



www.gasandoil.com/ogel/

Issue : Vol. 2 - issue 3

Published : July 2004

Oil, Gas & Energy Law Intelligence

Important Argentine Federal Supreme Court Ruling in Oil & Gas Taxation by O.R.A. Valdez and A.C. Luna Requena

About OGEL

OGEL (Oil, Gas & Energy Law Intelligence): Focussing on recent developments in the area of oil-gas-energy law, regulation, treaties, judicial and arbitral cases, voluntary guidelines, tax and contracting, including the oil-gas-energy geopolitics.

For full Terms & Conditions and subscription rates, please visit our website at www.gasandoil.com/ogel/.

Open to all to read and to contribute

Our aim is for OGEL to become the hub of a global professional and academic network. Therefore we invite all those with an interest in oil-gas-energy law and regulation to contribute. We are looking mainly for short comments on recent developments of broad interest. We would like where possible for such comments to be backed-up by provision of in-depth notes and articles (which we will be published in our 'knowledge bank') and primary legal and regulatory materials.

Please contact **Editor-in-Chief** Thomas Wälde at twwalde@aol.com if you would like to participate in this global network: we are ready to publish relevant and quality contributions with name, photo, and brief biographical description - but we will also accept anonymous ones where there is a good reason. We do not expect contributors to produce long academic articles (though we publish a select number of academic studies either as an advance version or an OGEL-focused republication), but rather concise comments from the author's professional 'workshop'.

Editor-in-Chief

Thomas W. Wälde

twwalde@aol.com

Professor & Jean-Monnet Chair
CEPMLP/Dundee and Principal
Thomas Wälde & Associates

© Copyright OGEL 2004

OGEL Cover v1.1

IMPORTANT ARGENTINE FEDERAL SUPREME COURT RULING IN OIL & GAS TAXATION

Oscar R. Aguilar Valdez
&
Álvaro Luna-Requena
Estudio Beccar Varela
Argentina

Abstract

The stamp tax is a provincial duty levied upon the execution in writing of non-gratuitous acts or contracts, including those entered into by correspondence, being the existence of a written document essential for the triggering of the taxable event. In a relevant decision for the oil and gas industry, Argentine Federal Court of Justice ruled on April 15, 2004 in re “Yacimientos Petrolíferos Fiscales S.A. s. Tierra del Fuego”, “Shell Compañía Argentina de Petróleo S.A. v. Neuquén” and “Transportadora de Gas del Sur S.A. v. Santa Cruz” that the taxable event of the stamp tax cannot arise out of the strict limit foreseen in the applicable regulations, and that licit efforts to avoid the tax are not reprehensible.

Since 1996, the stamp tax has been one of the most controversial taxes affecting large investments in the oil & gas industry in Argentina. Such controversies has been recently settled by an Argentine Federal Court of Justice’s ruling issued in three relevant cases on April 15, 2004, *in re* “Yacimientos Petrolíferos Fiscales S.A. v. Tierra del Fuego”, “Shell Compañía Argentina de Petróleo S.A. v. Neuquén” and “Transportadora de Gas del Sur S.A. v. Santa Cruz”.

Brief description of the stamp tax

The stamp tax is a provincial duty levied upon the execution in writing of non-gratuitous acts or contracts. The existence of a written contract executed by all the parties involved in it is *essential* for the triggering of the taxable event of this tax, to the extent that even if the parties may verbally agree on non-gratuitous reciprocal obligations, such an agreement would not be subject to the stamp tax until it is reflected in writing.

Although this tax is levied by the Provinces, the Federal Congress passed federal law 23.548 –known as “*ley de coparticipación federal*”- setting out some general criteria concerning stamp tax, such as: the concept of its taxable event and the definition of “taxable document” (*instrumento gravable*).

One of the taxable events if the stamp tax foreseen in the provincial legislations was that of written contracts entered into by correspondence. In these cases, local regulations foresee that correspondence agreements are subject to the stamp tax upon the formal

acceptance of a written offer. In this connection, a written offer would be regarded formally accepted when one of the following conditions is met:

- (i) Reproduction of the written offer, or reproduction of its main clauses;
- (ii) Formal signature of the offer by the addressee party.

With the legitimate purpose of avoiding the above-described taxable event, the parties designed a contracting structure consisting of a written offer sent by a party “A”, in which it was stated that the offer would be regarded accepted by party “B” if the latter performed certain act, such as e.g. the deposit of a certain amount of money in a specific bank account before a given lapse of time. This mechanism is known as contracting by means of a written offer tacitly accepted.

Other companies receiving an offer of agreement in writing choose to evidence its acceptance by remitting a letter to the bidder simply stating “*I accept your offer dated []*”, without signing the offer itself and without reproducing its main clauses.

The fact that the acceptance of the offer was tacit –not in writing- or that its written response did not reproduce the main clauses of the offer, allowed the parties not to fulfill the conditions described above in (i) and (ii), thus legitimately avoiding the taxable event of the stamp tax for correspondence agreements.

Origins of the controversy.

On October 2, 1996 the Provincial Court of Justice of the Province of Neuquén ruled in “Solba U.T.E.” that the mechanism of contracting above described as a mere letter of acceptance of the offer, without reproducing its main clauses, triggered the taxable event of the stamp tax for correspondence agreements, even though the objective conditions foreseen by applicable local regulations for that taxable event to occur were not reached.

The Provincial Tax Authority argued that the mechanism used by the parties involved in the case was a mere subterfuge aimed at evading the stamp tax, and that the principle of “substance over forms” or “economic reality” (*realidad económica*) allowed to conclude that the parties had agreed on a non gratuitous contract, even though they had not executed it in writing nor had they fulfilled the objective conditions to trigger the taxable event of the tax for correspondence contracts.

Based on the rejection of the appeal filed by Solba UTE made by the Federal Supreme Court of Justice, the provincial tax authorities of, *inter alia*, the hydrocarbons provinces of Neuquén, Mendoza, Santa Cruz, Río Negro, Salta and Tierra del Fuego, initiated ferocious campaigns of tax scrutiny of the companies contracting within their respective jurisdictions, wielding the novel theory of the “documental complex”. Its main targets were the agreements entered into tacitly, related to the oil & gas transportations and provisions. With the aim of invalidating said provincial claims, several oil & gas companies sued the claimant provinces before the Federal Supreme Court.

Settlement of the controversy.

On April 15, 2004, the Argentine Federal Court of Justice settled the matter by virtue of its ruling issued *in re* “Yacimientos Petrolíferos Fiscales S.A. v. Tierra del Fuego”, “Shell Compañía Argentina de Petróleo S.A. v. Neuquén” and “Transportadora de Gas del Sur S.A. v. Santa Cruz”.

The Argentine Federal Court of Justice’ ruling on the matter may be summarized as following:

- (i) Local regulations of stamp tax clearly foresee certain objective conditions to be fulfilled by correspondence agreements: (a) reproduction of the written offer, or reproduction of its main clauses; (b) formal signature of the offer made by the addressee party.
- (ii) Since federal law 23,548 provides the legal meaning of “taxable document”, the Provinces are not entitled to depart from such legal definition by virtue of local laws and regulations.
- (iii) The “substance over form” principle is almost irrelevant as regards the stamp tax, since the existence of the document in the manners foreseen by the law is essential to trigger its taxable event.
- (iv) It is not reprehensible the honest intention to legally avoid the tax by means that are out of its scope.

Conclusion.

We deem that the ruling of Argentine Federal Court of Justice has exemplary provided a much-needed dose of legal certainty in the stamp taxation of oil & gas transactions, which would benefit the future investments in such sector in Argentina.