Case Law ITALPEL S.P.A.

In this case the Federal Tax Bureau rejected, in the allocation of profits attributed to the branch of Italpel S.P.A. in Argentina, the consideration of expenses related to the operational activities of the permanent establishment.

There were two classes of expenses.

First, those incurred in connection with “new phone services and operation of central lines” for the provision of those services.

The second one, is related to the labour of directors and general expenses incurred in connection with new phone services and operation of central lines are relevant and have a direct relation with the obtention, maintenance and preservation of taxable profits.

Due regard must be given to the aforesaid circumstances that legitimate the deduction of any class of expenses related with the obtention of taxable income.

On the other side, the court rejected the deduction by the taxpayers of the amount of expenses related to fees of directors and general expenses of administration in accordance with some rule of apportionment related for instance to gross income or net profits emerging from the activities performed by permanent establishments or other associated enterprises.

We can conclude that the aforesaid method assumes that all parts of the enterprise have contributed to the profitability of the whole.

The difficulties to be solved is to determine which is the correct proportion of the told profits.

On these matter, the commentaries of the OECD Model Convention to Article 7 state that the criteria commonly used can be grouped into three main categories, namely those which are based on the receipts of the enterprise, its expenses or its capital structure.

Besides commentaries state that none of the methods can be considered better than others.

As a general rule we can say that the Argentina courts based their conclusions and decisions on the fact and circumstances that in any case the apportionment rules are not perfect and cannot be seen as conclusive in respect of a correct definition of the relations between the expenses and the obtention of taxable profits.

Up to a certain, extent the doctrine stated by Argentine courts is correct under the point of view that any expense incurred abroad is deductible in determining taxable income, in spite of which more legal rules are stated in respect of being mandatory to prove that those expenses are necessary to obtain those profits.

Even more, our country made a reservation regarding the provisions established in the former article 7.3 in which it was noted that there would not be any rule obliging the Contracting States to admit the deduction of expenses incurred outside of Argentina in the determination of the taxable income and not related, under some conclusive proof, to the economic activity of the taxpayer.