SUNAT, which explains why the SUNAT has not issued its own guidance on the reporting obligation. Nevertheless, since the

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SUNAT has responsibility for monitoring the relevant transactions and collecting the tax due, it is not surprise that it has provided interim guidance to facilitate compliance with the reporting obligation.

Failure to comply with the reporting obligation within the 10 business day term could result in the imposition of a penalty equal to 30% of the Tax Unit (1 UIT 2013 = PEN 3,700). Affected taxpayers should evaluate this from a risk management perspective, and decide whether to comply with the reporting requirement established in the 2011 rules, either through this mechanism or by submitting a timely letter to the SUNAT with the same specifications.

— Gustavo Lopez-Ameri (Lima)
Partner
Deloitte Peru
glopezameri@deloitte.com

Ana Luz Bandini (New York)
Senior Manager
Deloitte Tax LLP
anbandini@deloitte.com

Uruguay:
Tax incentives provided for hydrocarbons sector

Following the signing of contracts for exploration for hydrocarbons with four oil companies on 5 October 2012, the Uruguayan government published a decree (Decree 68/013) that promotes hydrocarbon exploration activities carried out within Uruguay's continental shelf under the contracts. The decree provides tax benefits for both contractors and subcontractors and the benefits apply as from the date the contracts were signed.

Incentives

Under Uruguayan law, holders of contracts for exploration for hydrocarbons are only subject to corporate income tax and social security contributions.

The incentives provided in Decree 68/013 apply to both contractors and subcontractors, which are defined as follows:

- Contractors are the parties that have been awarded the contracts, as well as assignees of the rights established in such contracts; and
- Subcontractors are entities and individuals hired by contractors to carry out part of the exploration. Subcontractors hired by the Uruguayan government petroleum company, ANCAP, are included in this category.

The benefits granted to contractors under the decree are as follows:

- An exemption from the nonresidents' income tax (IRNR) with respect to interest on loans granted to the contractor by a foreign company (normally a 12% withholding tax applies). Although the exemption from IRNR is not an actual benefit for the contractor, but rather for the company granting the loan, because common practice in Uruguay is for foreign companies to require "tax free" payments, the IRNR ultimately is a cost for domestic companies. The exemption will alleviate this burden for Uruguayan companies;
- An exemption from corporate income tax, IRNR, VAT and transfer tax that may apply on a transfer of the contractor's equity to another company;
- To prevent an input VAT cost (contractors already are exempt from charging output VAT), the decree grants a credit for VAT charged to a contractor on the purchase of goods and services related to its exploration activities, i.e. a contractor can recover the VAT invoiced by its suppliers; and
- An exemption from customs charges (tariffs, taxes, fees, duties, etc.) for the temporary import and re-export of machinery, equipment, materials, tools, vehicles and supplies necessary to carry out exploration activities.

A subcontractor is entitled to similar benefits:

- An exemption from corporate income tax and IRNR. This should cover all situations in which a charge to these taxes may arise: where a nonresident subcontractor does not have a permanent establishment (PE) in Uruguay (in which case there would be liability to IRNR) and where a nonresident subcontractor has a PE or where the subcontractor is a local company (in which case there would be liability to corporate income tax);

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- An exemption from charging output VAT on its supplies of goods and services and, as in the case of a contractor, a credit for input VAT charged on purchases;
- An exemption from net worth tax; and
- An exemption from customs charges (tariffs, taxes, fees, duties, etc.) for the temporary import and re-export of machinery, equipment, materials, tools, vehicles and supplies necessary to carry out exploration activities.

Comments

The tax benefits granted to contractors and subcontractors engaged in hydrocarbon projects are similar, since both are exempt from most applicable taxes, such as VAT, custom duties and net worth tax. The main difference in treatment relates to income tax: contractors continue to be subject to corporate income tax, whereas subcontractors are exempted from corporate income tax or IRNR, whichever tax is applicable. It should be noted that contractors may be able to reduce their corporate income tax liability under Uruguay's general investment regime, provided certain requirements are met.

The incentives granted under Decree 68/013 should help to reduce the tax costs of the affected companies, and if the contractors' exploration activities are successful, the benefits derived from such findings clearly would outweigh the tax costs incurred.

— Enrique Ermoglio (Montevideo)
Partner
Deloitte Uruguay
eermoglio@deloitte.com

Javier Bugna (Montevideo)
Senior Manager
Deloitte Uruguay
jbugna@deloitte.com

In brief

Argentina – A tax amnesty became effective on 25 March 2013 with respect to all federal tax, social contributions and certain customs duties liabilities incurred before 1 March 2013. Withholding tax, health care and tax prepayment liabilities are not within the scope of the regime. The amnesty does not provide for any reduction in the tax debt; instead, it allows taxpayers to pay the aggregated debt, interest and penalties in up to 120 monthly installments at a monthly interest rate of 1.35%. Taxpayers must apply to the Argentine tax authorities before 1 August 2013 to participate in the amnesty.

Bolivia – Recent guidance issued by the tax authorities clarifies the period for the setoff of tax losses. Net operating losses are subject to a three-year carryforward. A five-year period applies to companies in the hydrocarbon and mining sector and for companies registered after 9 September 2011 whose investment capital exceeds USD 150,000.

Colombia – The government is expected to issue a decree clarifying the tax treatment of capital gains derived from the alienation of a substantial participation in a Colombian listed company. According to the decree, foreign investors that dispose of more than 10% of the actively traded shares of a Colombian company listed on the Colombian stock exchange market will be subject to tax at a rate of 33%. Under existing law, the disposal of less than 10% of the shares of listed companies is a tax-free transaction.

Colombia – As from 3 January 2013 if a petroleum producer outsources production to outside a free trade zone, the producer, the importer and any related parties will become liable for any VAT payable. The Ministry of Mines (and not the tax authorities) determines the relevant percentages of materials that must originate within a free trade zone to qualify for free trade zone benefits.

Peru – The tax authorities are discussing a draft resolution to clarify the scope of the transfer pricing documentation requirements. Under Peru's transfer pricing law, taxpayers must submit an information return, as well as a technical transfer pricing study. The information return for fiscal year 2012 must be filed from 10 to 24 June 2013, depending on the last number of the taxpayer's ID. If the draft resolution is approved before June 2013, the technical transfer pricing study corresponding to 2012 would have to be filed as an appendix to the electronic return. This would be the first year in which the technical transfer pricing study is subject to a filing deadline, and it is unclear whether the tax authorities will provide an extension.

Uruguay – The General Assembly is considering a repeal of the tax on large holdings of rural real estate (ICIR), which the Supreme Court has declared unconstitutional, as well as a replacement tax that would be higher in certain cases. The ICIR

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would be repealed retroactively, and amounts already paid would be "refunded" in the form of credit certificates that could be applied against the payment of other taxes. The replacement tax would be in the form of a net worth tax on farm operations. The net worth tax would be levied at a rate of 1.5%, based either on the registration value of the land or the purchase value of the property, as revalued in accordance with the tax criteria. If approved, the proposals could negatively impact foreign investors with large rural real estate investments in the country.

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Norway
Tax increase announced for petroleum companies
The Norwegian government has announced proposed changes to the petroleum tax system that include reducing the "uplift" from 7.5% to 5.5%, which would result in a reduction in the overall uplift (i.e. for four years) from 30% to 22%. Also announced was a reduction in the general corporate income tax rate from 28% to 27%, but for petroleum companies, this rate reduction would be offset by an increase in the rate of the special petroleum tax from 50% to 51%.
[Issued: 9 May 2013]
URL: http://www.deloitte.com/view/en_GX/global/services/tax/cross-border-tax/international-tax/78f1c00003a8e310VgnVCM1000003256f70aRCRD.htm
URL: http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Alerts/dttl_tax_alert_Norway_090513.pdf

Malta
New treaty signed with Russia
Malta and Russia signed a new tax treaty on 24 April 2013 to replace the pending tax treaty signed between the countries in 2000. The entry into force of the new treaty is expected to contribute to the development of cross-border trade, as well as finance and investment relationships between the treaty partners. [Issued: 8 May 2013]
URL: http://www.deloitte.com/view/en_GX/global/services/tax/cross-border-tax/international-tax/8ab817a84e78e310VgnVCM2000003356f70aRCRD.htm
URL: http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Alerts/Global%20Tax%20Alerts/2013/dttl_tax_alert_Malta_080513.pdf

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