

Argentina Terminates Provisional Application of Tax Treaty With Switzerland

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On January 31 the Argentine official gazette published the Argentine government's decision to terminate unilaterally the provisional application of the tax treaty with Switzerland, a treaty that has generated controversy since its inception. (For prior coverage, see *Doc 2012-2448* or *2012 WTD 26-7*. For the 1997 Argentina-Switzerland treaty, see *Doc 97-30953* or *97 TNI 220-1*; for the 2000 protocol, see *Doc 2001-7559* or *2001 WTD 52-16*.)

The publication includes a summary of the note, subscribed by the Argentine minister of foreign affairs on January 16, informing the ambassador of Switzerland in Argentina of its decision not to be a party to the treaty and its accompanying protocol executed in 1997, or to the amending protocol and additional protocol, both executed in 2000.

Signing of Treaty and Subsequent Protocols

The treaty and its protocol were executed on April 23, 1997. Article 25 of the treaty conditions its entry into force on the exchange of letters between the governments informing that the constitutional requirements for the entry into force have been met. Switzerland provided such a notification, but Argentina did not, as the Congress failed to pass the treaty as a domestic law. One of Argentina's top concerns was the tax treatment of royalties (nontaxable at source under certain circumstances) and the possibility that such treatment would be expanded to other entities (at cost to Argentina) as a consequence of the most favored nation clause in some of Argentina's tax treaties.

On November 23, 2000, the countries entered into an amending protocol that modified some clauses of the treaty and its accompanying protocol. On the same date, an additional protocol was signed, whereby the countries agreed to the provisional implementation of the treaty, its accompanying protocol, and the new amending protocol as of January 1, 2001.

However, to produce a comprehensive refinement of the treaty, on August 7, 2006, a new amending protocol was executed that fully allowed the taxation of royalties by Argentina. But this amending protocol said it would enter into force concurrently with the tax treaty, which gave rise to a new controversy about whether the protocol's entry into force was subject to the definitive approval of the treaty or if the new text was also provisionally applicable.

Documents Referred to in Note and Official Gazette

The first paragraph of the note from the Argentine minister of foreign affairs to the Swiss ambassador states that it refers to the following documents:

- the tax treaty, dated April 23, 1997;
- its accompanying protocol, of the same date; and
- the 2000 amending protocol and additional protocol, both dated November 23, 2000.

The second paragraph says the Argentine government has decided not to be a party to the tax treaty and that, accordingly, its provisional application is no longer in force as of the date of the note (that is, January 16, 2012). The note does not mention the 2006 amending protocol at all.

This calls attention to the fact that the publication in the official gazette refers to the following documents:

- the tax treaty;
- its accompanying protocol;
- the 2000 additional protocol; and
- the 2006 amending protocol

Thus, the official gazette omits the reference to the 2000 amending protocol and adds a reference to the 2006 amending protocol, which was not considered in the note. The official gazette also refers to the "provisional implementation" of the 2006 amending protocol as taking place on November 23, 2000.

This inconsistency between the official gazette and the note reflects the controversy within the Argentine government over whether to apply the 2006 protocol provisionally despite the lack of congressional approval.

The note further confirms that the 1950 shipping and air transport treaty (mentioned in section 25 of the 1997 treaty) will further remain suspended. (For the 1950 Argentina-Switzerland shipping and air transport agreement, see *Doc 94-30232* or *93 TNI 251-56*.)

Controversy Over the Royalties Clause

Ever since the signing of the treaty and its accompanying protocol, paragraph 5(a) of the latter, which regards the treaty's royalties clause, has been considered a "controversial clause."

Although the second paragraph of the royalties clause in article 12 of the treaty includes a series of reduced withholding tax rates for some types of royalties, the "controversial clause" of the accompanying protocol establishes that "as long as

Switzerland does not, according to its internal law, levy a tax at source on royalties paid to non-residents, the provisions of paragraph 2 shall not apply and royalties shall be taxable only in the Contracting State of which the beneficial owner of the royalties is a resident."

Under these provisions, inasmuch as the internal Swiss legislation did not levy any withholding at source on royalty payments to nonresidents, taxpayers understood that the payment of Argentine-sourced royalties to any Swiss beneficial owner should not be subject to withholding taxes in Argentina.

The 2006 amending protocol eliminates paragraph 5(a) of the 1997 protocol. Yet, as previously mentioned, the entry into force of the 2006 protocol has never been clear, adding further complication.

Concern Regarding the Date of Termination

The second paragraph of the note states that the provisional application of the documents referred to therein "terminates as from the date hereof"; that is, as of January 16, 2012, although the publication in the official gazette wasn't until January 31, 2012.

The government has given informal notice that the termination will be considered to occur as of January 16, based on article 25 of the Vienna Convention on the Law of Treaties (the "provisional application clause"), which affirms that: "Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty."

Although the position of the Argentine government is clear, there is no agreement with the Swiss government on when the treaty should be formally terminated following the conclusion of its provisional application. Both governments have decided to focus on this issue during the next three months, as there are reasonable arguments to support a different position from that of the Argentine government.

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