RELEASE IN PART
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September 7, 2010

Canciller D. Héctor Marcos Timerman
Minister of Foreign Affairs
of the Argentine Republic
Ministerio de Relaciones Exteriores,
Comercio Internacional y Culto
Esmeralda 1212
C1007ABR Buenos Aires
Argentina

Ambassador Vilma Martinez
Ambassador of the United States of America
to the Argentine Republic
United States Embassy
Avenida Colombia 4300
C1425GMN Buenos Aires
Argentina

Re: Clarifying Agreement Respecting Non-Taxation of Consular and Embassy Employees

Dear Canciller Timerman and Ambassador Martinez:

We are United States tax counsel to [redacted] B6

We represent [redacted] in a dispute with the United States Internal Revenue Service (the "IRS") that arose out of a new, overreaching IRS tax initiative that conflicts with the letter and spirit of the 1853 Treaty of Friendship, Commerce and Navigation between Argentina and the United States (the "1853 Treaty") and that conflicts with longstanding past practice under the 1853 Treaty.

In the interests of fairness and justice for our client and for all Argentine or United States consular and embassy employees in a similar position, we respectfully urge you to initiate the process for Argentina and the United States to enter into an agreement that clarifies and reaffirms that consular and embassy employees of Argentina and the United States are exempt from tax on foreign service income in their host country, even if they have obtained permanent resident (or "green card") status after their hiring.

For your convenience, an **Appendix** to this letter provides an **Executive Summary** with background on the matter and the need for a clarifying agreement.

A U.S.-Argentine agreement that reaffirms tax exemption would be consistent with the longstanding practice of exemption under the 1853 Treaty, as expressed by the IRS itself in its letter dated March 27, 1995 to the Embassy of the Argentine Republic (the "1995 IRS Letter," copy enclosed) and in IRS Revenue Ruling 75-425 (copy enclosed).

An Argentine-United States agreement also would be consistent with recent bilateral efforts of the United States and Spain, Germany and the United Kingdom to preserve the tax exemption of their foreign service employees and protect them from potentially devastating tax consequences from the IRS' changed position.

Despite many decades of past practice, a reaffirming agreement between Argentina and United States is necessary because the IRS has reversed and narrowed its view and has recently decided that Argentine consular and embassy employees who are green card holders do not qualify for exemption from United States income tax, unless they rise to a certain level of "Diplomatic Agent" or "Consul" (categories whose parameters are uncertain, but is now considered by the IRS to include only the very highest levels in the diplomatic service). In our view, this reversal is unjustified and does not reflect governing law. In our view, it also violates international norms of fairness and due process by undermining valid and reasonable expectations of embassy and consular employees based on previously published IRS guidance.

I. Legal Background on the Dispute:

A. 2006 IRS Initiative Against Foreign Government Employees:

Our client's dispute arose out of an IRS initiative that was promulgated in 2006 pursuant to IRS Announcement 2006-95 purportedly to crack down on foreign government employees who did not qualify for the benefits of exemption from United States income tax under United States Internal Revenue Code ("IRC") Section 893 or otherwise under an international agreement.

The status of consular and embassy employees, and of green card holders in particular, was suddenly thrown into doubt (despite long-held understandings regarding exemption from U.S. tax). This upended the reasonable expectations and career and life plans of many people working in the interests of amicable international relations.

B. IRC Section 893:

1. Three-Part Test for Exemption under Domestic U.S. Tax Law:

IRC Section 893(a) provides that the wages, fees, or salary of *any employee* of a foreign government or of an international organization (including a consular or other officer, or a nondiplomatic representative), received as compensation for official services to such government or international organization is exempt from U.S. tax if:

(1) such *employee* is not a citizen of the United States,

(2) in the case of an *employee* of a foreign government, the services are of a character similar to those performed by employees of the government of the United States in foreign countries; and

(3) in the case of an *employee* of a foreign government, the foreign government grants an equivalent exemption to employees of the government of the United States performing similar services in such foreign country.

2. **Section 893(b) Certification**:

IRC Section 893(b) directs the U.S. State Department to certify to the U.S. Treasury the names of the foreign countries which grant an equivalent exemption to the employees of the government of the United States performing services in such foreign countries, and the character of the services performed by employees of the government of the United States in foreign countries (a "Section 893(b) Certification"). Under this directive, the U.S. State Department issued a Section 893(b) Certification for Argentina by letter, dated March 23, 2010, to the U.S. Treasury Department, and this was transmitted to the Embassy of Argentina by the Secretary of State in a diplomatic note dated April 19, 2010. (A copy of the Section 893(b) Certification and the transmittal is attached.) [1]

In this Section 893(b) Certification, the U.S. Department of State concluded that members of the diplomatic and consular missions of foreign countries in the Argentine Republic and foreign national administrative and technical staff personnel of such missions, who, at the time they were hired, did not hold Argentine resident status, are exempt from Argentine tax on their wages.

C. **Waiver of Benefits Upon Obtaining Green Card / Treaty Override**:

In accordance with U.S. immigration law, a so-called "Section 247(b)" waiver (codified at 8 United States Code 1257(b)) must be executed. *Absent an overriding treaty or international agreement*, this waives the benefits of the tax exemption under IRC Section 893(a) (as well as other exemptions from U.S. law).

Our client, and other consular and embassy employees in this position, reasonably relied upon existing U.S. tax law expressed in IRS Revenue Ruling 75-425 that a Section 247(b) waiver did not waive the benefits of U.S. tax exemption. Revenue Ruling 75-425, Paragraph 5

[1] In a recent case, the United States Tax Court decided that Section 893(a) is a self-effectuating provision and does not require a Section 893(b) Certification as a prerequisite to the exemption provided by Section 893(a). *Abdel-Fattah v. Commisioner*, U.S. Tax Court Summary Opinion, 2010 Tax Notes Today 81-9 (April 27, 2010). It follows from this case that the contents of a Section 893(b) Certification does not necessarily dictate the precise parameters of an exemption under Section 893(a)

provides, in relevant part, that "the alien consular employees of the following countries derive exemption from income tax on their official compensation from consular agreements, the filing of the [Section 247(b)] waiver does not terminate such exemption: . . . Argentina". The 1995 IRS Letter confirmed that U.S. tax exemption continued to apply to Argentine consular employees who are green card holders. Neither such IRS pronouncement restricts exemption to any particular level of employment status.

However, as a follow-up to the 2006 IRS initiative against foreign government employees, in Revenue Ruling 2007-60 (copy attached), the IRS declared Revenue Ruling 75-425 to be "obsolete" purportedly because "many of those income tax treaties, consular agreements, and international agreements have been modified, superseded, or are no longer in force, and because the facts on which the ruling position was based no longer exist or are not sufficiently described to permit clear application of the currently applicable legal provisions and agreements." In Revenue Ruling 2007-60, the IRS still acknowledges that individuals employed by a foreign government or international organization in the United States, who file a Section 247(b) waiver "will be entitled to any tax exemption conferred under the provisions of an applicable income tax treaty, consular agreement, or international agreement, that is still in force, to the extent the application of the exemption is not dependent upon the internal revenue laws of the United States." *See* Treasury Regulations § 1.893-1(c).

However, Revenue Ruling 2007-60 now obscures the IRS position with respect to a particular country from public view and requests that persons who wish to know the status of any particular country must contact the IRS by email for their position. Our understanding is that, contrary to longstanding views, the IRS now believes that the consular agreement between Argentina and the United States (*i.e.*, the 1853 Treaty) does not provide exemption to all consular employees but that exemption extends only to the very highest levels of the diplomatic and consular services. Even if a limitation of scope of exemption were applied, we believe that [redacted] would qualify for U.S. tax exemption because he is [redacted] B6
[redacted] but our view is not certain to be accepted by the IRS (or by a court).

This parsimonious view that the exemption provided by the 1853 Treaty does not extend to all employees of the consulates and embassy is startling, considering that there has never been a change to the 1853 Treaty. This new IRS view is certainly contrary to the spirit of a Treaty of "Friendship" and defies common sense interpretation of terminology provided in a document that was drafted more than 150 years ago – a time that long predated practices of precise employment classifications. We are skeptical that this view of the IRS would be validated by a neutral court tribunal, but we are concerned that absent a new reaffirming agreement between Argentina and the United States that confirms that the exemption applies to *all* consular and embassy employees (even if they have obtained permanent residence status after their hiring), the IRS will continue to take its unjustified and narrowed stance.

Our understanding is that Spain, Germany and the United Kingdom have taken measures to preserve justice for their consular and embassy employees in the face of this overreaching IRS

initiative by engaging with the United States to preserve tax exemption for their foreign service employees. We urge the Argentine Republic and the United States to engage and enter into an agreement that confirms tax exemption for all consular and embassy employees.

D. The 1853 Treaty:

Article 11 of the 1853 Treaty provides that:

> The Diplomatic Agents and Consuls of the Argentine Confederation shall enjoy, in the territories of the United States, whatever privileges, exemptions and immunities are, or shall be, granted to agents of the same rank, belonging to the most favored nation; and, in like manner, the Diplomatic Agents and Consuls of the United States, in the territories of the Argentine Confederation, shall enjoy, according to the strictest reciprocity, whatever privileges, exemptions and immunities are, or may be, granted in the Argentine Confederation to the Diplomatic Agents and Consuls of the most favored nation.

Under this "most favored nations" clause, the "Diplomatic Agents and Consuls" of Argentina are exempt from tax on the wages, salaries and fees with respect to their official services. Common sense, historical practice and comparable usage all indicate that "Diplomatic Agents and Consuls" must include all consular, diplomatic and embassy employees, since all are working in the official service of their country in its diplomatic and consular functions. This sensibly inclusive interpretation of this most favored nations clause is also consistent with the terminology used in United States tax law in IRC Section 893, which extends to all "employees" of a foreign government with respect to compensation for official services to such government.

III. Conclusion:

We respectfully request that the Argentine Republic and the United States of America to enter into an agreement to confirm and clarify that:

(1) the most favored nations provision of the 1853 Treaty provides an exemption from United States income tax on compensation for official services of all embassy, consular and diplomatic employees of Argentina; and

(2) this exemption applies to all such employees who are permanent residents (notwithstanding their having filed a Section 247(b) waiver).

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A confirming bilateral agreement would serve the interests of justice and due process for all of those who are in the service of amicable and mutually beneficial Argentine-U.S. relations, including [redacted] B6

Respectfully yours,

Andrew Bernknopf
For the Firm

cc: Secretary of State Hillary Clinton
[redacted]
Bruce Ramer, Esq.

Enclosures: Revenue Ruling 75-425
1995 IRS Letter
Section 893(b) Certification
Revenue Ruling 2007-60

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Canciller D. Héctor Marcos Timerman and Ambassador Vilma Martinez
September 7, 2010
APPENDIX

EXECUTIVE SUMMARY

- **New, Unjustified IRS Administrative Position Eviscerates Tax Exemption to Argentine Consular and Embassy Employees Under 1853 Treaty.**

As part of a recent tax initiative aimed at foreign government employees, the IRS has overreached and taken a new, unjustified administrative position that eviscerates the scope of the tax exemption conferred to Argentine consular and embassy employees under the 1853 Treaty of Friendship, Commerce and Navigation between Argentina and the United States.

- **IRS' Reversal of Longstanding and Correct Administrative Position Violates Norms of Fairness and Due Process and Undermines Valid Expectations of Consular and Embassy Employees.**

In planning their careers and their lives, Argentine consular and embassy employees have properly relied on a 1975 IRS Revenue Ruling and a 1995 IRS letter that correctly confirmed that they were exempt from U.S. income taxation on foreign service income, even if they had obtained U.S. permanent residency after their hiring.

When the IRS wrongly and unexpectedly narrowed its view of the scope of tax exemption under the 1853 Treaty, it violated international norms of fairness and due process. This radical departure from past practice by an administrative agency threatens to defeat the valid and reasonable expectations of Argentine consular employees.

- **Harm Can Be Averted by Entry Into a Confirming Agreement by Argentina and the U.S.**

Potentially devastating financial harm to Argentine consular and embassy employees from this radical reversal by the IRS can be averted by Argentina and the U.S. entering into an agreement that confirms that (1) consular and embassy employees of each nation at all levels of service are exempt from taxation in their host country on their foreign service income and (2) this exemption applies even if the employee has obtained permanent resident status in the host country after their hiring.

- **Argentina and the U.S. Should Join with Other Nations that have Taken Action to Protect their Consular and Embassy Employees by Bilateral Agreement.**

Argentina and the U.S. should consider the example set by Spain, Germany and the United Kingdom, who have engaged bilaterally with the U.S. to protect the rights and expectations of foreign service employees as to tax exemption for foreign service compensation.

A bilateral confirming agreement between Argentina and the U.S. would carry out the law created by the 1853 Treaty and would restore the reasonable expectations of consular and embassy employees.