

## **COUNTRY REPORT: ARGENTINA**

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### **I. PROVISIONS OF THE GENERAL LAWS**

#### **A. Overview**

Argentina is a civil law country. Its legal system is based on its Federal Constitution which adopts the representative, republican and federal government system. The federalism, as opposed to unitary means of government, entails the division of the country in provinces and a federal district, Buenos Aires city. As stated in articles 5 and 31 of the Federal Constitution, the provinces are not sovereign. The relationship between the Federal Government and the provinces may be characterized as a subordination system of all those matters that have been surrendered by the representatives of the country at the time the Federal Constitution was enacted, other than those that have been maintained in the hands of the provinces –i.e those governs by local law-. This give rise to “federal supremacy”. Each province has its own Constitution but the existence of federal law means that it supersedes local law and thus, each province may not enact legislation against federal law. Thus, the Federal Constitution is the supremous legal means that governs the rest of legal regulations. It also provides the supremacy of international agreements over federal and local laws.

The general legal framework of NPOs is governed by federal law. Indeed, the Federal Constitution provides that the National Congress has the right to enact, among other, the Civil and Commercial Codes. The Civil Code provides in its article 33 that legal entities may be of a public or private character and among the latter it includes the associations and foundations the principal purpose of which is the benefit of the society, have their own assets, be capable to acquire assets according to their by-laws, are not maintained exclusively from the state’s subsidies or donations and have obtained authorization to carry out their activities from the relevant authority. The main legal formed used for an NPO is the foundation and the association and both are ruled by federal law, even though the authorization of their creation and control of the entity as such is ruled by local law. Therefore, depending on the place the entity is created (i.e. Buenos Aires city or a province) the formation and controlled will be governed by the relevant local jurisdiction authority.

#### **B. Constitution**

The Federal Constitution do have some rules that are inherent to NPOs even though there are no specific provisions dealings with NPOs directly as there may be in other countries under which they have Constitutional legal status, other than the recognition of the right to participate in the legal frameworks of public services and prevention of conflicts to “consumers associations”. The right to claim to authorities, the right to publish the ideas without previous censure and the right of association with useful purposes are some of the main principles laid down with in

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article 14 of the Federal Constitution that are directly related to NPO's activities.

Non discrimination, including racial or ethnic discrimination is protected under article 16 of the Federal Constitution which provides that "Argentina does not admit privileges of blood or birth, there are no personal statutes nor nobility titles. All the inhabitants are equal before the law and admissible in the jobs without any other condition but capability ...".

### **C. Applicable laws**

The most important laws dealing with NPOs are:

- National Constitution, Articles 1, 5, 14, 16, 31, 43, 75 inc. 22, inc. 24, 121.
- Civil Code - Articles 30 through 50.
- Federal Education Law. Law 24,195 of April 29, 1993, articles 36 and 40.
- Foundations Law. Law 19,836 of September 15, 1972.
- Mutual Association Law. Law 20,321 of April 27, 1973.
- Approval of the Hague Convention acknowledgment of the legal status of foreign societies, associations and foundations - Law 24,409 of November 30, 1994.
- Income tax Law. Law 20,628 of July 11, 1997, as amended.
- Income tax implementing regulations. Decree 1,344/98 of November 19, 1998, as amended.
- Value added tax Law. Law 23,349 of August 25, 1986, as amended.
- Minimum deemed income tax Law. Law 25,063 of December 7, 1998, as amended.
- Donations proof (related to income tax exemption) - General Resolution DGI 3,191 of June 14, 1990.
- Donations requirements (related to income tax exemption) – General Resolution AFIP 1475 of May 7 of 2004.
- General Resolution DGI 1,432 of November 18, 1971.
- General Justice Inspection procedure - IGJ General Resolution 6/80 of January 22, 1981.
- Foundations: constitution - IGJ General Resolution 6/00 of December 18, 2000.
- Foundations: control - IGJ General 4/93 of March 2, 1993.
- Foundations: minimum capital - IGJ General Resolution 3/93 of March 2, 1993.
- Foundations: re-standardization - IGJ General Resolution 5/93 of March 2, 1992.
- Civil Associations: re-standardization - IGJ General Resolution 3/94 of August 1, 1994 and 7/94 of December 15, 1994.
- National registry of companies and other entities - Decree of the Executive Branch 23/99 of January 20, 1999.
- National registry of stock companies, non-stock companies, foreign companies and civil associations and foundations - IGJ General Resolution

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4/99 of July 14, 1999.

- National exempt organizations registry – General Resolution 1815 of January 12 of 2005.
- National registry of non-governmental organizations - Decree of the National Executive Branch 422/99 of April 27, 1999.

#### **D. Types of Organization**

The two main types of organizations for an NPO are the associations and the foundations. The Civil Code, in its article 33, includes associations and foundations as private legal entities. These are two types of NPOs that have to fulfil certain requirements according to such rule: a) their main purpose is to provide benefits to the society; b) they have their own property; c) they are capable of acquiring goods according to their by-laws; d) they are not maintained exclusively from the state's subsidies or donations; and e) they have to obtain authorization to carry out their activities from the relevant authority.<sup>1</sup>

Associations' and foundations' essential aim is the public benefit, without a profit seeking purpose. They may be created to fulfil directly society needs (foundations) or the needs of a given group, which indirectly benefit the society (associations).

Both of them must precise and determine their purpose in their by-laws, describing, specifically, the activities that would contribute to accomplish that purpose. They may also include other activities, but they must be connected to their main objective.

Foundations are governed by law No. 19,836 and subject to the control of the IGJ or DPJ. Their main purpose should satisfy directly a society need (e.g. medical assistance or assistance to disabled people) as subsidiaries of the state. They are key factors as collaborators of the state.

The founding members provide goods of their own property to accomplish foundations goals. The most important characteristic of foundations is that the beneficiaries are not connected with the legal entity (e.g. a disabled person who receives a wheelchair is not a member of the foundation).

On the contrary, the main objective of the associations is to satisfy the members' interests. For that reason, associations are created for their benefit. They may have different kinds of purposes (e.g. benefit, cultural, scientific purpose).

In order for an association to be recognized as a legal entity it has to file the relevant registration application with the IGJ or DPJ. Associations that do not have a legal personality recognized by the relevant authority are simple civil or religious associations depending on their purposes.

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<sup>1</sup> The General Public Inspection, Inspección General de Justicia, "IGJ", in the City of Buenos Aires or the Legal Entities Directorate, Dirección de Personas Jurídicas, "DPJ", in the provinces.

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Another difference is that associations have members and foundations have not. The founding members are not considered, technically, members of the foundations.

Finally, it is important to state that associations may change their purpose by modifying their by-laws. On the other hand, foundations have their purpose determined in their by-laws and it may only be modified if it becomes impossible to be accomplished.

Another type of NPOs which is recognized in the Civil Code is the simple association (article 46 of the Civil Code). These entities do not qualify as legal subjects from a civil law standpoint and they do not need authorization to carry out their activities from the relevant authority. All the founding members and administrators are jointly liable for the simple associations activities. However, their purpose is also to provide public benefits. A simple association is deemed to be an entity capable of having rights and obligations as an entity separate from its members (i.e. as a legal subject) so long as its articles of association and the appointment of its authorities are vested in a public deed or in a private instrument certified by a public notary.

The last type of NPOs is the mutual association. These NPOs, governed by law No. 20,321, as amended, are those formed as non-profit entities the basis of which is the solidarity principle and whose purpose is to grant help on that reciprocity basis against eventual risks or to provide material or spiritual welfare through periodical contributions of their members. Mutual associations are subject to the control of the National Institute of Mutual Action, and if duly registered, are deemed to be entities with legal personality. Among the activities in which a mutual association may be engaged we may mention the provision of medical or pharmaceutical assistance, subsidies, loans and insurance, construction, promotion of cultures, education, sports and tourist activities.

## **II. SPECIFIC QUESTIONS ABOUT LOCAL LAW**

### **A. Private inurement**

The fact that income and assets be distributed to any other person other than in fulfillment of the organization's statutory purpose, or as a reasonable payment for services or goods provided to the organization will entail adverse tax consequences, as described below. Foundations, for instance must destine their proceeds for the fulfillment of their purposes and not even accumulate funds unless with a precise object (Law 19,836, article 22). Therefore, in case there is a breach to this rule, or even in any case in which such a distribution is made, it may be deemed that the entity is not a foundation or an association but a commercial company and, therefore, be recharacterized as such or enter in a dissolution status because of an abuse of the form.

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Regarding, the rules governing financial transaction or “self-dealing” between NPO’s and their directors, officers, employees, or family members of these “insiders”, these transactions –in certain circumstances- may be deemed to be in breach to the rule that prohibit the payments of a retribution for the exercise of the seat to the board of administration (Law 19,836, art. 20).

Furthermore, the Foundations Law 19,836, in its article 21, foresees that any contract between the foundation and its founders or his/her heirs, except the donations that these make to the NPO, as well as any resolution of the board of administration which directly or indirectly give rise a benefit which is not foreseen in the by laws for the founder or his/her heirs, must be subject to the approval of the administrative controlling entity (i.e. IGJ or DPJ) and it will be invalid without this approval.

### **B. Proprietary Interest**

As a rule, the proprietary interests in the assets or income of an NPO is held in the hands of the NPO itself. They are legal persons with the right of acquiring assets and liabilities (Civil Code, art. 33)

However, a donor, for instance may only contribute the use or usufruct of a given property to the NPO, maintaining the property for itself. This is permitted by the Law.

In general, according to Civil Code (art. 1848), donations cannot be revoked unless the receivers do not fulfill the charges or conditions established on the donation or in case the receiving NPO has acted with ingratitude (Civil Code, art. 1858).

In relation to foundations, promises of donations made by the founders in the constitutive act are irrevocable once the foundation being declared a juridical person by the competent authority. If the founder dies after signing the constitutive act, a promise of donation cannot be revoked by his heirs after the request of an authorization from the competent authority to function as a juridical person is made. (Law 19,836, article 5)

Reformation of a foundation’s statute or dissolution and transfer of the foundation’s assets, motivated by a change of circumstances that renders impossible the carrying out of the foundation’s objective and which is approved by the controlling administrative authority, will not give rise to a revocation of donations by a donor or his heirs unless the donation instrument specifically established the manner of execution of the condition which later turns out to be impossible [Law 19,836 article 31]

Mutual benefit associations are governed by Law No. 20,231. Since there are no specific rules about liquidation in that Law, this proceeding is regulated by the Civil Code (Article 1777 to Article 1788 bis).

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According to article 1788 bis of Civil Code, in case of partial liquidation caused by death or retire of a member, the successors or the member, respectively, will have the right to receive a proportional part of the assets of the mutual benefit associations, which will be calculated taking into account the contribution of the member and the real value of the assets.

It should be noted that the reception of assets upon liquidation may trigger adverse tax effects, which are discussed below.

### **C. Dissolution**

#### (i) Associations.

The Civil Code, in the article 48, states that a private legal entity may be dissolved for different reasons:

- (a) Dissolution based on the members' decision. In this case, it is necessary to obtain the authorization of the IGJ or DPJ.
- (b) Dissolution by virtue of the law, despite the will of the members.
- (c) Abuse or violation of the terms of the authorization to function.
- (d) Impossibility of performance. The purpose of the association becomes impossible to be accomplished.
- (e) Dissolution based on public interests.
- (f) Discontinuation of the assets provided to fulfil the purpose of the private legal entity.

The death of the members of an association is not a reason for its dissolution, even when the number of the rest of the members becomes insufficient to fulfil the purpose of the legal entity. In this case, in absent of a by-law provision, the state has to decide the dissolution or the way to renew the members (Article 49 of the Civil Code).

The liquidation of the association will be carried out by a board of trustees and consist on selling all the assets and paying all the debts. The remaining assets should be destined to an NPO recognized as a legal entity by the IGJ or DPJ.

If the by-laws does not specify the destination of the assets, the State will acquires them and the National Congress should decide the purpose to which they will be dedicated to (Article 50 of the Civil Code).

The dissolution must be registered with the IGJ or DPJ and when the liquidation proceeding is finished, the authorization to function is cancelled.

Decisions regarding involuntary dissolutions are subject to administrative and judicial appeals.

(ii) Foundations.

As foundations are private legal entities that requires authorization to carry out their activities from the IGJ or DPJ, they may be dissolved for the reasons stated in the Civil Code, in the article 48, that have been mentioned above.

However, Law No. 19,836 includes specific rules related to the winding-up of foundations.

The winding-up must be decided by a meeting of the board of trustees. The meeting must be communicated to the IGJ or DPJ with 15 days of anticipation through the filing of a special form.

Within 15 working days as from the date of the meeting of the board, a copy of the meeting's minutes duly signed by the president and the secretary of the board and certified by a notary public, must be filed with the IGJ. In addition, it should be filed with the IGJ a list of the members and alternate members of the board that will be in charge of the liquidation and of the surveillance committee, if applicable, indicating the term for which they have been appointed and their personal data.

The liquidation of foundations will be carried out by the board of trustees and will consist of selling all the assets and paying all the debts. Said liquidation will last until all the debts are cancelled and all the obligations arising from agreements signed and engagements assumed by the foundation are executed in full.

During the liquidation proceeding, foundations will be able to continue complying with their purpose.

When the liquidation proceeding is finished a final liquidation financial statement must be prepared. A board of trustees' meeting must be held in which the final liquidation balance sheet must be approved and the destiny of the remaining assets of foundations, if any, must be decided.

The IGJ or DPJ is the authority in charge of approving the decisions of the board regarding the transfer of the remaining assets of foundations.

It is foreseen that in case of dissolution of a local foundation, the remaining assets must be destined to an entity of a public nature or to a non profit private legal person of public benefit domiciled in Argentina. This requirement does not apply to foreign foundations. The decisions which are adopted regarding the transfer of the remaining assets require previous approval of the administrative control authority (Law 19,836, art. 30).

**D. Activities**

**1) General**

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Argentine legislation does not specifically detail what activities may be carried out by civil associations, simple associations and foundations. As mentioned before, the Civil Code in its article 33 refers to associations and foundations that comply with certain general requirements such as that their main purpose is to provide benefits to the society ("public benefit"). Therefore, though there is no specific activity test, it is clear that the activity which the NPO will be engaged on must be related to a non profit (public benefit oriented) activity.

Foundations and civil associations complying with the requirements foreseen in article 33 of the Civil Code are, as a rule, legal persons

In order for an association to be recognized as a legal entity it has to file the relevant registration application with the competent authority (i.e. the IGJ or the DPJ) and be granted the authorization. Associations that do not have a legal personality recognized by the relevant authority are simple civil or religious associations depending on their purposes. A simple association is deemed to be an entity capable of having rights and obligations as an entity separate from its members (i.e. as a legal subject) so long as its articles of association and the appointment of its authorities are vested in a public deed or in a private instrument certified by a public notary. Otherwise, all the founding members and administrators are jointly liable for the simple associations activities as the entity is deemed to be only an irregular simple association.

Foundations are governed by law No. 19,836 that limits these entities to those that are formed with the object of providing public benefits, without a profit seeking purpose, through the contribution of one or more persons in order for the foundation to accomplish its goals.

An NPO, whether it is an association or a foundation, may not fully operate without the legal status qualification given by the General Justice Inspection (Article 45 of Civil Code). Thus, although the State confers legal entity status to organizations that do not obtain the proper authorization from the administrative authority (i.e. IGJ or DPJ), in practice, these organizations would not be able to take advantages of the legal benefits allowed by law.

## **2) Public benefit**

As stated before, Civil Code refers to "benefits to the society" that is understood as "community good, it means, the one that belongs to individuals as members of the community" (Llambías, J., Civil Law Treat, General Part, T. II, p. 92).

The "benefits to the society" may be understood as a useful purpose for the society, even though the object is not completely unselfish or altruistic and may report certain advantages to their associates (Bueres-Highton, Civil Code and complementary laws, 1<sup>a</sup>. P. 355).

We may say that having a public benefit purpose is a must for an NPO. This is indeed one of the requirements as such as stated under the Civil Code, article 33

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and also it is necessary for obtaining the income tax law exemption.

On 12 November 1971, the AFIP-DGI issued General Resolution 1432 clarifying the scope of the requirements to be complied with under the relevant provisions of the income tax law in effect at that time. Although this General Resolution was issued at the time of a different ITL, the wording of the relevant part of the ITL article was the same as the current one. Accordingly, it is still applicable and it has not been abolished. General Resolution 1432 sets forth that the following entities are also eligible for the exemption:

(a) civil entities with legal personality granted due to the public purposes expressly mentioned in article 20(f)<sup>2</sup> above even when they also carry out activities -statutorily permitted- which, if considered on an individual basis, may be not eligible for the exemption, so long as those activities are related to and compatible with such purposes;

(b) any other civil entity that qualifies as a legal entity (e.g. registered association or foundation) even if such status has not been granted under any of the purposes expressly mentioned in article 20(f) so long as its purpose is of a public nature;

(c) any other entity which complies with the conditions for being an entity capable of having rights and obligations as an entity separate from its members under article 46 of the Civil Code (i.e. a simple association with legal personality being formed by a public deed or a private instrument certified by a public notary) provided that it can be proved through a certification of the competent authority that its purposes and activities are those mentioned in the two above-mentioned cases.

### **3) Commercial/Business/Economic Activities**

NPOs essential aim is the public benefit, without a profit seeking purpose. However, an NPO may engage in commercial, economic or business activities, as a means of obtaining funds for its purpose. But these activities have a limit so as to avoid that the NPOs be deemed to be commercial entities. Accordingly, the profits of the commercial, economic or business activities of an NPO should be invested in the NPOs' purpose. What it is prohibited is to destine the profits or its assets to its members. This might be considered as one of the reasons that justify the dissolution of the NPO based on an abuse or violation of the terms of the authorization to function (Article 48 of the Civil Code).

In this sense, the relevant laws do not distinguish between "related" or "unrelated" commercial/economic activities. The issue is the destination of the proceeds and profits of such activities. We are not aware that there have been challenge to NPO's commercial activities on the grounds that they compete unfairly with commercial companies (e.g. a foundation dedicated to provide food to children

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<sup>2</sup> E.g. welfare, public health, etc.

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which runs a bakery) because of their tax exemption.

The carrying out of commercial activities may have adverse tax effects. This is discussed below.

### **E. Legislative and Political Activities**

Generally, there are no restrictions on the ability of foundations and associations to engage in legislative or political activities. In fact, it is very common that there are foundations very linked to political parties, specially for the analysis of the political and economic situation of our country.

In Argentina there is no legislation about lobbying activities. There is a draft on this matter that is under treatment at the Deputies Chamber.

Therefore, these entities may freely support a given legislation. Any restriction on the political activities of a particular entity would be contained in that entity's by-laws. However, consumer associations are prohibited from participating in partisan political activities.

Furthermore, the rights of an NPO to act in supporting activities/legislation ends when they infringe a given right granted to other persons.

### **F. Discrimination**

The Argentine National Constitution establishes that all people are equal under the law (art. 16). Along those same lines, the same provision prohibits advantages granted on the basis of blood or birth, further prohibiting personal privileges or titles of nobility.

The State must fix the education policy respecting the consolidation of an effective equality of opportunity and possibility for all citizens and the rejection of discrimination of any kind. [Federal Education Law, 24,195, article5(f)]

### **G. Control of organization**

#### **(i) Associations.**

Legal entities may be members of associations and for that reason they may participate in the election of the directors or trustees. However, legal entities are no able to be neither directors nor trustees. The positions of directors should be hold by persons older than 21 years old, who are members of the associations. The trustees should not be members of the board of directors.

#### **(ii) Foundations.**

Legal entities may be founding members of foundations and for that reason may be members of the board of directors. They also keep the right to point the rest of

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the directors. Therefore, they may control an NPO. The position of directors may be held by either by founding members or by other persons.

### **III. THE TAXATION OF ARGENTINE NPO'S.**

#### **General considerations**

Most of the tax laws of the different government levels do contain specific provisions for reducing the tax burden of the NPOs. This is more specifically foreseen in national taxes (e.g. income tax or value added tax), in the case of certain provincial taxes only to a minor extent. Although some municipalities provide some benefits for NPOs, as the main taxing power lies in the service supplying activities, the nature of an NPO is not much considered in the municipal tax laws. Local taxes are spread all over the country, thus municipalities of each jurisdiction have their own rules.

The Argentine tax policy in connection with NPOs has been in general oriented by the importance of their functions to the community as entities with public purposes. Accordingly, the special tax treatment that may be applicable in a given tax law to an NPO is directly attached to the objective of and the activities carried out by the NPO. This is shown by the reference to the type of NPO -foundation, association, mutual association- its core activity (e.g. charity, cultural, sporting, scientific) and the destination of its profits and property during its existence and upon dissolution.

#### **A. Income tax.**

##### **1) Types of exempt organizations.**

There is only a federal income tax law in Argentina and it is ruled by Law 20,628 as amended. Regulations are contained in Decree 1,344/98, as amended.

As a general rule, an association or a foundation formed in Argentina is deemed to be an income tax taxpayer in the same way as a local corporation. Thus, it is subject to income tax on all its taxable income unless it is recognized as an exempt entity. Indeed, if the relevant conditions are met, the NPO may qualify as an exempt entity recognized as such by the tax authorities (Administración Federal de Ingresos Públicos, Dirección General Impositiva, hereinafter the "AFIP-DGI") and therefore, it does not have to pay income tax as all income and capital gains derived by the NPO are deemed to be exempt.

There are different rules for different types of NPOs. Article 20 of the ITL contains five different provisions granting exemption to the income and gains derived by the relevant NPO.

The first rule governing the exemption of an NPOs is that laid down in article 20 (e) of the income tax law ("ITL") dealing with the exemption of religious

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institutions. The second and major exemption for NPOs is that under article 20(f) of the ITL for qualifying foundations, associations and other civil entities. The third exemption for NPOs is that for eligible mutual associations –ITL, article 20(g). The fourth case is that for income and gains derived by sporting associations– ITL, article 20(m). The last one is for an international NPO the central seat of which is in Argentina and for an NPO which has been appointed by the national government as an NPO of a national interest.

In all these five cases the exemption is *granted upon request*. Accordingly, the NPO has to file an application with the AFIP-DGI attaching the relevant articles of association and other documents and forms that the authorities may require. After analyzing the petition, the AFIP-DGI will grant or deny the exemption. If the exemption is denied, the NPO may file an appeal. Currently, the rules for requesting the income tax exempt status are laid down in AFIP-DGI General Resolution 1815.

We will discuss in this section the exemption for the first four cases, and the last one while dealing with foreign NPOs.

### **Religious institutions.**

The scope of this exemption is wide as it not only covers income from donations or other voluntary contributions but also income derived by the religious institution –of any creed– from the rendering of services such as education or medical assistance. Decree 1,092 of 1997 established that certain Catholic entities are granted this exemption in an automatic way. Therefore, the exemption does not need to be requested from the AFIP-DGI and it may be applicable just upon having a certificate issued by the Culture Secretary of the Ministry of External Affairs, International Commerce and Culture.

### **Qualifying foundations, associations and other civil entities – ITL, article 20(f)**

This is the most important rule on the taxation of NPOs. The exemption granted by this provision is based on three requirements: (a) its legal form, (b) the public purpose of the NPO, and (c) the distribution of profits or property test. In addition, there are two further limitations in order for the exemption to be applicable: (a) the prohibition of raising money from gambling or public shows; and (b) the banning of paying excessive fees to advisory councils. We will analyze these issues.

The first requirement for the exemption is that the NPO be formed as an association, a foundation or a civil entity. There is, accordingly, a correlation between the legal form and the purpose of the NPO because further to the public purpose being a specific requirement itself, the fact that the NPO has to be organized as any of those types envisages, by nature, the existence of a non-profit-seeking entity.

The former wording of the ITL set forth that this exemption be granted to entities

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for public purpose. The tax authorities defined from the outset of the law such terms as "those entities which neither directly or indirectly seek a profit purpose, being characterized, on the other hand, by the purpose of reaching a function which is useful for the society".<sup>3</sup> This led to many conflicts due to the subjective approach of this requirement giving rise to case law for denying the exemption. In 1946, the ITL changed its approach and turned to list the different activities that qualify for the exemption. The current wording of ITL article 20(f) establishes that the exemption is applicable to "associations, foundations and civil entities of welfare, public health, charity, beneficence, education and instruction, science, literature, arts, trade union and those of physical or intellectual culture". This list is not comprehensive. It only provides examples of public purposes

General Resolution 1432 issued by AFIP-DGI on 12 November 1971 sets forth that the following entities are also eligible for the exemption:

- (a) civil entities with legal personality granted due to the public purposes expressly mentioned in article 20(f)<sup>4</sup> above even when they also carry out activities –statutorily permitted– which, if considered on an individual basis, may be not eligible for the exemption, so long as those activities are related to and compatible with such purposes;
- (b) any other civil entity that qualifies as a legal entity (e.g. registered association or foundation) even if such status has not been granted under any of the purposes expressly mentioned in article 20(f) so long as its purpose is of a public nature;
- (c) any other entity which complies with the conditions for being an entity capable of having rights and obligations as an entity separate from its members under article 46 of the Civil Code (i.e. a simple association with legal personality being formed by a public deed or a private instrument certified by a public notary) provided that it can be proved through a certification of the competent authority that its purposes and activities are those mentioned in the two above-mentioned cases

Further to comply with the public purpose test, the NPO's income or gains and its property need to be used for the purposes of its formation and in no case are they to be distributed directly or indirectly to its members.

Article 20(f) of the ITL states that the exemption is not to be granted to those entities which raise all or part of their funds from the exploitation of public shows, gambling games, horse-races and similar activities. This is a limitation that gave rise to the denial of the exemption in many cases and large administrative and judicial jurisprudence.

The scope of this limitation was determined by case law of the National Chamber

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<sup>3</sup> Ruling No. 7 from the Honorary Commission of Income Tax of 25 October 1933, Enrique Jorge Reig, *Impuesto a las ganancias, op. cit.*, at p. 237.

<sup>4</sup> E.g. welfare, public health, etc.

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of Appeal<sup>5</sup> in a case where the exemption in ITL article 20(f) was denied for an NPO engaged in helping children with problems through the organization of centres for these purposes and the promotion of scientific research activities for autistic children and teenagers. In order to carry out its activities the association organized public shows hiring foreign artists. Due to these activities the exemption was not granted. The association filed a lawsuit and the judge rejected it. The National Chamber of Appeal overruled the first instance judge's decision on the grounds that, among other arguments, the purpose of the limitation is to prevent the deviation from the goals of the association, i.e. the public purpose of the entity. Accordingly, it was decided that the limitation was not applicable and that NPOs may raise funds from public shows so long as the objective of their formation is not contravened. The AFIP-DGI have relied later on this case law precedent in a ruling.<sup>6</sup>

An amendment to the ITL made in 1995<sup>7</sup> added a paragraph to article 20 according to which the exemptions under this provision for qualifying associations, foundations and civil entities, mutual associations and sporting associations will not be applicable for those institutions which during a given tax period paid to any of the members of the board of directors, advisory councils, syndics, auditors, or similar boards for the management or control of the institution, a remuneration for their activities –whatever the consideration was, including lodging and food or similar expenses– for an amount that was 50 per cent higher than the annual average of the three-best salaries of the administrative employees. Many queries have arisen from this new limitation. The first one is whether the manager or any other employee of the NPO is subject to this limitation, especially in those cases in which the relevant individual is carrying out both activities: as an employee and as a member of the advisory council of the NPO.

Administrative jurisprudence have provided some guidelines on how to apply this limitation<sup>8</sup> This ruling clarified that the remunerations that are subject to the limitation are those which are paid to the members of the management or control boards but only for their activities as such. The salaries paid to the relevant individual for any other activity –e.g. for his function as an employee such as the general manager of the institution– is not subject to the over-50 per cent best-salary test.

Another important limitation is that laid down in the ITL according to which foundations and trade union associations which carry out industrial and/or commercial activities are excluded from the exemption. This is a very conflicting limitation and even though some administrative jurisprudence have relaxed the

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<sup>5</sup> *Asociación Pro Ayuda a Niños Atípicos c. Fisco Nacional DGI*. Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal, sala II, 4 July 1995. Impuestos, LIII-B, p. 2811.

<sup>6</sup> Ruling, Dictamen (DAL) 74/96, 9 December 1996.

<sup>7</sup> Amendment made through Law 24,475 published in the OG of 31 March 1995.

<sup>8</sup> Dictamen (DAT) 89/96 of 16 August 1996.

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rule<sup>9</sup>, it is an arguable requirement which creates problems at the time to determine if a given activity could jeopardize the exemption status.

### **Mutual associations**

Under article 20(g) of the ITL, income and gains derived by mutual associations complying with the requirements of the relevant laws and regulations are exempt. This treatment also applies to the benefits that they grant to their members. Such requirements are those laid down in the Mutual Associations Law 20,321, this being registered in the National Registry. The exemption is of a wide range and in this sense has been declared by the Supreme Court in a case related to a mutual association engaged in insurance activities.<sup>10</sup>

### **Sporting associations**

ITL article 20(m) deals with the exemption on the income and gains derived by sporting associations and those of physical culture so long as they do not have either a profit-seeking purpose or exploit or authorize gambling games and so long as the sporting activities of the NPO prevail over the social activities. This exemption is also granted upon request and it is subject to the limitation on the fees paid to the advisory council.

The scope of this exemption was clarified by a Supreme Court ruling which stated that it is not applicable to NPO's engaged in gambling games as in this case where the NPO raised funds from horse-riding races.<sup>11</sup>

### **Foreign NPO's**

A foreign NPO may derive Argentine source income either directly from abroad or by having a presence in the country that may constitute a permanent establishment ("PE"). Unless a specific exemption is applicable, a foreign NPO will be subject to tax, though under different rules.

ITL article 20 (r) also grants an exemption for the income and gains derived by a non-profit international institution with legal personality the central seat of which is in Argentina. This exemption also applies to an NPO which has been appointed as of national interest by the Argentine government even if it neither has legal personality granted in our country nor its central seat is in Argentina. This exemption has also to be granted upon request as the other exemptions for an NPO.

A conflicting issue is whether a foreign NPO may be granted an exemption under the general rules laid down in ITL, article 20 (f). The tax authorities have specially granted it in case where non-discrimination status was foreseen in applicable

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<sup>9</sup> Ruling (Dictamen) DAL 6/2000; Ruling DAT 63/2002, Ruling DAT 82/2002, AFIP-DGI.

<sup>10</sup> Supreme Court, 24 July 1961, *F.A.T.A. Sociedad de Seguros Mutuos, La Ley*, vol. 104, p. 426.

<sup>11</sup> *Jockey Club de Rosario c. Fisco Nacional DGI*, National Supreme Court, 18 April 1989, *Impuestos*, vol. XLVII-B, p. 1711.

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international treaties.

### **Request of the exemption.**

As indicated below, the exemption from income tax is granted upon request. For this purposes, the NPO has to comply with the requirements foreseen under General Resolution (AFIP-DGI) 1815 published on January 14, 2005. There is a Registry of Exempt Entities in which the relevant NPOs which are admitted for the exemption be included.

### **2) Scope of the income tax exemption.**

Once the NPO has obtained the exemption it means that all its income and capital gains either from Argentine or foreign sources are exempt from tax. As such, local and foreign grants are exempt. Passive investment income and income from commercial activities is only exempt, as a rule. The issue is that in case the exemption is applicable then all its income is exempt but in case that deriving certain income jeopardizes the exemption (e.g. deriving income from industrial activities for a foundation), all the income derive by the NPO is subject to tax. There has been certain cases in which the tax authorities have challenged the exemption because of the (commercial) activities that were carried out by the NPO. The fact that certain (e.g. investment) income is derived by the NPO should not jeopardize the exemption so long as the NPO carries out the charitable purpose that is its core activity.

### **3) Tax benefits for charitable contributions. Tax benefited contributions for NPOs.**

The only tax benefit for qualifying contributions is the deduction as business expense from the taxable base of the donor and only up to the limit of 5% of its taxable base. Recognized exempt religious institutions are eligible for this deduction as also NPOs which qualify as an exempt entity under ITL article 20(f) so long as its principal purpose is either: (a) not for-profit welfare medical assistance including that for taking care of children, old aged people or disabled persons; (b) scientific and technology research so long as the NPO has the relevant certificate with respect to research programmes, researchers and personnel which will participate in the programme, such certificate to be granted by the Technology and Science Secretary from the Education and Culture Ministry; (c) scientific research on economic, politic and social matters oriented to the development of political parties' plans; or (d) systematic education activity provided that the relevant officially recognized certificates are granted as well as in the case that the NPO promotes cultural values through the support or organization of free courses in educational establishments.

There are formalities that need to be followed for tax purposes. General Resolution 3191 contains the requirements to be complied with such as having to make the donation in cash only through a bank deposit; and that the donor has to attach to the annual tax return a copy of the deposit certified by the donee. In

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addition, the latter is obliged to inform the tax authorities on the donations received each year.

#### **A. Custom Duties.**

- 1) No entity is exempt from paying import duties on the ground of being a non-for-profit organization. The only exemptions applicable at Customs tax burden are those on withholdings tax (VAT and income tax) and must be previously granted by the AFIP-DGI and be evidenced by means of a certificate issued for said purpose.
- 2) Imports are exempt from import duties where such exemption has been expressly authorized by a National Law or a decree issue by the Executive Power. Accordingly, in certain cases the NPOs are granted exemption for importing given assets such as those to be sold in certain exhibitions or bazaars the proceeds of which are clearly for a public benefit. The import of an ambulance by an NPO addressed to a public purpose.
- 3) In order to be exempted from paying import duties, the NPO shall file a petition before the Economy Ministry requesting the exemption. The petition must be filed together with all documentation evidencing the entity's charitable or humanitarian purpose.
- 4) In general terms, items imported as exempt must comply with certain requirements (for example, the assets must be used for the purpose for which they have been imported) and cannot be transferred for a term not less than two years (this term may be extended up to 5 years). In the event some of these requirements were not fulfilled the Customs House will be entitled to file a claim and initiate the corresponding adversary proceedings. In this case, the assets may be seized and all pertinent penalties shall be paid.

#### **B. VAT**

- 1) Foreign grants may be subject to VAT if they consist in movable assets and they must be imported through customs. Certain imports of services (i.e. services rendered abroad and used in Argentina, addressed to transactions subject to VAT) may also trigger VAT.
- 2) NPOs which are recognized as income tax exempt entities enjoy an exemption from VAT on the services supplied by them (VAT Law, art. 7 (para.6.). This exemption does not include the transfer of movable assets. Furthermore, there are certain limitations even on the services that the NPO supplies. Indeed, some services such as artistic, scientific, sportive, cultural

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and other meetings are excluded from the exemption unless for certain professional associations.

- 3) The VAT standard rate is 21%. Some items are subject to the reduced 10.5% and other to the higher 27% rate.
- 4) In principle, there is no minimum threshold for an NPO to be registered for VAT purposes. If the NPO has taxable supplies then it will have to register for VAT purposes or claim the exempt status, if applicable.

### **C. Other Taxes.**

Some other taxes which contain special treatment for NPOs are, for instance, the minimum deemed income tax law, which provides exemption for those NPOs which are also exempt from income tax (article 3 c) of the Minimum Deemed Income tax Law, N° 25,063 as amended) and some local regulations on real estate tax and turnover tax. In Buenos Aires province, for example there is a particular exemption for immovable property held by (i) foundations recognized as such and the property of which is used for its purpose and (ii) civil associations with legal personality, where its proceeds are used for the public benefit purpose and so long as the real estate is used for some particular activities such as sportive, public health, free social assistance and assistance to disable persons, among others.

## **IV. FOREIGN ORGANIZATIONS AND GRANTS**

### **A. Registration and others**

According to the regulations of the Argentine Public Registry of Commerce and the foundations law No. 19.836, in order to register with the Public Registry of Commerce a civil association, foundation or other entities with public benefits purposes that are incorporated in foreign countries, the following documentation is required:

- (i) the articles of incorporation and by-laws of the foreign entities and its amendments, duly registered with the appropriate authorities of the country of origin;
- (ii) certificate of incorporation in the country of origin issued by the appropriate authorities, or similar document certifying that the company is validly existing according to the laws of the country where it was incorporated ("certificate of good standing" or "extract K-bis");
- (iii) power of attorney in favor of the person who will act as legal representative of the foreign entity in Argentina;

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(iv) resolution of the competent authority (e.g. board of trustees, etc) of the associations or foundations by means of which the registration of the entities is resolved. Said resolution may establish the corporate domicile in Argentina; and

(v) information regarding all the projects that the entities will execute during the three first years of registered as well as the nature, characteristics, activities developments and budget sources necessary to comply with the purposes of the entities. This information is only required if the entity is a foundation.

The documentation required should be duly certified and legalized by the Apostille procedure or by the local Argentine consulate, and if it is written in a foreign language, it will have to be translated into Spanish by an Argentine public translator in Argentina.

The NPOs must acknowledge that they have a patrimony that may be enough to fulfill the purpose for which they have been incorporated. In such sense, the Public Registry of Commerce requires that civil associations shall acknowledge a minimum initial capital of \$200 (two hundred Argentine pesos) and in the case of foundations that amount increases to a minimum of \$12,000 (twelve thousand Argentine pesos).

Foreign foundations registered to carry out activities in Argentina are subject to the competent authority control as any other foundation formed in Argentina (Law 19,836, article 7). Accordingly, the same rules applicable to local foundations are also applicable to the dissolution of foreign foundation other than the obligation to destine the remaining assets upon dissolution to a non profit organization domiciled in Argentina or an Argentine public entity (Lay 19,836, article 30).

## **B. Foreign grants**

According to the corporate regulations they are no restrictions for a local organization to receive foreign grants whenever the by-laws do not establish the contrary.

Argentina does have rules on foreign exchange control. Accordingly, the relevant rules –which are regularly amended- must be reviewed at the time a given grant is to be received from a foreign NPO.

