

2004 Andean Community Income and Capital Tax Convention (English Translation)

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DECISION 578

[TRANSLATION]

ARRANGEMENT TO AVOID DOUBLE TAXATION AND PREVENT FISCAL EVASION

THE COMMISSION OF THE ANDEAN COMMUNITY,

HAVING SEEN: Articles 3, 22 items a) and b), 30 item c), 51 and 54 of the Cartagena Agreement, Decision 40 of the Commission and Article 19 of Decision 292 of the Commission;

WHEREAS: It is necessary to eliminate the double taxation of the activities of individuals and corporations domiciled in the Member Countries of the Andean Community acting at the community level and to establish a framework and rules for cooperation between tax administrations for this purpose;

It is also essential to update the rules to avoid double taxation between Member Countries in order to promote trade among member countries, attract foreign investment and prevent fiscal evasion;

DECIDES:

To establish this:

ARRANGEMENT TO AVOID DOUBLE TAXATION AND PREVENT FISCAL EVASION

Chapter I

Scope and General Definitions

Article 1

Scope

This Decision is applicable to persons domiciled in any of the Member Countries of the Andean Community, in respect of taxes on income and on capital. It applies mainly to the following:

- In Bolivia, the income tax.
- In Colombia, the income tax.
- In Ecuador, the income tax.
- In Peru, the income tax.
- In Venezuela, income tax and tax on business assets.

The rules set forth in this Decision are intended to avoid double taxation on the same income or capital at community level.

This Decision shall also apply to the modifications introduced to said taxes and any other tax which, on account of its tax base or taxable matter, is essential and economically similar to those described above and that may be established by any of the Member Countries after the publication of this Decision.

Article 2 General Definitions

For purposes of this decision and unless the context otherwise requires:

- (a) The terms "Member Countries" shall be used interchangeably to refer to Bolivia, Colombia, Ecuador, Peru and Venezuela.
- (b) The term "territory of a Member Country" shall refer to either the territories of Bolivia, Colombia, Ecuador, Peru or Venezuela.
- (c) The term "person" shall be used to designate:
 - (1) A natural person
 - (2) A legal person
- (3) Any other entity or group of persons, whether associated or not, subject to tax liability.
- (d) The term "company" shall refer to an organization constituted by one or more persons engaged in gainful activity.
- (e) A natural person shall be deemed to be domiciled in the Member Country in which he has his habitual residence.

It is understood that a company is domiciled in the Country indicated in its articles of incorporation. If no such articles of incorporation exist, or they do not indicate a domicile, the company shall be considered domiciled at the place where it has its effective management.

If, despite these regulations, it is not possible to determine the domicile, the competent authorities of the Member Countries concerned shall resolve the case by mutual agreement.

(f) The term "source of production" refers to the activity, right or asset that generates or may generate an income.

(g) The term "business activities" means activities carried out by companies.

(h) The terms "company of a Member Country" and "company of another Member Country" mean a company domiciled in one or another Member Country.

(i) The term "royalty" means any benefit, value or sum of money paid for the use or right to use intangible assets such as trademarks, patents, licenses, unpatented technical knowledge or other knowledge of a similar nature in the territory of a Member Country, including, in particular, the rights of breeders of new plant varieties under Decision 345 and the copyright and related rights covered by Decision 351.

(j) The term "capital gains" refers to the profit made by a person in the sale of property not acquired, produced or disposed of regularly in the ordinary course of its activities.

(k) The term "pension" means a periodic payment made in consideration of services rendered or for harm suffered, and the term "annuity" means a stated sum of money payable periodically during a specified period of time for free or in return for a payment made or appreciable in money.

(l) The term "interest" means income of any nature, including the financial performance of loans, deposits and amounts obtained on deposit ??by private financial institutions, with or without a mortgage or the right to participate in the debtor's profits, in particular, income from public funds (securities issued by government entities) and bonds or debentures, including premiums and prizes attaching to such securities. Penalties for late payment shall not be regarded as interest for the purposes of this article.

(m) The term "competent authority" means in the case of:

- Bolivia, the Minister of Finance or his delegate.
- Colombia, the Minister of Finance and Public Credit or his delegate.
- Ecuador, the Minister of Economy and Finance or his delegate.
- Peru, the Minister of Economy and Finance or his delegate.
- Bolivarian Republic of Venezuela, the National Superintendent of Customs and Tax of the National Integrated Service of Customs and Tax Administration (SENIAT) or his delegate.

Chapter II

Income Tax

Article 3 Tax Jurisdiction

Regardless of nationality or domicile of the persons, income of any kind obtained by them shall be taxable only in the Member Country in which such income has its source of production, barring the cases of exception provided for in this Decision.

Therefore, the other Member Countries, which, in accordance with their domestic law, assume the power to tax said income must consider it exempt for the purposes of the corresponding determination of the income or capital tax.

Article 4 Income From Immovable Property

Income of any kind from immovable property shall be taxable only by the Member Country in which such property is situated.

Article 5 Income From the Right to Exploit Natural Resources

Any profit obtained from the lease or sublease or the assignment or granting of the right to exploit or use in any way the natural resources of one of the Member Countries shall be taxable only in that Member Country.

Article 6 Business Profits

Profits resulting from business activities shall be taxable only by the Member Country where they were obtained.

Be considered, among other cases, a company active in the territory of a member country when it has in it:

It shall be considered, among other cases, that a company conducts activities in the territory of a Member Country when it has therein:

- (a) An office or place of business administration or management;
- (b) An industrial or assembly factory, plant or workshop;

- (c) A construction site;
- (d) A place or facility that extracts or exploits natural resources, such as a mine, well, quarry, plantation or fishing boat;
- (e) A sales agency or store;
- (f) A purchasing agency or store;
- (g) A storeroom, warehouse or similar establishment for the reception, storage or delivery of products;
- (h) Any other store, office or facility whose purpose is to prepare or assist in the activities of the company;
- (i) An agent or representative.

When a company carries out activities in two or more Member Countries, each of them may tax the income generated in their territory, for which purpose each Country shall apply its internal rules regarding the determination of the tax base as if it were a separate company, independent and distinct, but avoiding the causation of double taxation in accordance with the rules of this Decision. If activities are carried out by means of representatives or by using facilities like those indicated in the preceding paragraph, said persons or facilities shall be attributed the profits they would have obtained if they were totally independent of the company.

Article 7 Associated or Related Enterprises

1. When
 - (a) an enterprise of a Member Country participates directly or indirectly in the management, control or capital of an enterprise in another Member Country, or
 - (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of one Member Country and an enterprise of another Member Country, and in either case, conditions are made or imposed between the two enterprises in their commercial or financial relations that differ from those that would be made between independent enterprises, then the profits which would have accrued to one of the companies in the absence of such conditions, and in fact by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and therefore subject to tax.
2. When a Member Country includes in the profits of an enterprise of that Country, and taxes accordingly the profits on which an enterprise of the other Member Country has been charged to tax in that other Member Country, and the profits so included are profits which would have accrued to the enterprise in the first-mentioned Member Country if the conditions made between the two enterprises had been those which had been made between independent enterprises, then that other Country shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, the other provisions of this Decision shall be taken into account, and the competent authorities of the Member Countries shall be consulted, if necessary.

Article 8 Profits of Transport Companies

The profits obtained by air, land, sea, lake and river transport companies shall be subject to tax liability only in the Member Country in which these companies are domiciled.

Article 9 Royalties

Royalties on an intangible asset shall be taxable only in the Member Country where the intangible asset is used or there is a right to use it.

Article 10 Interest

Interest and other financial income shall be taxable only in the Member Country in whose territory their payment is charged and recorded.

Article 11 Dividends and Shares

Dividends and shares shall be taxable only by the Member Country where the company that distributes them is domiciled.

The Member Country of domicile of the company or individual recipient or beneficiary of the dividends or shares may not tax them in the name of the receiving company or investor or in the name of shareholders or partners of the receiving or investor company.

Article 12 Capital Gains

Capital gains may be taxed only by the Member Country in whose territory the assets are located at the time of their sale, except for those arising from the alienation of:

- (a) Ships, aircraft, buses and other transport vehicles, which shall be taxable only by the Member Country where the owner is domiciled, and
- (b) Bonds, shares and other securities, which shall be taxable only by the Member Country in whose territory they were issued.

Article 13 Income From Personal Services

Payments, fees, wages, salaries, benefits and similar compensation received in return for services rendered by employees, professionals, technicians or for personal services in general, including consultancy, shall be taxable only in the territory in which such services were provided, with the exception of wages, salaries, payments and similar compensation received by:

- (a) Persons who provide services to a Member Country, in the exercise of duly accredited official functions; such income shall be taxable only in that country, although the services are rendered within the territory of another Member Country.
- (b) The crews of ships, aircraft, buses and other transport vehicles engaged in international traffic; such income shall be taxable only by the Member Country in which the employer is domiciled.

Article 14 Business Profits From the Provision of Services, Technical Services, Technical Assistance and Consulting

Income earned by companies engaging in professionals, technicians, technical assistance, and consulting services shall be taxable only in the Member Country in whose territory the profit from such services is produced. Unless proven otherwise, it is presumed that the place where the profit is produced is the one in which the corresponding expense is charged and recorded.

Article 15 Pensions and Annuities

Pensions, annuities and other similar periodic income shall be taxable only by the Member Country in whose territory its source of production is located.

It is considered that the source is located in the territory of the country where the contract giving rise to the regular income has been signed and, when there is no contract, in the country from which such income is paid.

Article 16 Income From Public Entertainment Activities

Income derived from the performance of artistic and public entertainment activities shall be taxable only in the Member Country in whose territory the activities were carried out, regardless of the time the persons engaging in such activities remained in that territory.

Chapter III

Taxes on Capital

Article 17 Taxes on Capital

The capital located in the territory of a Member Country shall be taxable only by that country.

Chapter IV

General Provisions

Article 18

Tax Treatment Applicable to Persons Domiciled in Other Member Countries

No Member Country shall apply to persons domiciled in other Member Countries less favorable treatment than that applied to persons domiciled in its territory concerning the taxes that are the subject of this Decision.

Article 19 Consultation and Information

The competent authorities of the Member Countries shall consult each other and exchange the information necessary to resolve by mutual agreement any difficulties or doubts that may arise in the implementation of this Decision and to establish the necessary administrative controls to prevent fraud and tax evasion.

The information exchanged pursuant to the provisions of the preceding paragraph shall be deemed secret and may not be transmitted to any person other than the authorities responsible for the administration of the taxes that are the subject of this Decision.

For the purposes of this Article, the competent authorities of the Member Countries may communicate directly with each other, conduct concurrent audits and use the information for purposes of tax control.

In no case shall the provisions of the first paragraph of this Article be construed as obligating a Member Country to:

- (a) adopt administrative measures contrary to its laws or administrative practice or those of the other Member Country;
- (b) provide information not obtainable on the basis of its own laws or in the exercise of its normal administrative practice or that of another Member Country;
- (c) provide information that reveals trade, industrial or professional secrets, trade processes or information where its communication would be contrary to public policy.

Article 20 Interpretation and Application

The interpretation and application of the provisions of this Decision shall be provided in a manner that takes into account that its primary purpose is to avoid double taxation on the same income or capital at the community level.

The interpretations or applications that allow for tax evasion concerning income or capital subject to taxes in accordance with the laws of the Member Countries shall not be valid.

Nothing in this Decision shall prevent the application of the laws of the Member Countries to prevent fraud and tax evasion.

Article 21 Assistance in Collection Processes

Member Countries shall assist each other in the collection of taxes owed by a certain taxpayer by acts that are final or executory under the law of the requesting Country.

Requests for assistance may only be made if the property of the tax debtor located in the creditor Member Country is insufficient to cover the amount of tax liability owed.

Unless otherwise agreed by the competent authorities of the Member Countries, it shall be deemed that:

(a) The ordinary costs incurred by a Member Country that has committed to providing the assistance shall be borne by that Country.

(b) Extraordinary costs incurred by the Member Country that has committed to providing the assistance shall be borne by the applicant Member Country and shall be payable regardless of the amount to be recovered in its favor.

This Article shall be interpreted in accordance with the domestic legislation of Member Countries.

Article 22 Term

This Decision shall enter into force with respect to income tax and capital tax obtained and amounts paid, credited, or accounted as an expense from the first day of the fiscal year following the publication of this decision in the Official Gazette of the Cartagena Agreement.

Signed in Lima, Peru, on May 4, 2004.