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Tax treatment of computer software

Traitement fiscal du logiciel dans l'informatique

Steuerliche Behandlung von 'computer software'

Regimen fiscal de los programas de computación

Argentine
Argentina
Argentinien

National Reporter
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Preliminary remarks

The rapid expansion of data processing systems raises, as a true challenge to lawyers, the problem of adjusting the law to this new reality represented by heterogeneous legal relationships. The radical nature of this change has an impact on all the ramifications of the law and also makes its effects felt in the fiscal field.

For this reason, the subject before us proves to be timely not only because of its topicality but due to the urgent need to provide an answer to the still unsettled problems presented to the legal world by the data processing industry.

Generally speaking, Argentine legislation does not include specific provisions on software. No legal protection system has been expressly provided and from this it follows that a high degree of vagueness is to be found in many matters such as contractual and extra-contractual liabilities for the use of software, protection of users, defense of the privacy of third parties who are possibly affected by access to information, crimes through the use of programs or against these, and tax matters, which will be the specific subject of this paper.

We no doubt have before us a virgin field of law which will put to the test the flexibility of its traditional institutions and the imagination of lawyers who will have to bring such institutions into harmony with the transformation or development of new legal remedies.

The vagueness of the general legal system is translated to the tax system and becomes more acute because to this vagueness is added the complexity of tax rules.

Since the expansion of software is comparatively recent, no case law or administrative practices exist that point the way with certainty regarding the hypotheses of conflicts that may arise in the tax field.

Owing to the absence of specific legal regulations, the solutions must be sought in the general legal system. These solutions are based on certain assumptions that serve to guide the interpreter in the treatment of software in the face of the different taxes. These assumptions are:

a. Type of software. A distinction should be made between base software and application software, and within the latter between the "customized" software, the "standard" software and the "canned" software.

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b. Means used for transmission of software, that is, electronic or nonelectronic, tangible (disks, tapes) or intangible (via cable, telephone or satellite).
c. Legal method used for transmission: license for use, assignment, construction contracts, service contracts, sale, and so forth.
d. Tax treatment given to software by each of the above individuals, particularly the producer and the buyer, in tax returns.

I believe it useful that the tax setting be preceded by identification and analysis of the foregoing circumstances which will serve as a basis for the attribution of the taxable fact.

The purpose of this paper is to give an account of the course of these matters in Argentina through a description of legislation in force, and to test the solutions in respect of possible problems, which have been adopted or suggested by case law, doctrine and administrative and business practices.

Finally, I wish to point out that I have omitted definitions in the certainty that common technical terms are used. I will simply explain that the term *software* will be understood to mean the whole set of instructions to be used in a computer in order to achieve a given result, and to include the preceding documentation, the "source" and "object" programs, the documentation of the program and its manuals.

General legal system

As mentioned above, in Argentina there are no legal provisions specifically dealing with software protection. This circumstance has led to a situation in which this protection is sought from amongst a multitude of remedies with different "scope and effectiveness": contractual and extra-contractual specifications; ordinary (civil and criminal) liability; copyright; industrial property; trade-marks, unfair competition.

Within the ample protection given by the Constitution to a person's (tangible and intangible) property, it is envisaged that "any author or inventor is the exclusive owner of his work, invention or discovery for such time as shall have been specified by the law" (Article 17).

The Civil Code, in turn, provides that the right to possess a thing, dispose of it or avail oneself of it and use and enjoy it is inherent in property in accordance with its regular excercise (article 2513).

These precedents have been mentioned for the purpose of explaining that, to the extent in which software meets the requirements to be considered as a work, the protection of its creator's right will be assured.

As in doctrine and comparative jurisprudence at least three possibilities have also been raised in Argentina in this respect:

1. Copyright protection.
2. Patentability.
3. Special Law.

It is important to note that any of the above possibilities has been influenced

by principles that go beyond legal considerations, such as the conception on the national policy to be followed in the matter of data processing, specially in regard to the approach to technological exchange with the more economically and technologically developed countries.

I will deal with them below:

1. Copyright

It can safely be stated that in Argentina software is duly protected by Law No. 11,723 referred to as "Intellectual Property Act". Although there is no written rule specifying this or any important court decision in this respect, in practice the controversial use of how the development and sale of software can be best legally protected has so far been settled through application of copyright rules. There is a consensus of opinion that the legal protection of software should be maintained within this legislation, without prejudice to making the necessary amendments to Law No. 11,723 (enacted in 1933) in order to update it and adjust it to the peculiarities of software.

Article 1 of this law states that its provisions cover scientific, literary and artistic works, irrespective of reproduction procedures.

In ordinary practice, owners deposit the software with the Dirección Nacional de Derechos de Autor (National Copyright Bureau) just as do authors of literary works or musical compositions. Law 11,723 requires registration with this Bureau in order to exercise the relevant rights whenever the programs are used in public ("canned" type software). On the other hand, for the rest of the programs it has become customary to register them under the unpublished work system where registration is replaced by a deposit in a sealed envelope. This procedure gives the work an authentic date and protects it from unauthorized reproduction.

In regard to copyright, Argentina has ratified the Bern Convention of 1886, the Inter-American Copyright Convention adopted at Washington in 1946 and the Universal Copyright Convention adopted in Geneva in 1952.

There are not significant Court decisions so far specifically declaring that software is an intellectual work protected by Law 11,723, but some precautionary measures have been taken to protect an author against unauthorized reproductions, based on application of this law and the Bern Convention.

2. Patentability

Law No. 111 of "patents" protects inventions and discoveries, understood as "the new industrial products" or "the new means and the new application of already known means to obtain an industrial result or product."

Article 4 of this law excludes from patenting any purely theoretical products in respect of which no industrial application has been stated.

This argument has been systematically used by the Patent Office (Dirección

Nacional de la Propiedad Industrial) to oppose patenting of software and it so decided through Regulation No. 15 issued on December 11, 1975.

It should be noted, however, that in one case the courts revoked a decision of the Patent Office and decided that a method for optimizing remote data transfer be patented (case IBM v. Dirección Nacional de Propiedad Industrial on denial of patent – Appellate Court for Actions under Administrative Law – Room 1, June 21, 1984.) This finding should not be extended beyond the particular circumstances substantiating it, but it may justify the patentability of some type of software, either because of integration thereof with hardware or by reason of its use to attain an industrial result.

3. *Special law*

There is a trend of thought which, even considering software protection through copyright legislation as feasible, considers it to be insufficient and advocates a *sui generis* legislation as the best way of protecting software.

There are others who demand a specific legislation but they use different arguments based on the special nature of software which they consider belongs to a category different from that of scientific, artistic or literary works.

The most significant expression of this trend of thought is the draft bill drawn up by the Undersecretariat of Data processing and Development of the Secretariat of Science and Technique, Ministry of Education and Justice, of the National Government, which advocates a special protection system for software on the basis of considering it a technological product. This bill has not yet been discussed in Congress.

TRANSFER OF TECHNOLOGY

Law 22.426 created a system applicable to those contracts which have as their principal or accessory purpose, the transfer, assignment of licensing of technology or trade-marks, for a consideration of value, on the part of nonresidents in favor of (public or private) natural or juridical persons with domicile in Argentina, provided that such acts have effects in Argentina.

The regulation approved by Decree 580/81 defines "technology" as any technical knowledge for the provision of a service (Article 1 (o). "Transfer of technology" contracts must be registered with a government agency – (Institute of Industrial Technology)).

Until now, this administrative agency has rejected attempts (which were not numerous) to register any contracts whose purpose was the provision of software. But, recently, an Appellate Court revoked an administrative decision to the effect that software applicable to the solution of specific problems, developed on the basis of models, rules and qualities required by the user, fits within this concept of technology and, consequently, declared it subject to the provisions of law 22.426 (National Appeal Court for Federal and Administrative

Matters – Room I, August 25, 1987, in re "American Express Argentina S.A.").

We believe that this court decision should be circumscribed to the peculiarities of that particular case and it could only be applicable to the kind of "customized" software, which once again leads one to stress the importance of a case-by-case analysis, as well as the difficulties encountered in finding a single answer on the applicable legal system, at least in the present state of legislative indefinition.

CRIMINAL LEGISLATION

Argentine criminal legislation does not cover data processing crimes which in our opinion include any unlawful behavior involving data processing or transmission. In the absence of specific provisions, the punishment of illicit acts is imposed through merging of unlawful conduct in the ordinary criminal law (robbery, fraud, disclosure of secrets, damage, and so forth).

Law 11.723 has set up a specific criminal system for those who disregard the rights listed in it. If the protection of software provided by this law is accepted, then the crimes specified in it will also be applicable.

In this respect, article 71 of this law provides that any person who in one way or another ignores any intellectual property rights recognized by the law shall be punished with the penalty established by the Criminal Code for fraud (6 months' to 8 years' imprisonment).

There is no court decision fitting the crimes committed against the creator of a program into a particular penal institute. No accusation in this respect is known to have been made either.

ACCOUNTING TREATMENT

The accounting treatment of costs incurred in the production of software revives the controversial question of what would be the most suitable way of stating and measuring intangible property.

The cost involved in the program is, in essence, made up of investments in research and development effected to create it and, within these, the cost of materials (medium) whether they are of one's own manufacture or purchased from third parties, absorbed labor costs, overheads connected with investment, other intangible goods purchased to develop the software and, finally, any disbursement reasonably related to its production.

Regarding the classification of investments in software as "intangible assets", there appears to be agreement in our doctrine insofar as they express a value the existence of which will depend on the future possibility of producing profits.

Yet, there are in Argentina no rules, administrative practices or technical reports of professional organizations specifying or recommending the accounting treatment to be given to it in respect of the two options available:

1. To charge the costs to the results of the relevant fiscal year.

2. To capitalize such costs and write them off in a stated period fixed in terms of the useful life of the asset (the period where expectations of future recoverability are extinguished). This activation includes legal expenses on account of registration.

There are no accounting rules suggesting a different treatment of software purchased or developed on the basis of one's own production and, in either case, if it is intended for the producer's own use or for sale.

Accounting practices in Argentina show that computer programmers normally charge costs against the results of the relevant fiscal year.

Yet, from the technical accounting standpoint it has been noted that this treatment should be revised if reasonable expectations of recovery or future profit exist.

This possibility of recovering the economic value is a factual question that will depend on the type, application or intended use of the program. Nevertheless, a first distinction could be made between:

1. Expenditure on research and planning.
2. Expenditure on development and application.

Any expenses incurred in the research or planning stage could be charged to the results insofar as their possible charge to future income is unknown. But this is not the case with investments in development when, depending on the nature of the product, there are good reasons to expect that income attributable to future fiscal years will be generated, in which case they should be entered in the accounts under "intangible property", capitalized by the accumulation of costs and written off in terms of their expected economic life.

Tax system

The Argentine tax system is structured on the basis of a double jurisdiction of tax authority:

a. national
b. provincial

The taxes on the main manifestations of tax-paying capacity (income, consumption and property) affecting the software business are as follows:

1. income tax (national)
2. tax on gross receipts (provincial)
3. corporate capital tax (national)
4. value added tax (national)
5. stamp tax (provincial)
6. import and export duties (national)

1. Income tax

1.1. The income tax law (Law 20.268) does not provide for a special treatment of income derived from development, transfer and sale of software. Hence

the fact that this treatment depends on the legal nature assigned to it. Article 20 (j) of this law exempts any profits "arising from exploitation of copyright and the remaining profits derived from those rights which are protected by law 11.723".

Mention of the remaining profits refers to any earnnings of those persons referred to in Article 4 (c) of Law 11.723, that is, those persons who translate, rehash, adapt or alter a work.

Computer programmers are considered to be protected by this exemption, but this is subject to compliance with the following conditions:

a. that the tax be levied directly on the authors or their successors.

   This rule is designed to benefit natural persons and their successors. The term "successors" used in article 20 has been taken from a similar wording contained in Law 11.723. It is not clear if the term "successors" includes only an author's heirs or also third parties (assignees of such rights). Qualified national doctrine has understood that the exemption only includes the heirs. Yet, in a similar matter a court finding extended the exemption to the assignee (National Tax Court, decision D, 1479, November 12, 1984, case "Emi Odeón SAIC").
b. that the works be duly registered with the Dirección Nacional del Derecho de Autor (National Copyright Bureau). It should be noted that registration is a basic requirement to enjoy the protection of law 11.723 and also to be entitled to the exemption.
c. that the benefit be derived from publication, execution, sale or reproduction.
d. that the work has not been performed on request or originated in a purchase of works or services, whether or not a contract has been signed.

   This restriction is explained by the legislator's intention to benefit only those intellectual productions emerging from an author's free inspiration.

   In the matter of software, it represents an important limitation because it excludes from exemption any "customized" software to meet a user's needs.
e. that the beneficiary be an Argentine resident.

   The idea is to provide the exemption only to any works produced in Argentina, for which reason the law expressly specifies that the exemption shall not be applicable to nonresident beneficiaries.

An analysis of the foregoing conditions for qualifying for the exemption reveals the inadequate adaptation to software of a privilege designed to protect the authors of literary, artistic or scientific works.

1.2 NONRESIDENT BENEFICIARIES

Nonresident beneficiaries are those who obtain profits from an Argentine source and receive them in a foreign country, or those who, although receiving them in Argentina, do not have permanent residence in this country.

When net benefits are paid to these persons, those who pay them must with-

hold and pay into the Internal Revenue Service, as a single and final payment, 45% on a presumed net income. This presumed net income will vary according to the reason for which the remittance of profits is made.

Any payments to nonresident beneficiaries arising from copyright exploitation in Argentina are subject to a reduced withholding tax equal to 15.75% (45% of a 35% presumed net income).

In order to be entitled to this preferential rate, article 93 (b) requires that the works be duly registered with the Dirección Nacional del Derecho de Autor (National Copyright Bureau) and that the profits be derived from the presumed circumstances listed in article 20 (j) referred to above.

Business practice in Argentina shows that the local licensee withholds the 15.75% rate on any payments made by the foreign licensor (the holder of the rights). The rights on "standard" and "canned" software are usually assigned through license contract on software use.

It should be noted that because of the effect of the reference made by article 93 (b) to article 20 (j), the payment of "customized" software development, a common occurrence, for example, in the data processing industry, does not enjoy the benefit of the reduced rate.

What rate is to be paid in the case of "customized" software licensing or when the conditions required by article 20 (j) have not been met?

In this case, the general rate stipulated for nonresident beneficiaries, which amounts to 36%, must be applied.

Yet, having regard to the "American Express Argentina" court decision referred to above where the Federal Court described as a form of transfer of technology the software used to solve specific problems, and developed on the basis of guidelines, rules and quality standards required by the user, we believe that the lower percentage (27%) provided for in article 93 (a), section I, of the income tax law for transfers of technology could be applicable.

Of course, to be entitled to this treatment there should be a contract registered with the Authority responsible for implementation of the system created by the Law on Transfer of Technology (Instituto Nacional de Tecnología Industrial – I.N.T.I.). Certain conditions provided for in this law should also be complied with. Until now, this agency did not admit registration of software-use license agreements, and it was precisely against one of its decisions that the judgment referred to above was pronounced. If this judgment, which has now been appealed against, were ratified by the Supreme Court of Justice, then the abovementioned agency is likely to start admitting registration of "customized" software license agreements as technical assistance.

1.3. EXPENSES ON RESEARCH AND DEVELOPMENT

When considering the treatment to be given to expenses on research and development in their tax returns, software producers face the alternative of direct deduction or of writing off. The law offers eithers option.

The underlying general principle of the income tax law is deduction of any

expenses related to the source producing the income; that is, any expenses necessary to obtain, maintain and preserve the taxable income (articles 10, 17 and 87 (a)).

Therefore, it is important to consider the condition of taxable or nontaxable income attributed to the proceeds of software exploitation. If the whole of the income obtained is considered to be entitled to exemption under article 20, then the question of deductible expenses becomes less important.

When referring to the accounting treatment of expenses on research and development, I gave the reasons that might justify considering them to be amortizable assets. It should be noted here that in our legal system it is possible to write off these expenses for tax purposes, even if the taxpayer had not entered any sum in the books on this account and irrespective of the result shown by the fiscal year.

The law admits deduction of "the writing off of any intangible property" that by its characteristics has a limited period of life, such as patents, concessions and similar assets (article 81 (e)). This concept includes the writing off of any expenses necessary to develop computer software.

The option between deduction and amortization is dealt with by the regulatory decree of the income tax law. Article 146 provides that any expenditure on research, study and development for the purpose of obtaining intangibles, may be either deducted in the fiscal year in which it has been incurred or written off over a period of time not to exceed five years. In the event of a sale of software of one's own production, its computable cost shall be formed by the sum of all the expenses incurred to produce it, provided that such expenses had not been deducted for tax purposes.

In spite of the fact that Argentina's experience in the production of software is not enough to draw a definitive conclusion, the tax practice shows a certain tendency towards direct deduction of expenses on research and development.

1.4. DEDUCTION OF SOFTWARE ACQUISITION COSTS

A taxpayer who purchases software, whether on a permanent or a temporary basis, with or without authorization to reproduce it, may also opt for direct deduction of its purchase cost or for its capitalization as an intangible property. This decision is contingent upon both the intended use to be given to the software and the possibility of future recovery of the investment.

If he opts for capitalization, article 84 of the law provides that intangible property shall be written off on the basis of the number of years of its probable useful life. It also admits other methods when justified by reasons of a technical character.

The regulatory decree, in its article 134, establishes that the amortization provided for in article 81 (e) of the law, transcribed above, will apply only in respect of purchased intangibles "the ownership of which constitutes a right which is extinguished by the passage of time". For the purpose of establishing the deductible amortizations, it provides that the purchase cost of such intangi-

bles shall be divided by the number of years during which, legally, they are protected because of the right they represent. Thus the purchase value will be deductible in that way.

The tying of the amortization to a legal protection period, stipulated by law 11.723 on copyright, with no regard to the peculiar nature of software, makes application of this provision – which, strictly speaking, was not conceived for this case – wholly inadvisable.

Having regard to the fact that one of the difficulties encountered in applying the copyright system to software is, precisely, the length of the legal protection period, I believe it is reasonable to write off computer software on the basis of its probable economic life or other reasonable criterium, such as the period of time for which its temporary use has been contracted should this be the case. This criterion finds a legal support in the already mentioned article 84 of the income tax law.

1.5. WITHHOLDING OF TAX FOR RESIDENTS

The provisions applicable to payment of income tax provide for a withholding on any payments made for various purposes among which mention is made of "the provision of services" (General Resolution N° 2501, article 1 (b)). The withholding tax amounts to either 7% or 25%, depending on whether or not the taxpayer is registered for the tax.

In Argentina the obligation to withhold the tax on payments for the provision of software has been considered doubtful (unless the beneficiary is protected by the exemption stipulated in article 20).

In my opinion, the solution will once again depend on both the nature of the software supplied and the legal forms connecting the parties in the circuit of production and sale. It should be found out, on a case by case basis, who are involved in the business transaction and how the production of software is contracted for, so as to determine whether such transaction is a sale, a construction contract or a service contract. Only this last one is subject to the withholding tax.

There are no legal administrative decisions on this question.

2. *Tax on Gross Receipts*

This is a local tax levied by the City of Buenos Aires and the provinces on gross receipts resulting from the usual exercise for a valuable consideration of commerce, industry, profession, trade, business, construction, goods and service contracts, or from any other activity practiced for valuable a consideration, irrespective of the result obtained and the nature of the taxpayer.

This tax is applicable to receipts from software exploitation, inasmuch as the different legislations only grant exemption related to intellectual work in cases of receipts for income from the creation or publication of books, newspapers,

periodicals or magazines, among the rights protected by law 11.723 on intellectual property.

3. *Corporate capital tax*

In Argentina, the "tax on capital" (Law 21.287, text amended in 1986) amounts to 1.5% and is applicable on the capital shown in the balance-sheets of corporations and other forms of business organization. The tax base results from deducting the computable liabilities from the assets (as adjusted according to the tax law).

If the capital taken as a base results from the business balance-sheet, one understands the correspondence that should exist between the tax treatment and the accounting treatment. Indeed, if the software production cost is charged to the results of the fiscal year, it will not be considered to be an asset and, consequently, the tax base will diminish; if, on the contrary, this cost is capitalized and written off in terms of the time of useful life, then it should be included as "intangible property" in the assets computable for the purpose of the tax.

In assessing the software of one's own production, the taxpayer may consider as capitalizable cost the investments in research, study and development, unless he had deducted them directly for determination of the income tax.

The treatment given by the purchaser of software may, according to its characteristics, also vary among the above-mentioned options. If it were considered an intangible asset, the rules of the tax on capital stipulate that it should be valued at the purchase cost, updated to the date of payment of the tax, less the sum resulting from applying the relevant depreciation charge pursuant to the income tax law.

4. *The Value Added Tax (Law 23.349)*

This tax applies at a 18% rate to mostly all transactions. For the purpose of this discussion, the following should be mentioned:

1. Sale of movable property (article 1 (a)).
2. Processing, construction or manufacture of movable property at the request of a third party (article 3 (c)).
3. Construction and service contracts specifically listed by the law so long as they are not included in 1 and 2 above (article 3 (e)).
   This means, and it is important to stress it, that the VAT does not comprise all construction and service contracts, but only those stated in the limited list of the law.
4. Permanent importation of movable property (article 1 (c)).

The inclusion in the above mentioned taxable facts arising from the transfer of software raises the difficulties associated with its indefinite nature. To overcome them it is necessary to classify the forms in which the software can be

offered and have regard to the legal relationships established by the parties in the productive-distributive circuit.

In this respect, it is important to distinguish between:

a. "package" or "canned" software
b. "standard" software with subsequent acceptance
c. "customized" software
d. technical assistance for software maintenance, updating, conversion or adaptation.
e. data processing
f. other services involving computer software.

The treatment by VAT of transfers of "package" or "canned" software to the ultimate user or consumer has not raised any doubts. As long as it entails the reproduction of the original version of a program, its transmission qualifies as a sale of goods included in article 1 (a) of the law.

The situation of "customized" computer programs or of software "adapted" to the client, is different. In this case, its legal nature as intangible property likens it to a construction contract, or possibly, a provision of services. This being so, the transmission of software is not subject to VAT because it would legally reveal itself as a construction or service contract not specifically listed as taxable in the law.

Since software is normally through a tangible thing (tape or diskette), it could legitimately be asked whether this transmission generates the taxable fact provided for in article 3 (c); that is, whether it is a "construction of movable property on request".

In coincidence with national doctrine which has concerned itself with this subject, I think that it should be given the treatment of nontaxed work embodied in a piece of movable property, inasmuch as what defines the aptitude to generate the taxable fact is the main thing (the work) and not the accessory thing (instrumental medium), which only serves as a vehicle of form of expression.

In this respect, it is useful to note that the accessory nature of the medium is ratified by article 2335 of the Civil Code which, in reference to similar situations, provides that: "The paintings, sculptures, writings and printed matter shall always be considered to be principal, when the workmanship has a greater value and importance than the material used for its expression, and to be accessory such elements as the board, canvas, paper, parchment or stone to which they shall be attached".

In short, in the case of "customized" software there is no "construction of movable property on request" because the main purpose of the business is not this, but the transmission of an instruction program.

This approach has been tacitly ratified by General Instruction N° 41, issued by the Dirección General Impositiva (Tax Administration) on August 6, 1987.

This General Instruction abolished a previous one (Instruction N° 434 of January 29, 1986) which had declared taxable, by application of the above-mentioned article 3 (c), "the recording at the request of third parties, with or without

supply of materials, of small disks or diskettes on which data are recorded by magnetic means".

Although its juridical support has not been set forth, the new approach of the administrative authority implies recognition of the considerations made above.

In the case of "customized" or "adapted" software, the physical value of the medium constitutes an autonomous sale. In this respect, the law provides that incorporation of goods "of one's own production" in the case of provision of exempt or nontaxed goods and services (article 2 (a), paragraph 1) shall be considered to be a sale, from which it follows that the value of the medium is subject to tax. In accordance with this, the tangible and intangible values should be stated separately on an invoice.

Conversely, if the medium were either purchased in the local market or imported the taxable fact "sale" does not exist. In the absence of any provisions to the contrary, the transfer of the medium is absorbed by the condition of the main consideration (nontaxed intangible), just as the paper on which a lawyer writes his opinion is not subject to tax. It is therefore not comprised by the tax.

On this basis of the above comments, it may be concluded that the remaining services (updating, follow-up, adaptation, training, data processing, and so forth), directly or indirectly connected with software, are not subject to tax insofar as they have not been specifically included in those listed by the law, nor can they be considered the "construction of a thing at the request of third parties".

Finally, it should be noted that if the program were transmitted by a noncorporeal means, the above-mentioned question would not arise, without in such a case there being any doubt about the irrelevance of the tax.

Importation

The VAT is levied on the permanent importation of movable property. The tax base is determined by the Customs value of the goods (it includes freight and insurance), to which the import duty is added. Therefore, there is a conditioning of the value at the Customs stated for software, a question which, as will be seen later on, has not been duly settled.

5. *Stamp tax*

The stamp tax is applicable to the legal documentation of any acts performed in the jurisdiction of the Federal Capital or the provinces, and which are specifically provided for in the relevant legislation. The rate, which varies according to the jurisdiction, ranges from 1% to 1.2%.

The law in force in the Federal Capital (Law 18.524, text amended in 1986 and its amendments, article 58 (u) stipulates that "any agreements on assign-

ment of intellectual property rights" are exempted. The provincial laws contain similar exemptions.

Pursuant to this precept, software-use license agreements do not pay the stamp tax, provided that they have been registered with the Dirección Nacional de Derechos de Autor (National Copyright Bureau).

Finally, please note that the stamp tax states that contracts signed abroad are taxable when they produce effects in Argentina.

6. *Custom duties*

In the matter of import and export duties, the basic question consists in determining whether the software valuation at the customs includes only the tangible value or also the embodied intangible value.

6.1. IMPORT DUTIES

The Tariff Law (Law 22.415) used until December 1987 the Definition of Value of Brussels as basis for imposition of import duties, on the understanding that the value at the Customs is the price agreed to in conditions of free competition between independent parties.

Under this system, the criterion of the customs authority as regards software imports was to consider that the value at the Customs includes the cost of the physical medium and the registered instruction or data, irrespective of the kind of software involved.

It should be noted that this characterization of software as "movable property", attributed for the purpose of computing the import duties, proves inconsistent with the juridical nature assigned by the rest of the legislation and, from this particular fiscal standpoint, marks the predominance of the corporeal medium over the intellectual work or, what amounts to the same thing, the absorption of the latter by the former.

Generally speaking, it can be said that importers (probably influenced by their need to have access to the foreign exchange market which is not free in Argentina) have accepted the fiscal criterium and include software in tariff item 92.12.02.03 which comprises "records, tapes, cards and other articles with magnetic bands or magnetized, suitable for use in data processing systems, also if they are accompanied by books, manuals or other technical documentation". This tariff item establishes a 100% duty on the invoice cost to which 3% must be added on account of statistical rate, plus 0.5% for the Export Promotion Fund. All this, plus insurance and freight, is taxed by VAT (18%).

Argentina has recently enacted law 23.311 (published officially on July 15, 1986) approving the Agreement related to implementation of article 7 of the General Agreement on Tariffs and Trade (GATT), and its respective protocol, signed in Geneva on April 12 and November 1, 1979, respectively. The above Agreement became effective on January 1, 1988.

It should be noted that the regulatory provisions of law 23.311 have not taken into account the Decision on valuation of the data processing mediums for software for data processing equipment, adopted by the Customs, Valuation Committee at its tenth meeting held on September 24, 1984.

Until this Decision – which directs that the tangible medium be valued at the Customs only – has been accepted, I do not believe that there will be any change in the practices developed under the former legislation.

There is no case law on the subject.

6.2. EXPORT DUTIES

Since the year 1967 Argentina has been imposing export duties on a continuing basis. The problems posed by valuation are identical with those raised by import duties. Therefore, I refer to the comments made when dealing with this matter.

International tax treatment

Cross-border data transmission, increased and facilitated by a convergence between data processing and telecommunications, revives the question of taxation of international economic relations and the conflict between fiscal sovereignties.

In Argentina there are no rules that regulate cross-border data flows. This makes it necessary, once again, to infer the tax implications from the general principles.

For tax consideration purposes, it is important to find out the kind of legal connection established between transmitter and receiver, as well as the economic or technical function of the information supplied and, lastly, the data transmission means.

As long as this cross-border data flow can be used to transfer software, its treatment in respect of each tax will follow the guidelines outlined in this report, provided that these are not altered by any double-taxation agreements.

Argentine, with some exceptions, adopts as the criterion for attribution of a taxable fact to a taxpayer, the territorial system or "source principle". This principle, as is well known, is limited by the concept of "permanent establishment" in those treaties which follow the model of OECD.

Argentina maintains agreements in force with Sweden, Germany, Austria, Brazil, France, Italy, Chile and Bolivia and, except for these last two countries, adopts this concept of "permanent establishment".

But it should be noted that these agreements do not provide for the transfer of software, and only place a limitation on the rate paid on royalties for the use or the concession of use of copyright on literary, artistic or scientific works.

There are no experiences on this matter that will require a special comment.

Critical analysis

The evaluation of the Argentine situation shows that the tax treatment of software presents potentially conflicting aspects arising from its special nature and from the vagueness of the applicable legal system.

At the present time, this question is still in the process of maturing, for which reason it is somewhat illusory to advocate technical solutions that are not accompanied by a national data processing policy that will eventually guide decisions in the tax field.

Anyhow, and whatever the policy decision, it would be desirable to examine the following solutions to the problems which are currently being raised in our country by the software business:

1. Tax characterization of software derived from its intangible nature, which makes us recommend:
   1.1. In regard to income tax: assimilation to the remaining rights protected by the intellectual property law (Law N° 11.723).
   1.2. In regard to VAT, exemption of tax on its transfer, except for the case of "canned software".
   1.3. In regard to import and export duties, levying of the tax only on the value of the tangible medium.
2. To specifically include software in international double-taxation agreements.

Résumé

I. Introduction

La loi argentine ne contient aucune disposition spécifique concernant les programmes d'ordinateur. Cette absence de définition du régime juridique général a une incidence sur le système fiscal en créant des situations potentiellement conflictuelles. Comme conséquence du développement relativement récent du logiciel, il n'existe ni jurisprudence ni pratique administrative susceptibles d'offrir un pronostic certain sur les hypothèses de conflit qui se posent en matière fiscale.

Afin d'en orienter l'interprétation, l'encadrement fiscal doit être précédé du repérage des circonstances qui deviendront la base de l'attribution du fait imposable: le type de programme („sur mesure", „standard" ou „programme-produit"), le moyen utilisé pour en assurer le transfert (corporel ou incorporel) et la modalité contractuelle adoptée.

II. Protection légale

Droits d'auteur: dans la République Argentine les programmes d'ordinateur sont admis parmi les droits protégés par la loi de la propriété littéraire et artistique (loi N° 11.723). En pratique, les auteurs déposent leurs programmes d'ordinateur – comme le font les

créateurs d'oeuvres littéraires ou musicales – en vue de leur inscription dans un Registre de droits d'auteur.

Propriété industrielle: en vertu de la disposition N° 15 de l'Office des Brevets les programmes d'ordinateur ne peuvent être brévetés qu'avec le matériel.

III. Régime fiscal

LOI DE L'IMPÔT SUR LES BÉNÉFICES (LOI N' 20.628)

Cette loi ne prévoit aucun traitement spécial pour les programmes d'ordinateur qui en l'espèce sont assimilés aux droits d'auteur. Dans ce sens l'article 20, alinéa j. de la loi stipule que les bénéfices provenant de l'exploitation des droits d'auteur ne sont pas atteints par cet impôt à condition de satisfaire aux conditions suivantes: 1. que l'impôt concerne directement l'auteur ou ses successeurs; 2. que l'oeuvre soit inscrite sur une registre public et 3. que l'oeuvre n'ait pas été réalisée sur commande d'un tiers.

D'autre part l'article 93, alinéa b prévoit que les paiements à des „non résidents" au titre de l'exploitation de droits d'auteur sont l'objet d'une retenue réduite de 15,75 pour cent (45 pour cent d'un bénéfice net présumé de 35 pour cent). Ce taux préférentiel ne s'applique que dans les cas où les conditions ci-dessus sont remplies.

Les dépenses engagées pour la production (recherche, étude et développement) ou l'achat de programmes peuvent, sur option du contribuable, être traitées comme des déductions directes de la période fiscale où elles sont échues ou portées à l'actif et amorties comme des biens incorporels.

IMPÔT SUR LES CAPITAUX (LOI N° 21.287)

Pour l'application de cet impôt, le contribuable peut aussi opter entre l'affectation aux résultats de coûts de production ou d'acquisition et leur considération comme actifs incorporels susceptibles d'amortissement conformément aux dispositions de la loi sur les bénéfices.

IMPÔT À LA VALEUR AJOUTÉE (LOI N° 23.349)

Cet impôt frappe la vente de biens meubles, le louage d'ouvrage et de services et les importations en leur appliquant un taux de 18 pour cent. L'inclusion du transfert de programmes d'ordinateur parmi ces matières imposables offre des dificultés; elle dependra surtout du type de programme dont il s'agit et des liens juridiques entre les parties.

À défaut de jurisprudence la pratique établie est de considérer comme une „vente" l'aliénation de „programmes-produits" ou „paquets de logiciel", tandis que tous les autres programmes („sur mesure" ou „adaptés") ainsi que les services y relatifs ne sont pas atteints par cet impôt. Dans ce cas, le support matériel n'est que le véhicule ou la forme d'expression d'une oeuvre qui n'est pas grevée par l'impôt. Il n'existe pas de jurisprudence à l'appui.

DROITS À L'IMPORTATION

La loi argentine N° 23.311 prévoit la mise en vigueur, à partir du 1er. janvier 1988, de l'Accord relatif à l'application de l'Article VII du GATT et son protocole respectif. Néanmoins, l'autorité douanière n'a pas accepté la Décision relative à la valeur des supports informatiques comportant des logiciels, adoptée par le Comité d'évaluation en douane lors de sa Dixième réunion, Décision qui ne retient comme valeur imposable que elle du support corporel.

Transfert de données transfrontalier.

Aucune disposition – générale ou fiscale – n'a encore été adoptée en Argentine à l'égard du transfert de données transfrontalier. Dans les cas où ce flux de données pourra être utilisé pour le transfert de logiciel ou d'autres services y relatifs (par exemple l'accès à une banque de données), son traitement fiscal relèvera des normes générales d'interprétation.

IV. Analyse critique

L'évaluation de la situation argentine montre que le traitement fiscal des programmes informatiques présente des aspects potentiellement conflictuels, découlant de l'absence de définition du régime légal applicable et aggravés par le manque d'antécédents judiciaire susceptibles d'en orienter l'interprétation.

La définition de la nature des programmes d'ordinateur et leur régime juridique est à présent en cours d'élaboration. Il s'en suit que la prétention de parvenir à des solutions techniques plus ou moins permanentes, s'avère quelque peu illusoire jusqu'à ce que la politique informatique officielle fournisse la définition à laquelle seront subordonnées les décisions fiscales.

Zusammenfassung

I. Einleitung

Die argentinischen Gesetze enthalten keine Regelungen über Computerprogramme. Dieser Mangel im allgemeinen Rechtssysteem findet seinen Niederschlag auch im Bereich des Steuerrechts und schafft potentiellle Konfliktsituationen. Da die Entwicklung von Software relativ neueren Datum ist, besteht auch keine Rechtssprechung und verwaltungsrechtliche Praxis, aus der man etwas über die streitigen Fragen, die auf finanzrechtlichem Gebiet bestehen, vorhersagen könnte.

Für Zwecke der Auslegung muss der steuerrechtlichen Zuordnung eine Feststellung gewisser Merkmale vorangehen, die dann als Grundlage für die Besteuerung des steuerpflichtigen Tatbestandes dienen können: Programmform („massgeschneidert", „Standard" bzw. „vorgefertigt-benutzerorientiert"), das verwendete Übertragungsmittel (materialisiert oder elektronisch) sowie die vereinbarte Vertragsform.

II. Rechtsschutz

URHEBERRECHT

In der Republik Argentinien wird die Software in den vom Gesetz über geistiges Eigentum gewährten Schutz miteinbezogen (Gesetz Nr. 11.723). In de Praxis melden die Urheber die Programma bei einem Urheberrechtsregister an, gleich wie es die Verfasser literarischer bzw. musikalischer Werke tun.

GEWERBLICHES EIGENTUM

Nach der vom Patentamt erlassenen Verfügung Nr. 15 können vom Rechner unabhängige Computerprogramme nicht patentiert werden.

III. Steuersystem

ERTRAGSSTEUER (GESETZ NR. 20.628)

Dieses Gesetz sieht keine besondere Behandlung der aus der Nutzung von Computerprogrammen entstandenen Einkünfte vor, doch ergibt sich diese aus der Angleichung an die Urheberrechte. Dementsprechend wird der Gewinn aus Einkünften aus der Nutzung von Urheberrechten gemäss Art. 20 lit. j unter folgenden Voraussetzungen, die kumulativ vorliegen müssen, von der Steuer befreit:

1. Die Steuer belastet direkt den Urheber bzw. dessen Rechtsnachfolger.
2. Das Werk ist in einem öffentlichen Register eingetragen und
3. das Werk ist nicht im Auftrag eines Dritten angefertigt worden.

Andererseits enthält Art. 93 lit. b die Bestimmung, dass Zahlungen an „Nichtansässige" für die Nutzung von Urheberrechten einem verminderten Steuerabzug in Höhe von 15,75% (45% eines vermuteten Nettogewinnes in Höhe von 35%) unterliegen. Diese Steuerermässigung wird von der Erfüllung der oben genannten Voraussetzungen abhängig gemacht.

Aufwendungen für die Herstellung (Forschung, Prüfung, Entwicklung) oder den Erwerb von Computerprogrammen können nach Wahl des Steuerpflichtigen direkt von den Einkünften der entsprechenden Rechnungsperiode abgezogen oder aktiviert und wie ein immaterielles Gut abgeschrieben werden.

VERMÖGENSSTEUER (GESETZ NR. 21.287)

Auch bei dieser Steuer können die Produktions- bzw. Erwerbskosten wahlweise von dem Gewinn der betreffenden Rechnungsperiode abgezogen oder sonst als „immaterieller Vermögenswert" angesehen werden, der nach den selben Grundsätzen wie bei der Ertragssteuer abgeschrieben wird.

MEHRWERTSTEUER (GESETZ NR. 23.349)

Dieser Steuer unterliegen mit einem Steuersatz von 18% der Verkauf von beweglichen Sachen, Leistungen im Rahmen von Werk- und Dienstverträgen sowie Einfuhren. Die

Einordnung der Lieferung von Software in einen dieser Steuertatbestände verursacht gewisse Schwierigkeiten. Diese Frage hängt hauptsächlich von der Art des Computerprogramms sowie vom Rechtsverhältnis der Vertragspartner zueinander ab.

Obwohl es Rechtssprechung hierzu nicht gibt, besteht allgemein insoweit Übereinstimmung, dass die Veräusserung von Computerprogrammen, die „endgefertigt" oder „vorgefertigt-benutzerorientiert" sind, als „Verkauf" zu behandeln sind; dagegen gelten die übrigen Programme („massgeschneiderte" und „angepasste") sowie auch die damit verbundenen Dienstleistungen als steuerfrei. In einem solchen Fall gibt die Beschaffenheit des Softwareträgers lediglich Auskunft über ein Werk, das von der Steuer nicht betroffen ist. Zu dem Thema gibt es keinerlei Rechtssprechung.

EINFUHRZÖLLE

Mit Gesetz Nr. 23.311 tritt in unserem Land ab 1.1.1988 das Abkommen über die Anwendung von Art. VII des GATT-Abkommen und das dazugehörige Protokoll in Kraft. Die Zollbehörde akzeptiert jedoch die Entscheidung über die Bewertung der Softwareträger nicht, die vom Zollbewertungsausschuss in seiner zehnten Runde mit der Entschliessung angenommen wurde, nur den Wert des Softwareträges als Besteuerungsgrundlage zu nehmen.

GRENZÜBERSCHREITENDER DATENFLUSS

Argentinien besitzt noch keine – allgemeinen und steuerrechtlichen – Bestimmungen, die die Übertragung grenzüberschreitender Daten regeln. Soweit dieser Datenfluss zur Übertragung von Software bzw. sonst damit verbundenen Leistungen (z.B. Zugriff zu Datenbanken) verwendet werden kann, ist die steuerliche Behandlung gemäss den allgemeinen Normen entsprechend vorzunehmen.

IV. Kritische Analyse

Eine Beurteilung der Situation Argentiniens zeigt, dass die steuerliche Behandlung der Computerprogramme aufgrund der Unbestimmtheit und Lückenhaftigkeit des geltenden Rechts potentielle Konfliktsituationen beinhaltet. Dieser Zustand wird durch das Fehlen diesbezüglicher richterlicher bzw. verwaltungsrechtlicher Präzedenzentscheidungen, die der Auslegung dienen könnten, noch verschlechtert.

Die Frage der Rechtsnatur der Computerprogramme wird gegenwärtig geprüft, entsprechende Rechtsvorschriften befinden sich in Vorbereitung.

Die Forderung nach sachgerechten Lösungen von einiger Dauer ist so lange illusorisch, als die offizielle Politik im Bereich der Informatik nicht in der Lage ist, Definitionen anzubieten, nach denen sich die im Steuerrecht zu treffenden Entscheidingen ausrichten können.

Resumen

I. Introducción

La legislación argentina no contiene disposiciones específicas sobre los programas de computación. Esta idefinición del régimen jurídico general se traslada al campo impositivo y crea situaciones potencialmente conflictivas. Como el desarrollo del software es relativamente reciente, tampoco existe jurisprudencia o prácticas administrativas que indiquen un pronóstico cierto sobre las hipótesis de conflicto planteadas en el área fiscal.

A los fines de orientar la interpretación, el encuadre tributario debe ser precedido de la identificación de ciertas circunstancias que servirán de base para la atribución del hecho imponible: el tiempo de programa ("a medida", "standard" o "enlatado"), el medio utilizado para la transmisión (tangible o intangible) y la forma contractual adoptada.

II. Protección legal

Derechos de Autor. En la República Argentina se acepta la inclusión de los programas de computación entre los derechos protegidos por la Ley de Propiedad Intelectual (Ley N° 11.723). En la práctica, los autores depositan los programas ante un Registro de Derechos de Autor, en forma análoga a como lo hacen los autores de obras literarias o musicales.

Propiedad Industrial: La Disposición N°15, dictada por la Oficina de Patentes, no permite el patentamiento de programas independientes del ordenador.

III. Régimen impositivo

LEY DE IMPUESTO A LAS GANANCIAS (LEY N° 20.628)

Esta ley no contempla un tratamiento específico de los ingresos derivados de la explotación de programas; empero, éste viene dado por su asimilación a los derechos de autor. En tal sentido, el artículo 20 inciso j, exime las utilidades provenientes de la explotación de derechos de autor, siempre que se reúnan las siguientes circunstancias:

1. que el impuesto recaiga directamente sobre el autor o sus sucesores;
2. que la obra se encuentre inscripta en un registro público;
3. que la obra no haya sido realizada por encargo de un tercero.

Por su parte, el artículo 93, inciso b, dispone que los pagos a "no residentes", derivados de la explotación de derechos de autor, sufren una retención reducida del 15,75 por ciento (45 por ciento de una ganancia neta presenta del 35 por ciento). Esta tasa preferencial se encuentra condicionada al cumplimiento de los requisitos enunciados precedentemente.

Los gastos efectuados para la producción (investigación, estudio y desarrollo) o adquisición de programas, pueden ser considerados, a opción del contribuyente, como deducción directa del período fiscal en que se devenguen, o activarse y amortizarse como bien intangible.

IMPUESTO SOBRE LOS CAPITALES (LEY N° 21.287)

También en este impuesto puede optarse por cargar los costos de producción o adquisición al resultado del período fiscal, o por el contrario, considerarlos como "activo intangible", amortizable de conformidad con las normas del Impuesto a las Ganancias.

IMPUESTO AL VALOR AGREGADO (LEY N° 23.349)

Este impuesto alcanza, con la tasa del 18%, la venta de cosas muebles, las locaciones de obras y servicios y las importanciones. Plantea dificultades encuadrar la transmisión de los programas dentro de estos hechos imponibles, cuestión que dependerá, fundamentalmente, del tipo de programa y de las relaciones jurídicas que vinculen a las partes.

A pesar de no existir jurisprudencia, existe consenso en tratar como "venta" a la enajenación de los programas "producto" o "enlatados"; por el contrario, se considera fuera de la imposición a los demás programas ("a medida" y "adaptados" como también a los servicios vinculados a los mismos. En este caso, el soporte material sólo sirve de vehículo o forma de expresión a una obra no alcanzada por el impuesto. No existe jurisprudencia sobre el tema.

DERECHOS DE IMPORTACIÓN

Mediante la Ley n° 23.311, nuestro país ha puesto en vigencia a partir del 1-1-88, el Acuerdo relativo a la aplicación del artículo VII del GATT, y su respectivo protocolo. No obstante, la autoridad aduanera no admite la Decisión sobre valoración de los soportes informáticos con software, aprobada por el Comité de Valuación en Aduana en su Décima Reunión, que dispone tomar como valor imponible sólo el soporte tangible.

CORRIENTE DE DATOS TRANSFRONTERAS

En la Argentina se carece todavía de disposiciones – comunes e impositivas –, que regulen la transferencia de datos transfronteras. En tanto esta corriente de datos pueda ser utilizada para transferir software u otros servicios vinculados, (por ejemplo, acceso a banco de datos), el tratamiento fiscal deberá extraerse de las pautas interpretativas generales.

IV. Análisis Crítico

La evaluación de la situación Argentina demuestra que el tratamiento impositivo de los programas de computación, presenta aspectos potencialmente conflictos, derivados de la indefinición del régimen legal aplicable, y agravados por la ausencia de precedentes judiciales o administrativos que orienten la interpretación.

La naturaleza de los programas de computación, y su régimen jurídico, se encuentra actualmente en elaboración.

Resulta, pues, un tanto ilusoria la pretensión de alcanzar soluciones técnicas, con algún grada de permanencia, hasta tanto la política informática no brinde aquella definición a la que se subordinarán las decisiones impositivas.