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The Defence of Taxpayers' Rights in the Courts of Argentina

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Contents

1. LEGAL AND POLITICAL ORGANIZATION OF ARGENTINA

Argentina's Constitution provides for a representative, republican and federal form of government. The republican principle has its most significant expression in the separation of powers that function independently of each other: the executive, the legislative branch and the judiciary. Proper institutional operation on the basis of a balance of powers is, as stated by a renowned Argentine scholar, the first formal guarantee contained in the Constitution in favour of taxpayers' rights and individual rights in general.[1]

Among the various possible degrees of federalism, the Constitution adopts the system that has a sole sovereign state – the federal state – to which the provinces delegate certain powers. In turn, the provinces that make up the state must ensure the municipal system, and the provincial constitutions regulate the extent of autonomy enjoyed by the municipalities.[2] Therefore, in the framework of Argentina's federal system, three levels of jurisdiction coexist: the federal state, the provinces and the municipalities. Each of these levels has the power to enact substantive and procedural tax laws.[3]

The Constitution provides for the distribution of taxing powers among the various levels of government, i.e. between the federal state and the provinces. Thus, it falls upon the federal state to establish customs duties and indirect taxes, the latter power being exercised concurrently with the provinces, while direct taxation is reserved to the provinces. Nevertheless, the federal state may establish direct taxes, but subject to the proviso that they are for a definite period of time and on the condition that they are required for the defence of Argentina, its common security and the common good (Secs. 4 and 75(2) of the Constitution).

In practice, however, the formal distribution of taxing powers by the Constitution translates into a federal tax-sharing legal system that was adopted by the Constitution itself. In substance, the system means that the federal government collects certain taxes which it subsequently distributes to the provinces.

In addition, the Constitution provides fundamental guarantees for the protection of taxpayers as a counterpart to the state's prerogative to levy and collect taxes. These rights are expressly enumerated in many cases; otherwise, they are established by implication because the Constitution (Sec. 33) states that the enumeration of certain rights and guarantees is not to be construed to deny other rights and guarantees which are not enumerated therein.

The supremacy of the Constitution means that all acts performed by the branches of government – as well as all private acts – must comply with the Constitution.

1. Luqui, Juan Carlos, *La Obligación Tributaria* (Ediciones Depalma, 1989), at 74. One of the most serious conflicts is the encroachment by the executive on the law-making powers reserved to the legislative branch.
2. Per Secs. 5 and 123 of the Constitution. Although the provincial constitutions regulate the degree of municipal autonomy, after the 1994 amendments to the federal Constitution it has been stated that the municipal system in Argentina entails a "charter" autonomy.
3. In the area of criminal tax law, the federal government provides a single system which applies only to the evasion of federal taxes. The evasion of provincial and municipal taxes is not subject to criminal prosecution.

2. JURISDICTIONAL REVIEW IN TAX MATTERS

2.1. In general

2.1.1. Official assessment procedure

In the tax field, each jurisdiction (the federal state, the provinces and the municipalities) has different administrative procedures. In the federal sphere, the final administrative decision is the culmination of a procedure that commences with a tax inspection which, if it leads to a tax adjustment, gives rise to the "official assessment procedure". During this procedure, the taxpayer raises defences, and an administrative judge of the tax office decides the issues.[4]

The review of an official assessment may be requested, at the taxpayer's option, by a motion for reconsideration filed with (i) the director-general of the tax administration, the Federal Administration of Public Revenue, *Administración Federal de Ingresos Públicos* (AFIP), or (ii) the Federal Tax Court, *Tribunal Fiscal de la Nación* (Sec. 76 of Law No. 11,683).

2.1.2. Federal Tax Court

If the taxpayer requests a review by the Federal Tax Court, as allowed by the rules of procedure (see 2.1.1.), the effect of the request is a stay of the order to pay the tax in question. This specialized court has jurisdiction in both tax and customs matters and is highly regarded due to the sound quality of its decisions. Although the Federal Tax Court is an administrative court that is not part of the judiciary, it is considered to be an independent tribunal equipped with the necessary safeguards to ensure the objectiveness of its rulings.

In the tax field, the collecting agency's decisions which assess tax either definitely or presumptively, adjust losses and/or impose fines may be challenged by filing an appeal with the Federal Tax Court (Sec. 159 of Law No. 11,683).

The principle underpinning the Court's proceedings is the search for the substantive objective truth, which empowers the Court to prosecute the case *sua sponte* and to adopt measures for providing additional evidence in furtherance of a better substantiated decision. Nevertheless, the law allows for the waiver of the rights involved to a certain extent because the law permits the parties to concede the claim filed by the opposing party (Sec. 164 of Law No. 11,683).

The proceedings at this stage may be described as full proceedings for the cognizance of a case in which each party's right of defence is afforded a balanced protection and the parties may present such evidence as is typical in tax cases. The administrative nature of the Federal Tax Court, however, means a jurisdictional restriction on it: the Court may not declare a law or regulation unconstitutional.

2.1.3. Rule "*solve et repete*"

The rule known as "*solve et repete*" entails the impossibility of challenging a decision of the tax authorities requiring the payment of tax without first paying the tax. For many years, under the rule *solve et repete*, numerous laws granted the tax authorities an additional prerogative[5] allowing them to collect the required tax before the taxpayer could contest or challenge the decision or resort to the courts seeking a modification of the administrative act that affected the taxpayer's rights. It was traditionally maintained that this rule of procedure was based on the interest of keeping the flow of public revenues unimpaired, which interest was said to prevail over taxpayers' guarantees.

At the federal level,[6] it may be stated that the rule in tax matters is that there is an obligation to pay the contested tax before having access to the courts. This rule does not, however, apply to access to certain jurisdictional bodies, as is the case with a claim filed in the Federal Tax Court.

Social security is one of the areas where the rule *solve et repete* is fully applicable at the federal level. In the specific case of social security contributions, the obligor must pay the contested amount before gaining access to the jurisdiction of the courts. Even in this specific area, however, there are certain exceptions which mitigate this harsh rule. Thus, if the obligor provides evidence of his difficulty in paying or inability to pay the required amount, surety bonds are often admitted as a means to ensure future payment if the decision is ultimately adverse to the obligor.[7]

In tax matters *stricto sensu*, as discussed above, at the federal level, there are ways to challenge official assessments and penalties imposed by the collecting agency, and the taxpayer may seek relief in the Federal Tax Court without first paying the tax.

An appeal from the decision of the Federal Tax Court may be lodged by either the taxpayer or the tax authorities in the ordinary courts (Federal Court of Appeals for Administrative Litigation Matters) in the form of a limited

4. The only exception to this procedure is if the taxpayer has not filed a tax return and the tax authorities are aware of other tax returns filed by the same taxpayer in other periods. In this case, if the taxpayer is sent an administrative notice and fails to comply with the tax demand, the tax authorities are empowered to institute tax foreclosure proceedings directly.

5. The rule *solve et repete* is highly controversial among scholars; nevertheless, this author adheres to the position that the rule constitutes a prerogative.

6. Some provinces and municipalities apply the rule *solve et repete* when moving from the administrative stage to the judicial stage. This means that the taxpayer must pay the tax and all related charges before seeking judicial review. This ill-advised legislative trend, which, as stated above, does not prevail at the federal level, has been twisted by the courts many times, which have permitted access to the courts without prior compliance with the requirement to pay the tax at issue.

7. In this regard, it was held: "The imposition of the obligation to make a deposit as a prior requirement for the judicial review of administrative decisions must be assessed in light of the right to a defence embodied in Section 18 of the Federal Constitution in order to prevent judicial review from becoming an illusory guarantee (so decided by the Supreme Court of Argentina on April 30, 1974 in *Adelphia S.A.*; decision of October 10, 1985 in *Villar Hnos. y Cía. S.R.L.*; decision of March 25, 1986 in *Massio Hnos. S.A.*). Therefore, the size of the amount claimed – in the case at hand, an amount in excess of two million pesos – and the fact that the challenging party has presented a surety bond in order to gain access to the court warrant that such party be exempted from compliance with the above-mentioned requirement in order to guarantee its proper defence in court, following the broad standard adopted in this field by the Supreme Court of Justice (Decision of May 14, 1995 in *Sanatorio Otamendi y Miroli S.A.*)." Federal Court of Appeals for Social Security Matters, Panel II, decision of 18 December 1998 in *Club Atlético Velez Sarsfield Asociación Civil c/D.G.I.*

appeal. If the decision is adverse to the taxpayer and the taxpayer appeals, prior payment of the tax is not a requirement for the appeal. Once this stage in the proceedings has been reached, however, the collecting agency is entitled to force payment of the tax claimed by instituting foreclosure proceedings.

2.2. Mechanisms for judicial review

2.2.1. Review of administrative decisions in federal matters

As stated above, in the case of an official assessment, the taxpayer may seek review of the decision in the Federal Tax Court, or he may request reconsideration of the assessment by the tax administration (AFIP). If the taxpayer chooses the latter, the final administrative decision may be subject to judicial review by the federal courts of first instance. In contrast, the decision of the Federal Tax Court is reviewable at the appellate level (Federal Court of Appeals for Administrative Litigation Matters).

If the taxpayer seeks administrative review and the decision is unfavourable, a claim for reimbursement may be filed in the courts of first instance for administrative litigation matters. The decision rendered by the court of first instance may be appealed to the corresponding court of appeals.

In both cases, once the court of appeals issues its decision, an extraordinary or ordinary appeal may be filed in the Supreme Court of Argentina to seek relief.[8]

2.2.2. Review of administrative decisions at the local levels

Although the time frames and types of post-decision motions vary, it may be stated that, in general, the administrative tax procedures at the local (provincial and municipal) levels are substantially similar to the federal procedure and are governed by the same principles until the assessment decision is made. From then on, some provincial jurisdictions provide the right to resort to the local tax courts. Others provide direct access to the courts which, in most jurisdictions, includes original jurisdiction by the Supreme Court of Justice of the province.

In contrast to the federal procedure, the rule *solve et repete* generally applies as a condition for the admissibility of a complaint, which is then a claim for reimbursement.

The decisions rendered by the provincial courts may be reviewed only by the Supreme Court of Argentina, provided there is a federal question, as mentioned above.

2.2.3. Constitutional control

Unlike other countries where constitutional control is concentrated (i.e. one court is responsible for ruling on constitutional issues), constitutional control in Argentina is diffuse, that is, it is in the hands of all judges and courts in the judiciary. This is, however, without prejudice to the role played by the Supreme Court of Argentina, as a result of the "extraordinary appeal", as the ultimate custodian of the Constitution and of the rights, liberties and guarantees embodied therein.[9] Further, the constitutional control that is the imperative of the judges and courts to carry out must fall within the scope of a specific case or justiciable cause because Argentina's system does not allow abstract declarations of unconstitutionality.

In administrative proceedings and in the proceedings before the Federal Tax Court, no declaration of unconstitutionality may be obtained. Naturally, tax issues are not outside the scope of the diffuse constitutional control inherent in Argentina's judicial system.

With respect to administrative proceedings in which a branch other than the judiciary engages in conduct that is jurisdictional in substance, the Supreme Court has recognized their validity but, at the same time, has repeatedly conditioned their validity on the existence of *adequate judicial review* (see e.g. Supreme Court decision 247:646).

2.3. Provisional measures in tax matters

In certain cases,[10] a taxpayer may be faced with the possibility that the tax authorities are entitled to force collection of the tax claimed without a procedural channel being available to settle the issue unless the tax is first paid. In most instances, this occurs in cases which allow for the institution of tax foreclosure proceedings.

One possible defence that the taxpayer may have consists of seeking a provisional measure in the context of a lawsuit. Another is to file a petition for constitutional relief by means of an *amparo*. Thus, judicial proceedings usually entail the filing of a petition for *amparo*, the commencement of an action for a declaration of unconstitutionality, or the judicial review of an administrative act in respect of which no specific means of challenge has been provided for. Case law has generally been reluctant to grant this kind of remedy, but it may be asserted that there have been changes in the case law on the preservation of taxpayers' rights.

To demonstrate the restricted nature of these measures even for the Supreme Court of Argentina, it is worth recalling the Supreme Court's decision in *Firestone de la*

8. Sec. 14 of Law No. 48 sets forth the requirements for the admissibility of an extraordinary appeal: (i) the case must involve federal provisions, including constitutional guarantees, (ii) there must be a final decision; and (iii) such final decision must have been rendered by the highest court having jurisdiction to hear the case. For an ordinary appeal, the claim must exceed a certain amount, and a final decision must have been issued by the highest court having jurisdiction to hear the case.

9. In a decision rendered on 5 December 1865, the Supreme Court held: "... as an element inherent in our constitutional organization, the courts have the power and the duty to examine the laws in the specific cases brought before them and to compare such laws to the text of the Constitution in order to find out whether or not they are consistent with it and to refrain from enforcing such laws if they find them to be in conflict with the Constitution. This reconciling function is one of the most elevated and essential aims of the federal judiciary and one of the most significant guarantees designed to protect the rights embodied in the Constitution against all possible and involuntary instances of abuse by the public powers."

10. For example, cases involving an unpaid balance on a tax return or a tax claim arising from the non-filing of a tax return. At the federal level, however, as stated above, there are procedural channels to avoid prior payment of the tax before challenging the decision in court. This is not always the case under the rules of tax procedure in the provinces; in some provinces, payment is mandatory before the decision may be challenged in court.

Argentina S.A.I.C. (11 December 1990). In that case, the Court stated that the admissibility of provisional measures that had the effect of a stay in tax matters must be examined very closely in order to prevent the normal collection of public revenues from being hampered. In contrast to this restricted approach to granting provisional measures, a new concept has gained ground in case law, also supported by numerous legal writers, which endorses the possibility that these measures be granted if certain requirements are satisfied.[11]

Regarding provisional measures, an amendment was recently introduced in the Federal Code of Civil and Commercial Procedure[12] whereby, at least in theory, provisional measures may not be granted in a court proceeding if they are intended to hinder or otherwise disrupt the resources that the state obtains in its own right. These hypothetical cases should include provisional measures that have the effect of a stay in tax matters.

Nonetheless, despite this sombre legislative picture, judicial reality shows that this amendment has not been operational because several rulings have declared it unconstitutional and legal scholars have hotly contested its chances for enforceability.

2.4. No imprisonment for debts – the criminal tax system

Argentina abolished imprisonment for debts a long time ago (by Law No. 514). Although the letter of the law abolishes this penalty for civil or commercial debts, it is undeniable that the prohibition also applies in tax matters. Moreover, the criminal tax system currently in effect (Law No. 24,769) in no way criminalizes the mere existence of a tax debt. Rather, criminal prosecution in the tax field for the crimes described in the relevant legal provisions depends on the existence of fraud, which is to be understood as the use of a ploy or an instance of deception.

It should also be made clear that all the guarantees inherent in criminal law are fully applicable in both criminal tax matters and misdemeanours. These guarantees include, among others, the right against self-incrimination, the principle of legality in criminal matters, the presumption of innocence, the rule that the criminalization of conduct is reserved to the legislative branch, the right to have the decision reviewed by a higher court, the prohibition against analogy, the principle of culpability, and *ne bis in idem* (the rule against double jeopardy).

In addition, special courts having exclusive subject matter jurisdiction have been established in the City of Buenos Aires for the prosecution of criminal tax matters.

3. CONSTITUTIONAL GUARANTEES REGARDING TAXATION

All matters submitted to a court for resolution relate to a conflict regarding the application of the tax law. Conflicts regarding the application of legal provisions stem from two major causes: (a) a conflict between the law and individual guarantees, and (b) a conflict in the application of the law to a given case. There is solid case law on the operation of individual guarantees.

3.1. Principle of legality in tax matters

Sec. 19 of Argentina's Constitution, which must be read in conjunction with Sec. 17 (regarding the inviolability of property),[13] sets forth the fundamental principle of tax law that all taxes must arise from a law made by the Congress in accordance with constitutional provisions; this principle is usually worded as the well-known maxim "*nullum tributum sine lege*". Thus, no tax may arise other than from a law in the formal and substantive sense of this term.

In addition, tax laws must originate in the House of Deputies. The legal provision must necessarily define the substantive elements of the tax: the taxable event, the parties subject to the tax, the method or system for assessing the tax base, the tax rates for determining tax liability, the exemptions (if any), and the violations of the law and the penalties for them.[14]

In line with this guiding principle, the Supreme Court has held that no tax obligation is enforceable unless there is a pre-existing legal provision that is consistent with the relevant constitutional principles and requirements, that is, an obligation validly made by the only branch of government that is vested with such power.[15] In connection with this principle, Sec. 99(3) of the Constitution limits the matters that may be regulated by means of emergency executive decrees. Sec. 99(3) expressly prohibits tax matters from being substantively regulated by this kind of decree.

Finally, it should be noted that the principle of legality is fully applicable in criminal tax and tax penalty matters. In this area, the guarantee is expanded, and Sec. 18 of the Constitution provides for the non-retroactivity of legal

11. Indeed, in *Video Cable Comunicación S.A. c/ Instituto Nacional de Cinematografía* (Supreme Court of Argentina, 27 April 1993), the Court held that evidence must be provided of actual damage to the normal collection of tax and that no such damage exists – and therefore provisional measures are possible – if such measures do not jeopardize the development of the government's economic policy, i.e. if the public revenue system is not affected and the provisional measure relates to a development activity and to the resources required for that purpose.

12. The third paragraph of Sec. 195 of the Federal Code of Civil and Commercial Procedure was amended to read: "The courts shall not issue any provisional measure which affects, hinders, jeopardizes, or alters the intended purpose of, or otherwise disrupts, the resources that the State obtains in its own right, nor shall they impose any pecuniary penalties personally upon government officials."

13. Pursuant to Sec. 17 of the Constitution, only the Congress may fix the charges set forth in Sec. 4 of the Constitution which are part of the federal treasury. The first paragraph of Sec. 17 guarantees the inviolability of property; a comprehensive analysis of the entire provision reveals that its rationale is the need to protect taxpayers' property rights.

14. As stated in Casas, José O., *Estudios de derecho constitucional tributario* (Buenos Aires, 1994), at 123. The author is a legal writer.

15. There have been several Supreme Court decisions on this point. In *Eves Argentina S.A.* (Supreme Court decision 316:2329, recital 10 and the quote therein), the Court stated: "This Court has categorically held that the constitutional principles and precepts prohibit branches of government other than the legislative branch from establishing taxes, charges and assessments (Supreme Court decisions 155:290; 248:482; 303:245, among others), and consistently with the foregoing, this Court has repeatedly maintained that no tax obligation is enforceable unless there is a pre-existing legal provision that is consistent with the constitutional principles and requirements, that is to say, one which has been validly made by the only branch of government that is vested with such power."

provisions which establish penalties.[16] Sec. 18 also requires that there be a law, in the formal and substantive sense, which defines tax misdemeanours and tax crimes.

3.2. Principle of taxpaying capacity

Taxpaying capacity is another fundamental principle of Argentina's tax law. It serves as a prerequisite that legitimizes taxation by the government vis-à-vis the citizens' duty to finance public expenditures; at the same time, the principle operates as a limitation on tax-creating powers, meaning that the government is barred from establishing taxes in cases where there is no present taxpaying capacity.[17] Although Argentina's Constitution does not expressly establish this guarantee, it is considered included in the unnamed or implied guarantees (Sec. 33 of the Constitution).

Thus, taxpaying capacity operates as a limitation on the legislature when it enacts taxable events because such capacity arises from the taxpayer's ability to be the obligor of a tax obligation. This capacity to stand as the obligor is, in turn, established on the basis of events which reveal the existence of wealth and are turned into taxable events; it is only then that they legitimize the tax obligation.

It follows from the foregoing that taxpaying capacity is an independent principle which does not require any legislative developments that may determine its content or scope; it is fully operational per se. In summary, its direct effectiveness makes it impossible to legitimize a tax in cases where there is no present, actual and effective taxpaying capacity.

In this regard, as far back as 1945, the Supreme Court held: "The power to establish taxes is essential and indispensable for the existence of government, but when this power is unlimited as to the selection of the taxable matter or the amount payable, it necessarily entails the possibility of destruction that is inherent in it because there is a limit beyond which no thing, person or entity will tolerate the burden of a certain tax" (*Banco de la Provincia de Buenos Aires v. Nación Argentina*).

3.3. Taxes not to be confiscatory

Sec. 17 of Argentina's Constitution categorically outlaws confiscation. The confiscation mentioned in Sec. 17, however, is the equivalent of a criminal penalty consisting of dispossessing a criminal from all of his property, and it has long been decided that this is not the concept embodied in the constitutional guarantee against confiscation in tax matters.

Moreover, the Constitution places property rights in the highest rank and emphatically proclaims them to be inviolable. It declares that no one may be deprived of his property except by virtue of a decision rendered in accordance with the law. And it contemplates only two possible forms of deprivation: (a) condemnation, which must be due to reasons of public use provided by law and previously compensated for, and (b) taxes, which are exclusively those set out in Sec. 4 and may only be established by law (Sec. 99(3) of the Constitution).

In this regard, the Supreme Court has long held that a tax is confiscatory if it takes up a substantial portion of income.[18] A tax may also reveal its confiscatory nature when its amount is unreasonable. The existence of this "manner" in which a tax may amount to confiscation is unanimously recognized by legal scholars.[19]

This approach shows that the confiscatory nature of a tax not only entails a quantitative judgement, but is also complemented and enhanced by legitimacy, which in this case includes the implied guarantee of reasonableness. The excessive amount of a tax has been the cause for its disqualification in countless cases, whether as the sole cause or one of several causes.[20]

3.4. Principles of generality and equality

The combination of the principles of generality and equality may be synthesized by reference to the indiscriminate extension prescribed by the Constitution in respect of taxes when the relevant parties are on a par. The courts of Argentina have consistently held that equality does not mean identical equivalence, but equivalence among those

16. Unless the criminal provision is more favourable to the alleged offender.

17. In this regard, the Supreme Court has held: "The existence of a manifestation of wealth or of taxpaying capacity is an indispensable requirement for the validity of any tax" and "property rights are overtly impaired when the law makes a taxable event out of a manifestation of wealth that had been exhausted prior to the enactment thereof without even claiming a presumption that the economic effects of such manifestation are still present in the sphere of the assets owned by the obligor" (e.g. Supreme Court decisions 271:7 (recital 10 and the quote therein) and 321:2467 (recital 7)). In addition, the rule in *Navarro Viola de Herrera* (Supreme Court decision 156:48) is that taxpaying capacity must be understood as the yardstick to measure the tax obligation and that property rights are overtly impaired when the law makes a taxable event out of a manifestation of wealth that had been exhausted prior to the enactment thereof.

18. The Supreme Court declared unconstitutional a provincial land tax which took up more than 33% of the income of the property under an appropriate exploitation thereof (decision 196:122). The Supreme Court ruled similarly regarding an inheritance tax that exceeded the third part of the estate (decision 190:159). The Supreme Court has also held that a tax is unconstitutional if the tax causes "material damage to the right to property" (decision 210:1208), if "it absorbs a substantial portion of the asset values involved" (decisions 199:321, 205:131, 211:34, 235:883 and 302:708), if it is "extortionate" or "immoderately pervasive" (decisions 181:264, 185:12 and 234:663), if it is "abusive" or does not entail a "prudent equivalence" between the benefit giving rise to the tax and the amount of tax (decisions 210:78, 210:351, 210:374 and 211:1221), if it amounts to a "dispossession" of property "to an extent that is out of proportion with the asset values involved" (decisions 254:320, 276:355, 279:278 and 312:1987), if "it exceeds the taxpayer's economic or financial capacity" (decision 312:2467), or if it amounts to a "denial of the equivalence of undertakings" that is "at the core of commutative justice" (decisions 295:973, 298:466, 301:319 and 312:377).

19. See e.g. Casás, José O., *Presión fiscal e inconstitucionalidad* (Buenos Aires, 1992), at 109: "The implied guarantee of reasonableness entails, within our constitutional system, the prohibition of its opposing value, namely, arbitrariness or simply unreasonableness, in the exercise of the prerogatives enjoyed by the public powers. From the legislative standpoint, the requirement for reasonableness is complied with if the means employed to achieve the purposes of a certain governmental power are rightly appropriated in all cases; thus, what is reasonable does not necessarily coincide with what is timely or appropriate, but calls for a more precise requirement to be satisfied."

20. See e.g. Supreme Court decisions 151:135, 198:270, 202:296, 205:403, 208:258, 213:467, 224:267, 226:408, 234:663 and 297:236.

who are *in the same position*.[21] Therefore, any two parties who are in the same position from a legal and factual perspective – and, in particular, who have the same taxpaying capacity – will be subject to equivalent taxation.

For its part, generality is a prior condition that must be satisfied when examining the equality requirement. It is not admissible for a particular part of the population to bear certain taxation to the detriment of another.[22]

Both of these tax principles in turn entail the general principle of equality embodied in the Constitution, which conclusively prohibits any kind of benefit arising from personal privileges, blood prerogatives or titles of nobility.

3.5. Right to due process, due procedure and adequate judicial review

The right to due process, due procedure and adequate judicial review is guaranteed in both judicial proceedings and the administrative actions preceding them. The right stems from the principle embodied in Sec. 18 of Argentina's Constitution, which provides that "the right to a defence in court of the person and of rights cannot be violated". It is from this right to a defence that all express guarantees relating to due process and due procedure arise.

Among the guarantees contemplated in Sec. 18, which provides the basis for the inviolability of the right to a defence, is the fundamental right of access to the courts. The inviolability of the right to a defence of the person and his rights comprises, in turn, various specific rights, as has repeatedly been held by the courts and legal scholars. Among them are:

- the right to be heard; this includes the right to set out the reasons for a claim and the reasons supporting the defence raised, as well as the right to be defended by an attorney;
- the right to proffer and present evidence; and
- the right to a duly substantiated decision in both the administrative and judicial proceedings.

In administrative proceedings, certain additional rights accrue to a taxpayer in the context of the right to a defence, including (a) the informal nature of the proceedings, (b) access to the proceedings without paying fees or charges, and (c) the right to file post-decision motions.

It should be underscored that all these guarantees are fully operational without the need for any regulatory provisions.

In should be clarified that, in the area of federal taxes, Argentina's tax system is based on self-assessment by taxpayers. This assessment may be contested by the tax authorities by means of a regulated procedure called "official assessment" in which all of the above guarantees apply. Nonetheless, such a procedure may be subject to review by a jurisdictional body, as explained later.

3.6. Legal security

The principle of legal security, which is inherent in the rule of law, has been acknowledged by the Supreme Court. In *Autolatina S.A. v. D.G.I.* (27 December 1996), the Court stated that legal security is constitutionally ranked as a value that must be safeguarded.

4. INTERNATIONAL TREATIES IN TAX MATTERS

4.1. Constitutional rank

Before the reform of Argentina's Constitution, the legal rank that international treaties should be afforded was the subject of intense debate and even of landmark court decisions. The constitutional reform of 1994 provided a conclusive resolution to the issue. By means of the amendment to Sec. 75(22), constitutional rank was granted to certain international treaties relating to human rights, and the provisions of those treaties were deemed to supplement the rights and guarantees embodied in the Constitution. The amendment provides that other treaties approved by a qualified majority of the Congress will also have constitutional rank. All other treaties are supralegal in rank, but still below constitutional rank.

One of the most significant treaties having constitutional rank is the American Convention on Human Rights (*Pact of San José de Costa Rica*), which has many outstanding features. Consistent with the right to a defence, embodied in Argentina's Constitution since 1853, Art. 8(1) of this treaty provides:

> Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature.

This treaty has frequently been invoked by legal scholars to assert that the rule *solve et repete* has lost operational effect under Argentina's law insofar as the rule impedes access to the courts. Art. 8 of the treaty acknowledges, as is clearly evident in its provisions, a real individual right accruing to taxpayers to enjoy an effective jurisdictional protection of their rights. In this regard, one of the most difficult questions is how this protection is impaired by the obligation to make prior payment of the tax (*solve et repete*). Here, we are faced with a true tension between the rights of taxpayers and the possibility that the normal collection of public revenues will be affected.

4.2. Investment protection agreements

Argentina has concluded investment protection agreements with certain countries which afford reciprocal protection to investments. Under these agreements, investors in Argentina who are subject to discriminatory treatment may resort to arbitral tribunals to seek a remedy.

21. As constantly held by the Supreme Court regarding these matters; see e.g. decisions 179:86, 182:486, 1188:464, 191:460, 192:139, 199:268, 201:545, 205:199 and 207:270. The Supreme Court has stated that establishing categories or differences is admissible when it is justified in the circumstances, subject to a standard of reasonableness; see decisions 175:199, 177:103, 184:592, 188:143, 192:139, 201:202, 209:28, 210:284, 210:500 and 210:855.

22. As the Supreme Court has held many times; see e.g. decisions 157:359, 162:240, 168:305, 172:102, 178:80, 178:231, 184:50, 188:403 and 190:227.

To date, Argentina has concluded about 56 such agreements, which were adopted by laws enacted by the Congress. Most of the agreements were concluded in the 1990s. Argentina has an investment protection agreement with e.g. Spain, France, the United States, the United Kingdom, Germany, Guatemala, Nicaragua, Russia, Portugal, Romania, Peru, Bolivia, Bulgaria, Denmark, the Netherlands, Belgium, Luxembourg, India, Cuba, Mexico, the People's Republic of China, Austria, Canada, Italy, Sweden, Switzerland, Poland and Chile.

These agreements provide mechanisms for resolving disputes relating to "investments" by means of international arbitration conducted by ad hoc tribunals or by tribunals established under specific rules. Among the latter is the International Centre for the Settlement of Investment Disputes (ICSID).

The ICSID was established by the Convention for the Resolution of Disputes between States and Citizens of Other States, executed in Washington, D.C. on 18 March 1965. Argentina adopted this Convention by means of Law No. 24,353. At present, there are 142 member states. The ICSID operates under the aegis of the World Bank and is based in Washington, D.C., but the parties may, by mutual agreement, establish another place for the conduct of the arbitral proceeding.

This body provides mechanisms and procedures for resolving disputes by means of conciliation and arbitration between the member states and investors who may be considered as nationals of other member states. The use of these mechanisms and procedures is voluntary, but once they have been resorted to, unilateral withdrawal is not permitted. It is a preliminary requirement that "friendly consultation" be encouraged with the host state of the investment. The consultation must comply with the formalities required for the ICSID to register the arbitration.

All the parties to the Convention that created the ICSID have a duty to abide by and comply with the arbitral awards. These awards may not be appealed, and they may be clarified, reviewed or annulled only for specific reasons relating strictly to procedural defects or the probity of the arbitrators.

At present, Argentina is a party to 35 cases that are officially pending, some of which relate to tax matters. The cases fall into two main groups: those commenced before the economic emergency and those filed afterwards.

Although one of the requirements for using the ICSID is that the dispute relate directly to an "investment", there is nothing to prevent tax issues from being brought before the ICSID if a provision of an investment protection agreement has been violated.