IBEROAMERICAN TAX MOOT COURT 2015
Case Competition

I. Entities

A. MINING GLOBAL LTD. (hereinafter "MINING GLOBAL") is a world-known leading mining company and a manufacturer of mining equipment. MINING GLOBAL was incorporated in 1975 in a country named DUNGA. MINING GLOBAL is liable to corporate income tax in DUNGA.

B. PRIME COAL CO. (hereinafter "PRIME COAL") is a subsidiary company of MINING GLOBAL. PRIME COAL was incorporated in 1997 in a country named TECALA. PRIME COAL is engaged in the sale of mining equipment and the provision of consulting services related to the mining industry. It is considered, for tax purposes, as resident in TECALA. PRIME COAL is liable to corporate income tax and to equity tax in TECALA.

TECNOS INC (hereinafter "TECNOS"), MANTOS INC (hereinafter "MANTOS") and INSUROS INC (hereinafter "INSUROS"), are subsidiaries companies of MINING GLOBAL incorporated in 1997 in TECALA.

C. NORTH COAL CO. (hereinafter "NORTH COAL") is a subsidiary company of PRIME COAL. NORTH COAL was incorporated in 2000 in MACONDO. NORTH COAL is liable to corporate income tax in MACONDO

II. Issues

A. MINING GLOBAL sells its mining equipment in TECALA through PRIME COAL under a commissionaire agreement entered into by the companies in 2012. PRIME COAL sells the mining equipment in its own name on behalf of MINING GLOBAL, company who owns the equipment. MINING GLOBAL imports the equipment into TECALA where a subsidiary renders the storage services. PRIME COAL representatives are only empowered to legally bind PRIME COAL. The management and control of the distribution of the mining equipment is controlled by PRIME COAL, following the global policies established by MINING GLOBAL. There are other different subsidiaries of MINING GLOBAL located in TECALA that render complimentary services to the purchasers of the mining equipment such as (i) technical assistance (TECNOS), (ii) maintenance (MANTOS), (iii) insurances (INSUROS), among others. In return of the mentioned agreement, PRIME COAL receives a commission from MINING GLOBAL.

B. In 2000, the government granted to NORTH COAL mining concessions in MACONDO; those mining concessions are valued at 5.000 MU. In 2014, PRIME COAL sold its shares in NORTH COAL to a Private Investment Fund for the price of 8.000 MU. The Tax Administration of MACONDO levied taxes on the operation arguing the application of Article 13.4 of the TECALA-MACONDO DTC.

C. In 2014, PRIME COAL provided consulting services to MINING GLOBAL. The consulting services were rendered at service provider's facilities. MINING GLOBAL has paid to PRIME COAL 100 MU in consideration for the services. MINING GLOBAL withheld 20 MU.

D. By almost 35 years, Charles DuPont was employed by PRIME COAL as a public relations director in TECALA. On 10 June 2013, Charles DuPont was transferred to MACONDO; he worked at this Country by nearly seven months. On 2014, Charles DuPont resigned and in consideration for the fidelity shown to the company, PRIME COAL paid him a retirement bonus in the amount of 1000 MU.

III. Legal framework

A. Double Tax Conventions (hereinafter "DTC")

A.1. Between DUNGA and TECALA

- There has been a DTC in force since 2011 (2010 OECD Model Tax Convention). Nevertheless, Article 23 of the DTC states that:

> *"**Article 23. Credit method***
> *1. Where a resident of a Contracting State derives income or owns capital which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall allow:*
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> *a) as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in that other State;*
> *b) as a deduction from the tax on the capital of that resident, an amount equal to the capital tax paid in that other State.*
>
> *Such deduction in either case shall not, however, exceed that part of the income tax or capital tax, as computed before the deduction is given, which is attributable, as the case may be, to the income or the capital which may be taxed in that other State.*
>
> *2. The tax credit shall be applied in accordance with the domestic legislation of the Contracting State."*

- In January of 2013, Paragraphs 4, 5 and 6 of Article 5 of the DTC were renegotiated. The new paragraphs states:

"4. Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

a) the use of facilities solely for the purpose of storage, display of goods or merchandise belonging to the enterprise;
b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, or display;
c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise or of collecting information, for the enterprise;
e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity of a preparatory or auxiliary character;
f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs a) to e), provided that the overall activity of the fixed place of business resulting from this combination is of a preparatory or auxiliary character.

5. Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 6, where a person is acting in a Contracting State on behalf of an enterprise and, in doing so, habitually engages with specific persons in a way that results in the conclusion of contracts

a) in the name of the enterprise, or
b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or
c) for the provision of services by that enterprise,

that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

6. Paragraph 5 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent acting on behalf of various persons and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or

almost exclusively on behalf of one enterprise or associated enterprises, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to these enterprises."

A.2. Between TECALA and MACONDO

- There has been a DTC in force since 2012 (2010 OECD Model Tax Convention).
- The Article 13 of the DTC is according to the model above mentioned except for this two paragraphs:

"1. Gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State can only be taxed in that other State.
(…)
4. Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State can only be taxed in that other State."

B. Domestic legislation

1. Domestic legislation of DUNGA

- The Income Tax rate applicable to persons and legal entities is 20%.

- Pursuant the DUNGA Tax Code, income derived from the provision of consultancy services rendered from abroad to DUNGA recipients, is deemed as DUNGA source income.

2. Domestic legislation of TECALA

- The Income Tax rate applicable to persons and legal entities is 30%.

- Pursuant the TECALA Tax Code, income derived from the provision of services in the Country, is deemed as TECALA source income.

- The TECALA Tax Code states:

*"**Credit Method.** For resident corporations and individuals, a credit for foreign taxes paid on foreign-source income is granted, up to the amount of Corporate Income Tax"*

- The TECALA Tax Code establishes a General Anti-Avoidance Rule (hereinafter GAAR):

"The use or implementation of any deceptive scheme, with the sole purpose of modifying or distorting the reality of the transaction,

operation, among others, in order to evade or reduce the tax obligation shall be considered an abuse."

- The nationals from TECALA are considered tax residents in TECALA as long as they do not prove their tax residence in a different country where they should be subject to an effective taxation.

3. Domestic legislation of MACONDO

- The MACONDO domestic legislation states that immovable property is: *"Property or rights which, from its nature, destination, or the object to which it is applied, cannot move itself, or be removed. Immovable things are in general, such as cannot either move themselves or be removed from one place to another."*

- The MACONDO Tax Code establishes a 0,5% income tax rate applicable to all kind of income perceived by expatriate employees for a period of 5 years.

C. Case Law

1. High Tax Court of TECALA

During 2014, the High Court of TECALA has drawn a jurisprudence line in relation to situations of double non-taxation arising in the application of DTC. The High Court of TECALA ruled, following the recommendations of the OECD in the Report of Action 6 of the BEPS Projects. The Court ruled that:

"The purposes of the Convention are not limited to the elimination of double taxation; TECALA do not intend the provisions of the Convention to create opportunities for non-taxation or reduced taxation through tax evasion and avoidance. Therefore, as double non-taxation or reduced taxation were neither foreseen nor intended by the Convention, even if a DTC is applicable, TECALA has jurisdiction to levy taxes in those situations where income is not effectively taxed in the other contracting state.
It should be understood that an effective taxation from the TECALA point of view should reflect at least the 75% of the nominal tax rate in force in TECALA."

IV. Pleadings

The Tax Authority of TECALA carried out an audit regarding the issues above mentioned and claimed that:

A. The Tax Authority considers that MINING GLOBAL is deemed to have a Permanent Establishment in TECALA.

B. PRIME COAL is liable to tax in TECALA regarding the sale of its shares in NORTH COAL. The Tax Authority of TECALA does not consider the mining concessions granted to NORTH COAL as immovable property.

C. PRIME COAL deducted on its Corporate Income Tax return of 2014 the withholding tax paid in DUNGA. The Tax Authority assessed the tax filing and rejected the deduction of the foreign tax credit paid by PRIME COAL, as long as the income derived of the consultancy services is not considered as a foreign source income.

D. The TECALA Tax Authority assessed the lack of withholding (30%) over the payment of the retirement bonus made by PRIME COAL to Charles DuPont. PRIME COAL understands that payment following the DTC is no subject to tax in TECALA. The Tax Authority claims that the payment should be subject to tax as long as it is made in consideration for the labor executed in TECALA. Moreover, the Tax Authority has found that PRIME COAL usually transfers its high executive employees to MACONDO before the retirement of the employee; therefore, the Tax Authority considers the payment as part of an abusive scheme. Finally, the Tax Authority does not consider applicable the DTC as their application leads to a non-effective taxation.

V. Current procedure

The case is now pending before the court. The court in which you are filing the petition (and before which you will later plead orally) only assesses legal arguments. Assume that you are in a rule-of-law country, where rules as well as general principles of law may be invoked. Please note that the Court will not assess any procedural issue.

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