"TAX AVOIDANCE" AND "TAX EVASION"
An Argentine view

By Alberto Tarsitano
at@ccas.com.ar
Cardenas, Cassagne & Asociados
www.ccas.com.ar

Introduction

1. The criminalisation of tax offences has been a legislative decision that has given rise to heated controversy, both in Argentina and the rest of Latin America. Those who distrusted the effectiveness of criminalisation did not dispute the fact that the right of the State to the full collection of taxes should be afforded the protection of criminal law. As a matter of fact, what was called into question was that the adequate institutional context was in place for an efficient and neutral application of the provisions of criminal law.

2. A combination of fear that the Tax Authority would use criminal reports as a spur for collection and the belief that the State had a long way to go before resorting to criminal remedies advised against criminalisation until the early nineties. The adoption of this tool, however, did not manage to abate the tax evasion plight, the social dimension of which is rooted in complex causes and a large number of predisposition factors, including the recurring economic crises and the inept management of public accounts. These circumstances help explain –though not justify– the fact that emerging countries are homes to tax evasion in a context of leniency, lack of interest or social permissiveness.

3. In Argentina, the criminalisation of tax offences has been received with distrust by the economic players. This may be regarded as somewhat ambivalent. On one hand, the fight against tax evasion is a condition required to bring transparency to the markets, by providing them with equal opportunities and fair competition. On the other hand, there is a lack of trust in the criminal tax law enforcement authorities. Large corporations, especially multinational companies, do not wish to see their management involved in criminal proceedings resulting from an abusive use of criminal law. A good reputation may be harmed by a rash criminal report, even if such report is subsequently dismissed by the courts. Added to this is the fact that being subject to a criminal proceeding is, of itself, a situation of distress for the party who undergoes it, because of the potential damage entailed by it.

4. This is why economic players increasingly look to legal security with as much interest as they take in examining financial security in order to decide in which region or country to invest. And when legal security is assessed, it is not so much the abstract design of the legal structure that counts as does the behaviour that is desirable to expect from those having the duty to enforce tax laws and criminal tax laws: neutral tax authorities and judges who are qualified to fathom the complex interplay between taxable event and punishable event.

5. A quick look at comparative law reveals that tax systems and criminal tax systems, given their common roots, share similar provisions and principles. Underneath the specifics of each country, we find that the legal instruments used for prevention and punishment provide a certain common basis; therefore, the main task of this kind of seminar should consist in developing a doctrine that furnishes legal provisions with substance, in a manner such that criminal proceedings affect only those who actually deserve to be punished under the principles of the rule of law.

6. The globalisation of the economy has also led to a spontaneous globalisation of tax systems, which tend to adopt similar principles. In Latin America, the non-existence of a formal system for the harmonisation of tax provisions among the various countries –even those countries that have formed economic alliances, such as Mercosur – does not prevent the achievement of a certain degree of harmonisation in the adoption of common principles, under the guidance of international organisations, multinational organisations, governmental entities, tax agencies, universities and academic associations. This generalisation is particularly noticeable in tax collection procedures and provisions on administrative and criminal offences.

7. This paper focuses on the crime of "tax evasion" (as it is called by the law). It is appropriate to note here that tax evasion is one of the various types of tax crimes (see paragraph 10 below).

8. Generally speaking, tax evasion is considered an administrative offence punishable with a fine and, under certain aggravating circumstances, a tax crime punishable with imprisonment. There is no difference as to the nature of a fine and imprisonment as methods of punishment: both are criminal penalties. The difference between administrative and criminal offences lies in the type of punishment and the procedures used to apply it. Imprisonment is a punishment imposed by the courts, whereas administrative penalties (fines) are imposed by collection agencies (though subject to review by the courts). This distinction between –and co-existence of– administrative offences and crimes is common to the legal systems of, for example, Spain, Brazil, Mexico, Uruguay and Chile.

9. In general, it may be concluded:

9.1 Tax wrongs are criminal in nature. Their structure and the applicable punishment are identical in substance to those of the ordinary criminal act of wrongdoing.

9.2 There is substantial identity between the administrative offence called "tax fraud" (as per Section 46 of Law No. 11683) and the crime called "tax evasion" (as per Sections 1 and 2 of Law No. 24769). Both the administrative offence and the crime concern the same legally protected interest, namely the wholeness of the State assets derived from the regular collection of national taxes.

9.3 The same behaviour may result in a pecuniary penalty being imposed upon a corporation and the punishment of imprisonment being meted out to its directors. In order to avoid breaching the rule *ne bis in idem* (i.e., the rule against double jeopardy), legal scholars have put forward different solutions, but this is an issue which is yet to be settled by the courts.

9.4 The tax crime is a "result crime" (meaning that it is consummated only when some damage is caused committed wilfully. Thus, it requires a damaging result and wilful intent. Picturing in the mind the possibility that some harmful result may ensue is enough to satisfy the wilful intent requirement. No crime exists as a "danger crime" (meaning one consummated by the mere creation of some kind of danger) as was contemplated in the previous Criminal Tax Law (Law No. 23771); this characterisation was removed from the current law (Law No. 24769).

9.5 The Criminal Tax Law adopts the fundamental principle of territoriality, which means that it applies to tax crimes committed within the territory of the country. As stated above, the tax crime is a "result crime." The term "result" must be understood to mean economic damage, and therefore, any act performed in preparation of the crime beyond the borders of the Argentine territory will always be embedded in the act whereby the crime is consummated: the filing of tax returns and the omission to pay. The crime is consummated upon the filing of a deceptive tax return and the underpayment of the tax due.

Tax Crimes

10. Law No. 24769 provides for the following criminal offences: simple evasion (Sections 1 and 7); aggravated evasion (Sections 2 and 8); wrongful use of tax subsidies (Section 3); fraudulent obtainment of tax benefits (Section 4); tax misappropriation

(Section 6); fraudulent tax insolvency (Section 10); fraud in payment (Section 11); and fraudulent alteration of records (Section 12).

11. For the basic offence of tax evasion, the law prescribes the punishment of imprisonment for 2 to 6 years, imposed upon the tax obligor who *"by means of deceptive statements, malicious concealment or any other device or trick, whether by action or omission, totally or partially evades the payment of national taxes, provided that the evaded tax amount exceeds the sum of one hundred thousand pesos (ARS 100,000 – approx. EU 30.000) for each evaded tax and for each fiscal year, even in the case of an instantaneous tax or of fiscal periods lesser than one year."* (Section 1).

12. Aggravated evasion is punished with imprisonment for 3 years and 6 months to 9 years, and this criminal offence as described by law is committed where:

a) The evaded amount exceeds the sum of one million pesos (AR$ 1,000,000 – approx. EU 300.000).

b) One or more interposed persons have taken part in order to hide the identity of the true obligor and the evaded amount exceeds the sum of two hundred thousand pesos (AR$ 200,000 – approx. EU 60.000).

c) The obligor has made fraudulent use of exemptions, allowances, deferrals, releases, rebates or any other kind of tax benefit, and the evaded amount exceeds the sum of two hundred thousand pesos (AR$ 200,000 – approx. EU 60.000). (Section 2)

13. Once assessed, the taxpayer's behaviour is characterised as an administrative offence *(simple omission or tax fraud)* or a crime *(tax evasion)*. A crucial dividing line is drawn by the intention to omit payment of the tax. The omission to pay *without intent* (Section 45, Law No. 11683) is punished with fines of 50 to 100 per cent of the unpaid principal. Included in this category are the instances of lawbreaking through negligence, error of construction, or ignorance of fact or of law. The courts may reverse the penalty imposed by the collection authority when they consider that the interpretation of the scope of the legal provisions is a matter of dispute. The omission to pay the tax *with intent* is punished by administrative agencies with a fine of 200 to 1,000 per cent of the unpaid principal (Section 46, Law No. 11683).

14. The intention to evade payment of the tax is a requirement for both the administrative offence *(tax fraud)* and the crime *(tax evasion)* to be deemed committed. The existence of intent, which is a subjective element, manifests itself objectively by means

external facts that provide actual proof of an instance of concealment or deception. Certain court rulings have added the requirement that these manoeuvres conducted either by action or omission must somehow be capable of deceiving the Tax Authority.

15. The Tax Procedure Law (Law No. 11683) contemplates a number of rebuttable presumptions which evidence the intention to evade payment of the tax. These are not specific criminal offences, but descriptions of facts or events which prove, unless evidence is provided to the contrary, the taxpayer's malicious intent (Section 47). Although these presumptions are set forth in the procedural law with respect to the case of tax evasion punishable with a fine, there is nothing to prevent them from applying also to the tax crime contemplated in the Criminal Tax Law (Law No. 24769).

Such presumptions are the following:

a) serious discrepancy between books or other records and tax returns.
b) inaccurate entries which seriously affect the assessment of the tax.
c) inaccurate statements originating in an overt lack of compliance with the law.
d) failure to keep books of account or records for significant transactions.
e) asserting non-corresponding legal forms *["formas jurídicas inadecuadas"]*, provided that the underlying intention is to disguise the economic reality of the act in question.

This last presumption is especially important because of its impact on the re-characterisation of tax planning schemes.

16. In the Argentine penal system, the judge builds up his conviction about the existence of the intention to commit a crime by means of an unrestricted evaluation of the facts of the case. Under the Federal Code of Criminal Procedure, the pattern of evaluation is shaped on the standard of GOOD JUDGMENT (as per Section 398 of the Code of Criminal Procedure).

The Persons

17. The Argentine penal system has adopted the rule *societas delinquere non potest.* It follows that the forms of punishment provided for in the Penal Code and in the laws supplementary to it are imposed upon the individuals who have participated in the crime perpetrated through a legal entity. Naturally, there are exceptions to this rule: such is the case of fines, which, even if criminal in nature, may be applied to legal entities. These

exceptions are typically found in criminal financial law, especially in connection with tax and customs matters and in the criminal provisions under the law of securities and negotiable instruments.

18. The Criminal Tax Law (Law No. 24769, Section 14) provides for the punishment of imprisonment of those individuals to whom, whether by reason of their performance in office or their functional connection with the entity, the behaviour described as a crime is attributed organically. Thus, the law identifies those persons who are punishable with imprisonment when the act has been committed in the name, with the aid or for the benefit of a legal entity: directors, agents, administrators and controllers. Logically enough, no attribution of criminal liability stems from mere performance in office, so it is always necessary to prove that the persons have committed *the crime* with malicious intent (direct malice). Nonetheless, those persons who handle the management of the company, especially its legal representative or chairman, shall in principle be criminally liable, unless they can prove that the acts with which they are charged were beyond their control.

19.With regard to the attribution of criminal liability, court rulings have gone in a direction that is viewed as favourable. In early cases, directors and controllers were subjected to the proceeding almost automatically, with the courts adhering to the so-called theory of the *position as guarantor*. However, this objective attribution approach has given way to the need to prove actual participation in the commission of the crime.

20. Where charges are pressed for the alleged commission of a tax crime, we may wonder whether the persons accused may rely upon the concept of "due obedience" in order to shift liability onto those from whom they received orders or instructions to act in a certain way. Our legal scholars and courts unanimously reject obedience as an excuse when the order received is overtly contrary to law. Rather than result in the exclusion of anyone, this situation may lead to the inclusion in the proceeding of those persons who appear to have acted as abettors or participants in the perpetration of the crime. This may even present its own peculiar features in the case of international groups of companies, where the acts in question have been performed in the interest of the group. Although this liability may, at least in theory, be extended to cross-border subjects, no reports have as yet been filed whereby non-residents have been held to be criminally liable.

21. In addition to the criminal constituent requirements set forth by law in respect of the principal perpetrator of the crime, we must not fail to notice the general provisions on participation contained in the Penal Code (Sections 45 to 49). Therefore, in the case of tax evasion having been allegedly committed by the legal entity, in addition to the criminal liability attributed by law to the persons who are members of the management and control

bodies, it is possible to penalise other persons by reason of their acting as necessary participants, co-principals, accomplices or abettors in the commission of the tax crime.

22. The liability of tax advisors and those professionals who attest to the faithfulness or truth of certain acts or documents has been addressed in particular. It attaches to those persons who express their opinion, attest to, authorise or certify legal acts, balance sheets, financial statements or any kind of document in order to facilitate the commission of the crimes. Along with the punishment that may be administered under the general rules of criminal participation, the disqualification from practising the profession for a stated period of time is contemplated as an accessory punishment. This liability concerns lawyers, certified public accountants and notaries public.

23. In addition, Section 13 of the Criminal Tax Law provides for an increase in the applicable punishment where public officials participate in a tax crime while holding office or within the scope thereof.

Administrative and Criminal Proceedings

24. The tax collection authority must file a criminal report after having assessed the amount of the debt, even if the assessment has been appealed. Thus, an objective condition for the criminal proceeding to develop is that, at a very early stage, the Federal Board of Public Revenues issues the assessment of the tax. This provides a stronger safeguard, for the assessment of the tax entails an administrative proceeding that ends with a duly substantiated decision after the taxpayer has at least filed a preliminary defence by submitting various writings and items of evidence.

25. The existence of a previous administrative proceeding assessing the tax claim ensures that no criminal report is issued before the administrative authority has reached a decision as to the merits of its case. The foregoing notwithstanding, most criminal reports lodged by the tax authority fail to elaborate on the taxpayer ´s mental state evidence (intent to deceive) leading to a criminal offence. The fact that in Argentina nearly 1,000 reports are filed annually shows the administration trend to automatically proceed with a criminal action report where the assessment involves an amount exceeding EU 30,000 (the threshold required for any such action).

26. Where the criminal report is filed by a third party, the court must send the records to the relevant tax collection authority in order to immediately commence the debt verification and assessment proceeding. The tax collection authority must issue the

assessment within ninety business days, which may be extended upon a duly substantiated request being made by such authority.

27. The official assessment may lead to a challenge filed with the Tax Court. At the same time, if a criminal report is filed, the criminal court rules whether or not the crime has been committed. Thus, there are two proceedings running parallel. The Criminal Tax Law only provides for a stay of execution of penalties in administrative proceedings, which means that, in principle, criminal courts are pre-emptive only in connection with the punishment imposed. But what happens if the criminal court decides that there is no crime because no tax must be paid, and such decision is made before an ordinary court rules on this issue in the same or a different manner? The Law is silent as to this matter, which must be dealt with by having regard to the general principles of law. Even so, the issue is a controversial one. The Tax Court has ruled that it is not bound by the criminal court decision, stating that such decision stands on its own only as regards the evidence of the subject acts, but has no binding force on the Tax Court as far as the tax consequences of such acts are concerned. These rulings are not sufficient, however, to establish a definitive approach to the issue, and the need is clear for a more effective harmonisation in view of the unwanted effects of two possible contradictory decisions. Double punishment (and double proceedings, i.e., administrative and judicial) have been provisionally admitted on the grounds that one punishment –the fine– is imposed upon the company, and the other punishment –imprisonment– is meted out to the individuals who committed the crime.

28. Payment of the evaded tax before the Tax authority takes action does not avert the punishment. Repentance after the crime has been consummated does not preclude the effects of the crime, even if, under the general principles of the Penal Code, this may be an element to consider upon assessing the punishment to be imposed or, if applicable, upon examining the admissibility of a conditional sentence (as per Sections 41 and 26 of the Penal Code). However, there is an exception to this rule: in cases of *simple evasion* (less than EU 30.000), payment of the tax claim causes the extinguishment of the right to bring criminal suit. This benefit may be granted only once in respect of each individual or legal entity.

29. In this respect, the Argentine statute has followed the Spain model. The statutes of other Latin American countries provide for similar ways of extinguishing the criminal action. Brazil contemplate this pre-emptive mechanism quite freely in that payment of the tax, regardless of the amount involved or the instances in which the mechanism is used, operates to render the action void. Spain also provides for the termination of the action where the debt is acknowledged and paid.

Tax saving, tax avoidance and tax evasion. Re-characterisation of legal transactions.

30. The study of cases in light of the applicable provisions of tax law first requires that the meaning and extent of the terms used be clearly defined. We think it appropriate, for the sake of consistency, to draw on the concepts used by the General Reporter, Professor Victor Uckmar, in the 37th IFA Congress, held in Venice, Italy in 1983, in connection with Tax Avoidance and Tax Evasion.

According to Professor Uckmar's report, the following definitions apply:

a) *Tax saving*: is the reduction of the tax liability by means which the statute did not intend to cover.

b) *Tax evasion*: The taxpayer avoids the payment without avoiding the tax liability and consequently escapes the payment of tax –which is unquestionably due according to the law of the taxing jurisdiction– and even breaks the letter of the law. It is the direct violation of a tax provision. The intention to evade is necessary to establish a criminal offence.

c) *Tax avoidance*: can be defined as a way of removing, reducing or postponing the tax liability, otherwise than by means of tax evasion and tax saving as described in the preceding paragraphs. It is an indirect violation of tax law or, differently put, the exploitation of areas which the legislator intended to cover but for one reason or another did not.

With regard to the foregoing definitions, the following is worth noting:

i. Argentine tax law provides a general rule of construction of the letter of the tax law based upon the principle of economic reality (Section 1, Law No. 11683). As a spin-off of such principle, a general tax anti-avoidance rule has been adopted which, in essence, follows this economic approach, with the aim of preventing the taxpayer from exploiting the formalism and loopholes of the law. But it is highly important to note that the economic theory adopts the formula of an anti-abuse provision, which means that a transaction may be re-characterised only where a non-corresponding legal form is used (Section 2, Law No. 11683). Nonetheless, in spite of the long time that the formula has been in place (it was introduced in 1946 after the German model), it has not made it possible to develop a consistent conceptual construction, either in the administrative or the judicial

sphere; as a result, many difficulties continue to arise at the time of defining in what case a tax planning scheme should be labelled as tax saving, tax avoidance, or even tax evasion.

ii. Therefore, the concept of tax avoidance refers to a behaviour that indirectly violates the law, through the use of an improper *(abusive)* use of the available legal forms.

iii. At the same time, the Supreme Court of Argentina has also adopted the well-known universal principle that the taxpayer has the right to develop its business or affairs by trying to minimise the tax burden to the extent permitted by law.

31. An attempt has been made by Argentine federal law (although the provinces also adopt similar formulas) to resolve this tension between form and substance by means of a re-characterisation of the legal forms that are regarded as abusive. Thus, a legal form without economic substance may be re-characterised on the ground that it is considered abusive. The law has not adopted the doctrines of business purposes or valid economic reasons other than fiscal reasons. In fact, if it is considered that there is a right to tax saving accruing to the taxpayer, the pursuit of such saving should not, of itself, be the reason alleged to consider whether or not a certain legal form is non-corresponding. However, if added to a certain degree of artificiality in the legal steps taken is the absence of valid reasons –of an economic nature or otherwise–, this absence will probably influence the decision to re-characterise.

32. Section 2 of Law No. 11683 operates as a corollary to the principle of economic reality embodied in Section 1. Such Section 2 provides as follows: *"In order to determine the true nature of the taxable event, regard shall be had to the acts, situations and relations of an economic nature actually performed, pursued or established by the taxpayers ..."*, and ends by prescribing that, for such purposes, the actual intention of the taxpayers must be ascertained if, as a result of such *"... acts, situations or relations of an economic nature, [they resort to] legal forms or structures which are not manifestly those that private law makes available or authorises so that the exact economic and actual intention of the taxpayers may be correspondingly materialised; [for such purpose,] upon the real taxable event being examined, the non-corresponding legal forms and structures shall be set aside, and regard shall be had to the real economic situation as falling within the scope of the forms or structures that private law would apply to them regardless of those chosen by the taxpayers or that [private law] would allow them to apply as those which most closely correspond with the actual intention thereof."*

33. Now then, a challenge we are faced with at present –and a significant one, given the number of problems that come up and the absence of accurate guidelines in our

statutory law or case law– consists in establishing the consequences as to administrative and criminal offences that may derive from those tax planning schemes which use legal constructions that the Tax Authority regards as "non-corresponding", to varying degrees. Establishing these guidelines will entail a decisive contribution to legal security, and may prevent legitimate tax savings from being re-characterised, not only for purposes of the collection of a larger tax amount but also –and this is all the more serious– with the unwanted effect of the taxpayer being brought to the criminal courts under a charge of evasion.

34. We should begin our analysis by stating a core concept: *there is no punishable event where there is no taxable event*, because, as provided in the *Argentine Criminal Tax Law*, it is only the "obligor" that may be punished, that is to say, the debtor of the tax obligation born as a result of the existence of the taxable event.

35. A corollary that clearly follows from the premise set out in the paragraph above is that, if by means of anti-avoidance behaviour, the taxpayer avoids tax liability, no criminal offence may be derived therefrom. It was so recommended by the IFA in the 37th Congress held in Venice, with section 3 of the Resolution stating that "tax avoidance is not illegal."

36. In the Luso-Hispanic-Latin American field, whose interests come together at the Latin American Institute of Tax Law (which also incorporated Italy in 1991), it is worth noting that in the XIX Conference held in Lisbon in 1998, the conclusions included the following assertion: "**Mere avoidance as a way of not performing the taxable event, in order to minimise the tax cost within the range of options provided for by law, cannot be penalised.**" (Emphasis added).

37. Legal transactions may, by themselves, constitute taxable events, as is the case with stamp tax, or be a source of results which are subject to tax under the tax laws.

38. Under Argentine law, the taxpayer assesses and pays taxes spontaneously. In so doing, he performs a preliminary legal characterisation that is useful insofar as it determines the existence and extent of the events that fall under the incidence of the tax. When these events are represented by legal transactions, there may be a discrepancy between the tax effects that the taxpayer ascribes to the scope of the legal transaction and those that the Tax Authority assigns to it, which discrepancy is usually based upon a different approach to the legal substance and the economic substance of the legal transaction in question. It is the actual content that all the attention must be focused on.

39. In business planning schemes, it is common practice to seek a tax saving by means of inter-dependent or related legal acts which, if taken separately, appear to be effectual and legitimate from the standpoint of private law provisions, but when they are examined as a whole, they reveal a motive that is alien to the individual causes of each transaction: obtaining an economic result that is equivalent to that which the tax lawmaker intended to tax.

40. Under these circumstances, the departure of content (substance) from structure (form) warrants the re-characterisation of the tax treatment of the transaction, and then, the analysis of whether the taxpayer's behaviour should be penalised (either as an administrative or a criminal offence) or should be free from punishment.

41. The path that the courts go along, whatever the transaction brought to their attention, has three stages: 1) the characterisation of the legal act in accordance with the actual legal and economic substance thereof; 2) the analysis of whether or not it must be treated as an event subject to tax; 3) if it is regarded as a taxed event, the examination of the taxpayer's behaviour in light of the legal definition of the administrative or criminal offences. These are three different legal characterisations.

42. The task of characterising and re-characterising non-corresponding legal forms must be performed by paying close attention to the circumstances of time, cause, motive, documentation and externalisation of the events, especially if the aim is to draw not only fiscal but also criminal consequences from such re-characterisations. Fundamental safeguards under the Rule of Law are at stake, and acting rashly or without full knowledge of these issues may result in something more serious than the principle of legality in tax matters being jeopardised: the presumption of innocence and legal security.

43. As stated above, Argentine Law resolves the tension between form and substance by resorting to the phrase *"non-corresponding legal forms" ["formas jurídicas inadecuadas"]* (Section 2, Law No. 11683) as a standard which allows re-characterisation. But it should be noted that this phrase is considerably vague, and that protection is thereby afforded to certain behaviours which should be addressed quite differently as far as their reproachability is concerned. It is like going to the doctor's and getting the response that the cause of the disease "is a virus." That's fine, but which one? Certain viruses are more aggressive than others. And more serious. Therefore, the general anti-avoidance formulas, shaped into anti-abuse provisions, cannot be used as broad-spectrum antibiotics, especially if someone uses them to establish consequences in the sphere of punishment (whether as administrative or criminal offences).

44. It may asserted that the wording of the phrase *non-corresponding legal forms* encompasses different types of behaviours, which are not only tax-avoiding but also tax-evading. To put it simply, a sham transaction also resorts to a non-corresponding legal form. It is obvious that no anti-evasion provision is necessary –which would entail a logical and legal contradiction– while, on the other hand, general anti-avoidance provisions *are* necessary, as the prevailing legislative tendency seems to indicate. Or at least, it is my opinion that the lack of necessity of the anti-evasion provision is even more evident that the lack of necessity that certain scholars predicate in respect of anti-avoidance provisions.

45. Within the range of behaviours covered by the extent of this concept, only some of such behaviours, the most serious ones, are criminalised by *Law No. 24769* –precisely those in which the *non-corresponding legal form* manifests itself as the fraudulent means that leads to tax *evasion*. Other behaviours that materialise through *non-corresponding legal forms* do not deserve to be branded as fraudulent, because there is no "deceptive statement" or "malicious concealment" or "ploy" or "trick" whatsoever. These behaviours are those in which the lack of correspondence between form and substance is due to a different appraisal of the tax effects attributed to the result achieved, but since the events and forms are disclosed directly to the Tax Authority, the treatment that may be afforded to them under tax law can in no way be extended to the field of criminal tax law, particularly as regards the crime of tax *evasion*.

46. The rule for characterisation embodied in Section 2 of *Law No. 11683* comprises conducts that reveal different levels of non-correspondence between form and content. The difference between one level and the next one may be, as stated above, evanescent. From the tax perspective –and not so from the criminal tax standpoint–, the important thing is to define the outward limit of the legal provision, that is, that behaviour which, while approaching the tax planning options, differs from them and provides the ground for the taxable event to be considered in place. Below the outward limit in respect of the taxable event –tax planning options– are those behaviours in which the violation of the law begins to appear progressively more or less evident. This means that the ineffectual or unenforceable character of the legal form opens up a wide range of possibilities and includes *behaviours contra legem* and *in fraudem legis* (the latter being understood as used in civil law, not in the sense the term has in criminal law). In the former, it is usually easier to arrive at the disregard of the forms, due to the greater departure from the cause; the problem appears when an attempt is made to establish the indirect violation that relies upon a provisional legitimacy granted to the action by a protective legal provision. Indeed, the interpreter is faced with these difficulties in characterising the behaviour when the motive behind such behaviour and the legal form that expresses it is to reach an economic result that, in the tax field –unlike the civil law field–, is not a *forbidden* result but a result that is totally or partially tax free.

47. Only when a wilful divergence between the means and the result may be verified on the basis of a patent lack of correspondence between the externalised legal transaction and its real substance, and the intention to evade the tax is inferred therefrom, may the interpreter use his power to re-characterise the transaction from the tax point of view and cause criminal consequences to ensue from it.

Controversial issues

(a) When does a certain legal form correspond with the economic substance?

48. The corresponding legal form serves as an instrument in achieving the economic result ascribed to such form. On the other hand, the non-corresponding form does not reflect the true economic and legal substance of the transactions involved. Complexity and artificiality are usually the objective features of these forms. In tax planning schemes, this dichotomy between form and substance is normally brought to light by the artificial path that several legal transactions go along; although legitimate when individually considered, these legal transactions reveal that they are tax-avoiding in nature vis-à-vis the final outcome (in short, this amounts to the application of the well-known Ramsay case in all systems). Non-corresponding forms entail concepts like *fraus legis* or abuse of law, which take into account the divergence sought between *intentio juris* and *intentio facti*, by means of which the taxpayer avoids the tax in contravention of the rationale for the tax legislation.

(b) When a form has been re-characterised because it was non-corresponding, may it be held by the courts as a case of concealment capable of leading the tax authorities to deception?

49. If the re-characterisation is performed by using a general anti-avoidance formula, precisely because the taxpayer's behaviour is held to be tax-avoiding, it is only natural that no criminal penalty may result. There is a clear-cut difference between this behaviour and the crime: while the latter requires fraudulent acts, intentional omissions, false statements, etc. –in sum, various ploys that are capable of deceiving the Tax Authority–, tax avoidance involves the performance of transparent acts, which are re-characterised because they conflict with the purpose ascribed to the tax law. Now then, it must be pointed out that the wording of anti-avoidance formulas as embodied in the various legislations is always quite vague. For instance, Argentine law contemplates the use of legal forms which are "non-corresponding" with the economic purpose pursued by the parties to a transaction. As stated above, a non-corresponding legal form may be the

instrument for a tax-avoiding behaviour, but it may also give rise to tax-evading behaviours. The case of simulation is the clearest example in this regard.

50. It is indispensable to draw a dividing line between non-corresponding forms amounting to tax avoidance and those which lead to tax evasion, because otherwise, these legal provisions end up becoming *ad terrorem* provisions that breach deeply-rooted principles of Criminal Law, such as the principles of legality and definition of the criminal offence.

51. In paragraph 15 above, we mentioned a peculiar feature of Argentine procedural law: where non-corresponding legal forms, or forms which are extraneous to trade practices, are asserted for tax purposes, and provided that the actual economic substance of the relevant acts is thus concealed, *the intention to defraud the Tax Authority shall be presumed (Law No. 11683, Section 47 e.)*. If the phrase "non-corresponding legal form" is read to mean only tax-avoidance behaviours, Argentine law would be establishing a precedent that would probably be unique in the world. Indeed, if read literally, the text of the law seems to state that, in principle, every non-corresponding form (including those amounting to tax-avoidance) leads to tax fraud (administrative offence). And, if it is assumed, as set forth above, that there is identity of concept between tax fraud (administrative offence) and tax evasion (criminal offence), the reasoning may even embody the presumption that tax avoidance may end up in tax evasion.

52. This conclusion is untenable. Instead, the abovementioned legal provision must be analysed by using an approach that is more in agreement with the vagueness of the phrase *non-corresponding legal form*. What the administrative law does is provide an additional indication of the malicious intent required by the offence characterised by *deceptive statements or malicious concealment*. No special criminal offence is actually added by the law. A mere presumption is created, accompanied by the requirement that the non-corresponding legal form be asserted as a shifty manoeuvre whereby the fraud may be perpetrated. The *non-corresponding* form as contemplated by the legal provision under discussion is a form that is capable of concealing, covering up, disguising the reality of those events that fall within the scope of the law. As a result of this addition, the taxpayer may prove that the presumption of malice does not apply if the whole issue amounts to holding different views on the tax effects of legal transactions and clauses which are openly and candidly brought to the consideration of the tax authorities.

53. We will now try to draw and put forward a number of distinctions. The possible behaviours that the taxpayer may adopt range between two extremes: *tax saving* and *tax evasion*. Tax evasion (a criminal offence) is a direct violation of the law, committed intentionally and fraudulently. Facts are concealed, documents are forged, balance sheet

figures are distorted, non-existing costs are feigned, and so on. In short, the taxpayer lies about the facts on the basis of which the tax result is assessed.

54. Between the two extremes mentioned above, there is a series of behaviours adopted by means of *"non-corresponding" legal forms* which may be treated differently by law as a source of punishment. Included in the crime is *absolute simulation,* i.e., the case in which the parties perform an act that is not real at all, but a mere appearance from which they seek to derive beneficial tax effects. Also a case of evasion may be that of *partial simulation* affecting certain elements of the legal relationship (parties, price, time, place). A careful analysis must be performed, though, of those instances in which simulation slips into a fraudulent circumvention of the law, as happens with *relative simulation.* In this last case, there are two acts: one is unreal or fictitious (the simulated act), and the other one is real or true. This happens, for example, where a person wishes to benefit one of his heirs and simulates the sale of a piece of realty, with the transaction being, in fact, a gift.

55. The following should be distinguished from relative simulation: behaviours *that entail a fraudulent circumvention of the law, indirect transactions,* and *anomalous* or *atypical transactions,* in which we find a single act, or a series of related acts, all of which are real, leading to an economic result that is not subject to tax or is comparatively less liable for tax than an analogous result. And it seems that this should be the field of action reserved to the anti-avoidance provision.

56. The *non-correspondence of the form* surfaces, under the Argentine formula, as a certain *abuse of the existing forms.* When a transaction is made up of several legal acts, this abuse materialises in the choice of a complex and artificial legal path. Upon examining this path, the law *presumes* the existence of a "corresponding" legal form from which tax consequences are derived. To reiterate: what the law does is *presume.* It must be noted that this construction may never bring about a criminal consequence, because only one of the following two possibilities may exist, and neither of them leads to the criminal law arena: *either there is a presumed taxable event, or the taxable event is deemed to exist by analogy.*

(c) Difference between real and fictitious (simulated) taxation of the legal entity

57. As is the case with other legal systems, Argentine criminal law provides that the crime is aggravated *"where one or more interposed persons have taken part in order to hide the identity of the true obligor."* This provision corresponds to the case of subjective simulation contemplated in Section 955 of the Argentine Civil Code, which refers to the fictitious interposition of persons (*"rights are created or conveyed to interposed persons, other than those for whose benefit such rights are actually created or conveyed"*), and

cases of actual interposition (as decided by the Civil Court of Appeals in and for the City of Buenos Aires, JA, October 28, 1992).

58. When there is an actual interposition of persons, the legal act is not simulated, because there is no agreement to simulate between the parties to the act; for example, the seller does not know that the transferee (a straw man) acts on behalf of the true purchaser. The situation varies in the case of a fictitious interposition, because in this case there is a trilateral agreement that invalidates the legal transaction as entered into by the parties. In the case of an actual interposition, a third party actually acquires the property or right being conveyed, but in fact, he does so as an undisclosed agent for the party that has a real interest in the conveyance, of which the transferor has no notice. But the conveyance of ownership as effected by the transferor is real, because the transferor believes that he is performing an act that is also real, not simulated (as decided by the Civil Court of Appeals in and for the City of Buenos Aires, Panel D, November 14, 1990. JA, 1991, II, 434).

(d) Relationship between simulation and abuse of law

59. It is considered that there is an abusive use of a right when such use conflicts with the purposes that the law took into account upon contemplating such right (Section 1071 of the Civil Code). The consequence is that the act is contrary to law. This is a general principle of law, which has a similar correlative expression in the Companies Law (Law No. 19550). Companies may perform abusive acts, which are sanctioned as ineffectual and unenforceable as against third parties. Such acts *are directly ascribed to the partners, members or shareholders or the controllers who made them possible* (as per Section 54, last paragraph).

60. Now then, a distinction has been drawn between: (i) *fake companies*, in which the abuse of the legal form translates into the existence of a company with an unlawful purpose or a mere shell without any content whatsoever, and (ii) *abuse due to the partners', members'* or *shareholders'* performance. In the former case, there is an absolute disregard of the corporate entity. In the latter case, there is a partial disregard of the company, resulting in the ineffectiveness of certain acts as against third parties, with the status of *sui juris* being preserved for other purposes.

(e) Can tax avoidance be criminally punished?

61. Tax avoidance cannot be penalised.
The fraud against civil law that tax avoidance consists in cannot be confused with tax fraud (meaning tax evasion). Evasion exists whenever incomplete and inaccurate data on relevant facts are provided to the tax authorities.

62. Setting aside a certain degree of synonymy, there is a big difference between *fraus legis* (understood as a civil law concept) and tax fraud (tax evasion). What is more, the *animus* of the taxpayer is different, because although in both cases the aim is not to pay the tax, in the case of the *fraus legis* the taxpayer is convinced that he is avoiding the tax by lawful means, while in the case of tax fraud (tax evasion), he perfectly knows that he is dishonestly breaking the law.

August 2004