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# *Capital Gains in Extractive Industries*

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September 29, 2015

# *Agenda*

1. Indirect disposals

2. Direct disposals
   - Context
   - Taxation rate
   - Background
   - Accounting aspects
   - Common structures

3. Trends

# Indirect disposals

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# *Indirect disposals*

- ***Domestic regime does not regard them as taxable (Articles 24 and 265)***

- Draft law (2012)

  *"Profits from operations that lead to the internationalization of ownership of assets located in the country, regardless of the legal means employed for that purpose in the country or abroad."*

- Exception for domestic corporations with respect to taxes (Article 12.1)

They are not very common → Fiscal disadvantage of the purchaser

# Direct disposals

2

# ***Direct disposals***
*Context*

- *Total or partial transfers of rights in exploration and production, partnership and other contracts (private participations).*

- *Very common at the exploration stage and in special times for the industry (price crises)*

- Absence of a fiscal regime for the industry. *General rules*

- *Few precedents due to fiscal disputes*

# Direct disposals
## *Taxation rate*

| | | |
|---|---|---|
| Positive or negative net earnings may qualify as: | **A.** | *Regular income or loss.* |
| | **B.** | *Occasional profit or loss (additional).* |

## A. Regular income or loss

- *Rights or participations possessed for less than 2 years.*
- *Profit can be set off against regular tax losses (they do not expire).*
- Net tax base versus sales price (Article 90- Commercial Value).

# *Direct Disposals*
*Taxation rate - cont.*

## *A. Regular income or loss*

- *Taxable income * 25% (income) + 9% ( "income tax for equality" or CREE)*

- *Incremental rate of CREE*

| | |
|---|---|
| *5%* | *2015* |
| *6%* | *2016* |
| *8%* | *2017* |
| *9%* | *2018* |

- *Recapture of depreciations allowed*
  - From 2012 backwards?
  - Constitutional Court
  - DIAN (Colombia's Taxes and Customs Directorate)

# *Direct Disposals*
*Taxation rate - cont.*

## *B. Occasional profit or loss (additional).*

- *Rights or participations possessed for 2 or more years, provided they are fixed assets.*
- *Profit can only be set off against occasional tax losses (of the fiscal year)*
- Net tax base versus sales price (Article 90- Commercial Value).
- *10% occasional profits tax*
- ***Recapture** of depreciations already allowed (from 2012 backwards?)*

# *Direct Disposals*
## *Taxation rate - cont.*

***C.*** Sales price must be no less than 75% of the commercial value

- Recoverable reserves as a measurement item (Judgment of 2003).
- Costs incurred as a measure of the value of the right/claim (Judgment of 1994).

***D.*** "Carry" as an assessment factor

***E.*** Absence of VAT and other taxes

***F.*** Business restructurings

# Disposals of rights in petroleum contracts Regional Comparison

| Country | Rate | Recapture | Offsetting losses |
|---|---|---|---|
| Argentina | 35% | No | Yes |
| Ecuador | 22% to 25% | No | Ring Fencing |
| Colombia | 10% to 39% | Yes | Yes* |
| Peru | 28% | No | Yes* |
| Mexico | 30% | No | Yes* |

# ***Direct Disposals***
*Accounting Aspects (IFRS)*

***Contracts with unproven reserves (exploration)***

- Treat money received as less value of the investment (without profit unless it exceeds the value of the asset).
- There is no accounting income, but there *is* tax income.
- Withholdings at source/down payments unnecessary.

# Direct Disposals
## *Commonly found structures*

***Commonly found structures***

- **A** Transfer for a price in cash and/or kind.
- **B** Transfer without a price but with "carry."
- **C** Transfer with price in cash and/or kind plus carry.
- **D.** Transfer without price with the assignor required to pay

# Trends

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# Direct Disposals
## Trends

**Trends**

***Streaming*** (originally mining, but gaining ground in hydrocarbons)

***Overriding royalties***

# *Thank you*