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INVESTING IN THE REPUBLIC OF ARGENTINA: APPLICABLE WITHHOLDING RULE AND EXCEPTIONS ACCORDING TO THE ARGENTINE CENTRAL BANK REGULATIONS

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I. INTRODUCTION

IN Argentina, according to the provisions of Argentina Decree 616/2005 (dated June 9, 2005) and certain communications of the Central Bank, effective June 10, 2005, a 30-percent withholding applies to certain fund investments made from abroad.¹ This amount is retained by the involved financial entity for a 365-day term as a deposit that does not accrue any interest. The main purpose of this regulation is to prevent speculative investments that exploit short-term profit opportunities and then leave the country for new emergent markets.

Accordingly, both the aforementioned decree and the Central Bank communications state that the 30-percent withholding shall be applied to the following operations.

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1. See Decree No. 616, June 9, 2005, <http://www.infoleg.gov.ar/infolegInternet/anexos/105000-109999/106969/norma.htm>.

II. WITHHOLDING APPLICABLE TO INVESTMENTS MADE THROUGH FOREIGN FINANCIAL LOANS

Both Decree 616/2005 and the Central Bank communications state that a 30-percent withholding shall be applied to the following operations:

- a) financial debts of the financial and non-financial private sector, except for primary issuance of debt instruments with public offering and quotation in self-regulated markets,
- b) primary issuance of shares of resident companies without public offering and quotation in self-regulated markets, insofar as they do not represent direct investment funds,
- c) portfolio investments made by nonresident companies destined to hold local currency and financial assets and liabilities of the financial and non-financial private sector, insofar as they do not correspond to the primary subscription of debt instruments with public offering and quotation in self-regulated markets and/or to the primary subscription of shares of resident companies with public offering and quotation in self-regulated markets,
- d) portfolio investments made by nonresident companies destined to acquire any right in secondary markets regarding securities issued by the public sector,
- e) portfolio investments made by nonresident companies in the primary subscription of bonds issued by the Central Bank,
- f) income obtained in the local exchange market from sales of external assets by resident companies of the private sector in an outstanding amount exceeding the equivalent of U.S. \$2 million in any calendar month, by entities authorized to make exchange transactions,
- g) funds entered into the local exchange market destined to subscribe to the primary issuance of securities, bonds, or participation certificates issued by the trustee of a trust, with or without public offering and quotation in self-regulated markets, whenever the aforementioned requirements are applicable to acquire any of the trust assets.²

III. EXCEPTIONS TO THE WITHHOLDING APPLICABLE TO INVESTMENTS MADE THROUGH FOREIGN FINANCIAL LOANS

Communication A 4377³ basically states that withholding should not be applied and that the funds should be released by the bank if the local company shows the appropriate bank⁴ that:

2. *Id.*

3. Communication A 4377, Argentine Central Bank, <http://www.bcra.gov.ar/pdfs/comytexord/A4377.pdf>.

4. Please note that depending on the appropriate bank involved, there may be some differences, although not substantial, regarding the documents necessary to prove that the initiation of the capitalization process with the Commercial Companies Registry has been performed.

- a) the liquidation of foreign currency of resident companies derives from loans in foreign currency granted by the involved local financial entity,
- b) it falls under the case of Debts of Multilateral and Bilateral Agencies of Credit and Official Agencies of Credit, stated in the Exhibit of Communication A 4323,⁵ either directly or through its related agencies,
- c) it is the case of other financial debts with foreign entities of the financial and non-financial private sector, insofar as the resulting exchange liquidation funds, excluding taxes and expenses, are simultaneously applied by the involved financial entity to:
 - i. the purchase of foreign currency to cancel principal of foreign debt or
 - ii. the purchase of long-term external assets. Accordingly, we will only consider direct investments by resident companies as purchases of long-term external assets if the customer proves the effective destination or use of funds in a definitive capitalization or in a purchase of foreign companies within a 180-day term since the incoming date in the exchange market,
- d) It falls under the case of other financial debts with foreign entities of the non-financial private sector insofar as:
 - i. it is contracted and cancelled within an average life not inferior to two years, including the payment of capital and interests, and,
 - ii. it is applied to investments in non-financial assets in the private sector. The plan of application must be contained in the customer's affidavit, together with a detail of the investment allowing the involved entity to unilaterally determine the destiny of the incoming funds. Such exception will automatically expire if the declared destiny is amended, in that case, the deposit contained in item six of Communication A 4359⁶ shall be made within ten business days,
- e) the funds of foreign currency introduced into the local exchange market are going to be applied to a primary subscription of participation certificates, bonds, or debt instruments issued by trusts intended to construct energy infrastructure works, with basic assets composed in whole or in part of specific debits created by Law No. 26095,⁷ insofar as they can be cancelled or rescued in whole or in part in terms not inferior to 365-running days, whatever their cancellation may be,
- f) the repayment term of the loan is not inferior to two years, including repayment of capital and interests. In this case, a certified copy of the loan agreement shall be submitted to the bank. In

5. Communication 4323, Argentine Central Bank, <http://www.bcra.gov.ar/pdfs/comytexord/A4323.pdf>.

6. Communication A 4359, June 10, 2005, Argentine Central Bank, <http://www.santanderrio.com.ar/comex/normativa/A4359.pdf>.

7. Law 26095, B.O., May 17, 2006, <http://www.infoleg.gov.ar/infolegInternet/anexos/115000119999/116424/norma.htm>.

order to maintain the exemption, the following conditions must be fulfilled:

- i. the loan must be specifically granted by the foreign creditor to finance micro-enterprises of low-resource persons,
- ii. the funds will be effectively used to finance micro-enterprises of low resource persons. The destiny of the funds regarding direct foreign loans of the non-financial private sector shall be provided in the aforementioned conditions,
- iii. that the entity in charge of receiving the funds by the exchange market:
 - a. contains in its corporate purpose the financing of micro enterprises of low-resource persons or those similarly situated, as being its main activity, which shall be proved by submitting the last audited annual balance sheet
 - b. provides technical assistance, follow-up, and training to the borrower, to develop its entrepreneurial capacity;
 - c. includes exemptions from the income tax, the value-added tax, and the gross income tax.
- g) incomes resulting from the export of assets with recourse in favor of the exporter made in foreign entities complying with the requirements set forth in item 2.f. of Communication A 4377,⁸
- h) the exchange purchases according to 475—*Application of Portfolio Investments to Cancel Debts*, which were performed pursuant to the regulations set forth in the Communication A 4178⁹ and its complementary material, insofar as they are applied simultaneously to the cancellation of services of the external debt foreseen in the regulations of performance of said funds, and are not contemplated within the deposit,
- i) the exchange market incomes as of July 11, 2005 are used in, the sale of external assets of resident companies of the private sector destined for the primary subscription of public documents issued by the National Government, which funds are in turn destined to purchase foreign currency to address its debt services.¹⁰

In order to maintain the aforementioned exemption of 30-percent withholding, the borrower shall submit to the bank, within a term of ninety-days since the release of the funds, documents that prove that the funds have been effectively applied to the destiny previously informed (non-financial assets). Otherwise, the 30-percent withholding applies.¹¹ In this regard, a certification issued by an external auditor following certain requirements (basically certifying the destiny of the funds of the loan) shall be submitted to the appropriate bank.

8. Communication A 4377, Argentine Central Bank, <http://www.bcra.gov.ar/pdfs/comtextord/A4377.pdf>.

9. Communication A 4377, Argentine Central Bank, <http://www.bcra.gov.ar/pdfs/comtextord/A4377.pdf>.

10. Communication A 4359, Argentine Central Bank, <http://www.santanderrio.com.ar/comex/normativa/A4359.pdf>.

11. *Id.*

When the destiny of the funds are modified during the term of the loan, the bank shall receive notice within a term of ten days, and the 30-percent withholding shall be applied.¹²

IV. WITHHOLDING APPLICABLE TO CAPITAL CONTRIBUTIONS

Both Decree 616/2005 and the Central Bank communications state that a 30-percent withholding shall be applied to capital contributions made from abroad to Argentina. As described before, this amount is retained by the involved financial entity for a 365-day term as a deposit without accruing any interest. The main purpose of these regulations is to prevent speculative investments destined to obtain considerable profits and then leave the country for new emergent markets to invest for short-term periods.

V. EXEMPTIONS TO THE WITHHOLDING APPLICABLE TO CAPITAL CONTRIBUTIONS

Communications A4359, A4237 and A4447 of the Central Bank provide for an exemption to the aforementioned withholding applicable to capital contributions.¹³ In this regard, the income of foreign currency in the exchange market by direct investment in the country—Code 447—shall be exempted from the withholding, insofar as the involved entity proves that the initiation of the definitive capitalization process with the Commercial Companies Registry has been performed.

The transfer of funds must have been ordered by the direct investor or must correspond to a re-transfer of funds from the foreign account to the local company. In that event, it is necessary to prove that those funds correspond to the contribution made by the nonresident investor and that the foreign account of the local company was temporarily used as part of the process of integration and of the income of funds in the local exchange market. In this regard, “temporary” means that the re-transfer of funds to the account of the correspondent bank of the local entity was executed in a period not exceeding the two business days subsequent to the crediting of funds date in the company foreign account as capital contribution.

Communication A 4554¹⁴ determines the terms within all the documents proving the aforementioned exemption shall be submitted, otherwise, the deposit (withholding of 30-percent) set forth in item six of Communication A 4359 shall be made. Additionally, listed are the docu-

12. *Id.*

13. See Communication A 4359, <http://www.santanderrio.com.ar/comex/normativa/A4359.pdf>; Communication A 4237, Argentine Central Bank <http://www.bcra.gov.ar/pdfs/comytexord/A4377.pdf>; Communication A4447, Argentine Central Bank <http://www.bcra.gov.ar/pdfs/comytexord/A4447.pdf>.

14. Communication 4554, Argentine Central Bank, <http://www.bcra.gov.ar/pdfs/comytexord/A4454.pdf>.

ments that the contributor shall file to initiate the capitalization process and have the 30-percent withholding released:

- shareholders meeting minutes stating the approval of the capital contribution,
- Annex VII Resolution Form 7/2005 signed by a legal representative of the company in Argentina and certified by a public accountant,
- capital contribution agreement with signatures legalized by an Argentine notary public,
- board of directors' minutes approving and accepting the capital contribution signed by the legal representative,
- accounting certificate stating the composition of the net capital of the company. The signature of the public accountant must be legalized by an accountants' public association,
- publication in the Official Gazette,
- copy of the stock ledger book and the meeting attendance book.

It is important to state that the 30-percent withholding is always applied to capital contributions, although when the funds are credited and all the necessary documents are submitted, such funds will be reimbursed.

VI. OTHER EXEMPTIONS TO THE 30-PERCENT WITHHOLDING

Other exemptions set forth in the regulations are as follows:

- a) incomes obtained by sales of participations in local companies to direct investors—Code 453—shall be exempted insofar as the involved entity proves the purchase of the representative party of the capital stock paid with those funds provided that said purchase be contemplated in the direct investment concept by means of the corresponding agreement, together with the document certifying that the registration of the amendment of the by-laws of the company with the Commercial Companies Registry has been initiated, if required by the company or by copy of the registration of the transfer of the new shares in the stock ledger book.

If the entity does not have the required documents when the amendment takes place, the deposit shall be made. The deposit might be released after the 365-day term or after submitting the above-mentioned required documents.

- b) incoming funds obtained by investments of nonresident companies destined to purchase real property—Code 489¹⁵—will be exempted from the deposit, insofar as the liquidation of funds is simultaneously made with the signing of the deed conveying title in favor of the nonresident company.

The income of external funds ordered by nonresident companies, destined to pay the contract of sale and the installments af-

15. *Id.*

ter selling real property being constructed in the country, may be registered as exchange incomes by direct investments, when:

- i. the entity may certify that the seller or customer of the entity is a company or a person experienced in the construction industry or in the sale of real estate,
- ii. the beneficiary of the transfer ordered by the nonresident purchaser is the seller,
- iii. the funds are simultaneously destined to the exchange liquidations and to the payment of the contract of sale and the expenses arising thereof, or
- iv. in the event the funds are applicable to the payment of installments subsequent to the execution of the contract of sale, a contract of sale, containing the legal requirements, including its registration in the jurisdiction where it may be possible, shall be required. In that case, there shall be a correspondence between the funds sent and the installment paid as set forth in the contract of sale.

