

## Tax Penalty Amendments Move Through Congress

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# COUNTRY DIGEST

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Argentine President Cristina Fernandez de Kirchner in December issued Decree 2120/2011,<sup>1</sup> calling special sessions of the National Congress to discuss a series of unexpected tax proposals that were deemed of special importance for the recently reelected government's economic program.

The Chamber of Deputies and Senate considered 12 bills between December 15 and 22 and passed them all with little debate. Among the most significant measures are more aggressive penalties and provisions in the Criminal Tax Law (CTL) and the extension of some temporary federal taxes, including the financial transactions tax (FTT).

The National Congress also enacted the 2012 budget, extended the Economic Emergency Act<sup>2</sup> through December 2013, and approved a bill that restricts the immovable property that can be held by foreigners, among others.

The Argentine Revenue Service has also implemented a withholding tax for triangular transactions in cases where goods acquired abroad are not imported, but are resold to third countries. The most important measures of immediate interest are discussed in more detail below.

### Amendments to the Criminal Tax Law

Under new Law 26.753,<sup>3</sup> which became effective on January 6, the CTL now provides for up to nine years of imprisonment for tax and social security fraud and stipulates objective thresholds (a fixed amount of Argentine pesos) for determining the amount of unpaid taxes that constitute a criminal offense. Those amounts had become outdated because of inflationary pressures in Argentina since the devaluation of the peso in early

2002. Because of the outdated amounts, almost every tax dispute before the amendments triggered a criminal tax issue because the previous thresholds were too low.

Law 26.753 quadruples the old thresholds — for example, increasing the amount that constitutes “simple evasion” from ARS 100,000 to ARS 400,000 (from approximately \$23,146 to approximately \$92,586), and the amount that constitutes “aggravated evasion” from ARS 1 million to ARS 4 million (from approximately \$231,465 to approximately \$925,862). The new bill also identifies the use of “faked invoices” to document tax deductions or credits as aggravated evasion.

One of the most important changes under the new law is that state tax deficiencies can also trigger criminal offenses. (Previously, only federal taxes were included under the CTL.)

There are constitutional objections to a federal law governing criminal offenses involving taxes that are in the exclusive domain of the states. However, the current administration was able to build the necessary congressional support, so the next stage of the objections will take place before the judiciary.

The new law also eliminates an article under which it previously was not mandatory for the Revenue Service to file a complaint (even when the thresholds were exceeded) if the facts and circumstances showed that no criminal offense had been committed.

Furthermore, the law states that tax offenders are not eligible for probation, attributes criminal liability to corporations and other entities, and provides different penalties (such as the cancellation of registration, the suspension of activities for up to five years, the loss of state benefits, and fines) that will be added to administrative penalties established in other regulations.

The old CTL allowed the taxpayer, in some cases, to halt criminal prosecution by paying the disputed amount. The new law eliminates that possibility, characterizing it as an unjustified privilege, and provides that taxpayers will be exempt from criminal liability only if taxes are “spontaneously” paid, and not as a consequence of a tax audit in process.

These new amendments have important consequences. First, because Argentina recognizes the “most

<sup>1</sup>Published in the official gazette on December 12, 2011.

<sup>2</sup>Law 26.204, published in the official gazette on December 20, 2006.

<sup>3</sup>Published in the official gazette on December 28, 2011.

favorable criminal-law principle” as a matter of a constitutional right, the new standards may result in the dismissal of a number of ongoing criminal prosecutions<sup>4</sup> (for example, a tax assessment of ARS 200,000 for the 2010 fiscal period, which could be characterized as “simple evasion” under the previous law, would not be considered a criminal offense under the new law).

Also, the Revenue Service previously could consider a criminal offense to occur when a taxpayer filed tax return amendments that exceeded the established thresholds. Because the new text provides that spontaneous tax payments will not be punished, the long-standing debate over the consequences of an ex post amendment of a tax return may no longer be relevant. However, the characterization of a payment as “spontaneous” will probably lead to new discussions because the law provides little guidance.

Also, procedural difficulties could arise as a result of the inclusion of state taxes in the CTL. For example, each state will have to enact its own procedural rules to prosecute and judge such crimes, and they will all have to agree and coordinate how to prosecute cases when the dispute is over how the taxable amount is allocated among the different jurisdictions.<sup>5</sup>

Finally, the number of lawsuits is likely to increase as a result of the inclusion of state taxes in the CTL and the elimination of the rule that had allowed the Revenue Service to bypass criminal prosecution when the facts and circumstances showed that there was no evidence of willful misconduct.

### Other Tax Amendments

The National Congress also extended the terms of the FTT<sup>6</sup> and the cigarette surtax<sup>7</sup> until December

2013 and December 2012, respectively.<sup>8</sup> The FTT generally is levied at a rate of 0.6 percent on all debits and credits in banking accounts opened with Argentine financial institutions and on certain other transactions performed outside of the banking system to circumvent taxation. The cigarette surtax is levied at the rate of 7 percent on the final price of cigarettes.

Both taxes originally were set to expire on December 31, 2011, but the government considered it essential to extend them to provide the national government and the state jurisdictions with the necessary resources to carry out specific functions.<sup>9</sup>

Finally, the annual allowable income tax deductions for individuals have been increased, and the executive branch has been authorized to modify them as needed to keep in step with changing government policies.

### New Tax for Triangular Transactions

The Revenue Service recently issued General Resolution 3240/2011,<sup>10</sup> which introduced a withholding tax of 3.5 percent (that is, an advance payment of income tax, creditable against the taxpayer’s final annual tax liability) applicable in triangular transactions in which a local intermediary buys goods abroad that are resold to third countries.

As happens with regular export transactions, intermediaries will have to repatriate and sell foreign currency proceeds in accordance with Argentine Central Bank regulations. Financial institutions will act as withholding agents at the time the foreign exchange transaction is performed.

If the withholding would produce an excessive credit balance, taxpayers may request a certificate excluding them from the regime. The Revenue Service will decide whether to grant or reject requests on a case-by-case basis.

The new withholding tax is effective from January 1, 2012. ◆

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<sup>4</sup>Ex post facto criminal law may be applied only if the retroactive application benefits the accused person.

<sup>5</sup>Taxpayers who carry out activities in more than one Argentine state have to assess turnover taxes, considering their gross revenues, and allocate them among the different jurisdictions in accordance with rules set forth in a multilateral agreement signed by all the local states.

<sup>6</sup>Law 25.413, published in the official gazette on March 24, 2001.

<sup>7</sup>Law 24.625, published in the official gazette on January 9, 1996.

<sup>8</sup>Law 26.730, published in the official gazette on December 28, 2011.

<sup>9</sup>See the “whereas clauses” of the FTT and cigarette surtax amendment bill.

<sup>10</sup>Published in the official gazette on December 22, 2011.