

Tax treatment of Cross border transactions regarding intangible assets. Tax Policy Reflections for Latin America

*Catalina Hoyos Jiménez
Lawyer and Professor U. Rosario- Bogotá
Candidate PhD U. Salamanca
Founding Partner for Godoy & Hoyos Abogados*

INTRODUCTION

The world demonstrates that most of the wealth is concentrated in commerce of intangible goods. To give an example, the relation between price of market- book value (M/B), in other words, the index that compares the capitalization of companies quoting at the securities public market with the book value reflected in Balance Sheets, demonstrates the reality of this premise. For the companies included in the Standard and Poor's (S&P) Index the measure of this relation has dizzily increased since the 80's, evidencing that while at the beginning of this decade the relation was from 1 to 1, currently it is from 6 to 1.¹ This means that for each six dollars of a company's value in the market, only one appears entered in its balance sheet. This means that for each six dollars of a company's value in the market, only one appears entered on its balance sheet. The examples are evident: Johnson & Johnson intangibles value in connection with its tangible assets has been estimated in an 87.9%, those of Procter & Gamble, in 88.5%, those of Merck in 93.5% , those of Microsoft in 97.8% and in 98.9% those of Yahoo².

In Latin America, the development of commerce of intangibles has not been so important as in other continents, but with some exceptions we may state that our countries have increased their economic indicators in a significant way during the last years and of course is to expect or is at least desirable that this trend be maintained and even be improved. We may also state that in the behavior of their economies it is possible to perceive the effects of investments that go beyond the exploitation of natural resources and the development of the agricultural field to encounter, then, important companies in sectors particularly influenced by "intangible needs" as occurs with those of services and telecommunications, and evidencing at the same time the existence of other companies that are also important, that are developed exactly in sectors of commerce of technology. To top it all, even those sectors of our economies whose purpose is not the commerce of intangibles as such, show within their assets important intangible wealth that obviously, demands mobility.

The questions following the aforementioned and that in addition, constitute the purpose of this work, result obvious: Have the Latin American tax legislations properly assimilated this economic trend? Furthermore, if the answer to said query is positive, the next to question would be, ¿how have they made it?, and on the contrary, if it is negative or if being positive we reach to the conclusion that the

¹ Lev, Baruch. *Intangibles: Medición, Gestión e información*. Ediciones Deusto, 2003, Planeta DeAgostini, Barcelona. P. 22.

² Hagelin, Ted. A new method to value intellectual property. *AIPLA Quarterly Journal*, Volume 30, Number 3, Summer 2002, P. 354. See also: GHAFELE Royo: "Cómo reflejar el valor de la propiedad intelectual en los informes de contabilidad" How to reflect the intellectual property value in the book reports . at: www.wipo.int/sme/es/documents/ip_

legislations are not enough, ¿How we may expect our legislations to change, in order to avoid the obstruction of commerce?.

Within this context, we have chosen four subjects that may allow us to reach to some conclusions useful for the development of a proper regulation in connection with the taxation of intangibles in the region (within which we shall mention of course, the matters regarding copyright rights), all from the perspective of the income taxes.

- **Tax Rates in international business transactions directly or indirectly related to intangibles.** It would be made a compared analysis in order to demonstrate that the different countries of the region apply very high income tax rates to transnational business transactions, as well as the secondary effects of these measures.
- **Source of income and characterization of business transactions over intangibles on tax matters.** In most of the countries of the region exists a clear situation: there is a great confusion as to the way it has to be characterized each of the business transactions over intangibles, mainly those related with copyright rights and the aforesaid has lead to the generalization of improper and expensive tax treatments, not promoting the knowledge exchange, most importantly regarding software, while at the same time it is determined an uneven treatment between the business transactions falling over tangible and intangible goods.
- **The way how our countries have adopted article 12 of the OCDE Model as to the regulation of incomes derived from royalties.** Considering that our countries have tend to qualify in an improper way the business transactions over intangibles, mainly the business transactions over software, this chapter will study to what extent said “mistaken” pre –qualifications have influenced at the time of signing or construing the Double Tax Treaties (DTT), in the specific cases. If as a consequence of our study we encounter that the Latin American countries are misunderstanding the provisions of the DTT that refer to royalties, the aforementioned could demonstrate that said DTT are not contributing to mitigate the impact that the internal legal regulations have over the sector taxation, and neither for preventing the double taxation
- **The effects of Decision 578 of the Andean Community of Nations** regarding the Andean inter-community commerce, this is, over Colombia, Peru, Bolivia and Ecuador

Our analysis will assume a study of comparative law of Colombia, México, Brazil, Argentina, Venezuela and Peru.³

1. TAX RATES OF TRANSNATIONAL BUSINESS TRANSACTIONS DIRECTLY OR INDIRECTLY RELATED WITH INTANGIBLES IN THE STUDIED COUNTRIES.

The tax rates in the country of source are important, as in many cases determine the behavior of the parties in a given transaction. Indeed, the foreigner shall be open to “accept” the tax withheld at the source, only in as much as the same is creditable on its corresponding jurisdiction, and it will be willing

³ Thanks in advance to all Professors and Friends Jesús Sol (Venezuela), Alberto Tarsitano (Argentina), Marcos Vinhas (Brazil), Alex Córdova (Perú), Jaime González Bendiksen and Luis Carbajo (México) for their assistance.

to propose the partial or full tax assumption on the part of the contracting party, in case of not being possible to make effective the credit on its country.

For purposes of this work, we shall take into account all payments made for copyright rights, software (as it is considered by some legislations as a copyright right) and technical services and of technical assistance, as the same may usually accompany provisions related to copyright rights.

1.1. Argentina⁴

Title V of Income Tax Law, particularly article 93, contains some presumptions of net income for payments made to foreign beneficiaries, according to the different types of incomes, (within them there are the interests, copyright rights, lease of real estate or personal property, etc). These presumptions go from the 35% up to the 80%, at the same time that there is a residual category (subsection h) that presumes the net income in a 90% applicable to all those incomes not complying with the guidelines set forth in the above subsections. The tax rate, on the other hand, is of 35%.

Within this context, we have that in the case of copyright rights and software, the law presumes in a 35% the net profit obtained by the payment beneficiary, thus the withholding rate is of 12.25% over the gross amount. The conditions for applying these presumptions, are: i) the registration of the work before Copyright Office; ii) the tax should fall over the author and its assigns and iii) the payment should not be originated in works made for hire or resulting from a work or services lease.

The problem caused with the application of the previous provision, in related with the discussion as to whether the legal entities, developing in addition most of the business transactions, comply with the requirement of “ownership” of the copyright right. The treasury has held the restrictive position stating the fact that the law clearly defines what is restricted only for individuals, as it is understood that such persons are the only ones that may be “authors or assigns”. Thus, the Administration has understood that the payments for foreign beneficiaries being legal entities, it corresponds to apply the residual presumption of the 90% of subsection h) to which reference was made, with which the withholding at source rate results being of the 31.50% in these cases.

For the contracts of technical assistance, engineering or consulting that can't be obtained in the country the law sets forth a presumption of profit of the 60% of the gross amount, so long as the contracts are duly registered, being the services effectively rendered and having complied with all the requirements of the Law of Technology Transfer. In these cases, then, the withholding at source aliquot is of 21%. On the other hand, if it is not complied with the requirements it is applied the residual presumption of the 90%, for a final withholding at source rate of the 31.50% calculated over the gross amount.

If it is referred to a transfer for a good and valuable consideration of a good economically located, placed or used in Argentina, the aliquot that in effect applies is of the 17.50%. The rest of the supplies not foreseen in article 93 of the LIG, as we already warned, are subject to a withholding at source of the 31.50% (pursuant to the supposition of the net profit presumption of the 90%).

In any case, it is foreseen, that taxpayers may opt, in order to determine the net profit subject to withholding, between the cited system of presumptions or the sum resulting from deducting the paid or

⁴ This chapter was made with the support of professor. Alberto Tarsitano

proved gross revenue, the expenses made in the country necessary for its obtaining, maintenance and conservation, as also are the deductions acceptable for the LIG, according to the type of profit that is referred to and so long they have been recognized by the Tax General Office.

1.2. Brazil⁵

The withholding rates are as follows:

- Incomes remitted to producers, distributors or intermediaries, resulting from incomes derived from the exploitation of audiovisual works in Brazil, including payments for the acquisition or import of foreign films for a fixed price: 25% (art. 706, Decree 3000, 1999)
- Incomes derived from technical services and technical assistance without implying technology transfer, rendered to customers from Brazil by individuals or companies residing or domiciled abroad, independent from the way of payment, the place of rendering of the service and the date of hiring: 25% (art. 708, Decree 3000, 1999)
- Acquisition of any right. This includes the transmission of any film or event even of sports competition, via radio, television or any other mean, in which participate individuals from Brazil: 15% (art. 709, Decree 3000, 1999)
- Royalties of any class: 15% (art. 710, Decree 3000, 1999)
- Residual Rate: 15% (art. 685,I, Decree 3000, 1999)
- Any income paid by residents to non residents, derived from licenses of use or acquisition of technological knowledge, as well as agreements supposing technology transfer including those related with patents, trademarks and supply of technical services and technical assistance (art. 685-2, Decree 3000, 1999)⁶. The same rate applies to contracts of administrative assistance and similar⁷: 15%

All the above withholdings should be practiced over gross payments.

It also exists a “Contribuição de Intervenção no Domínio Económico” (CIDE)⁸, having a rate of 10%. This tax should be paid by the legal entities having licenses of use or being acquirers of technological knowledge through the way of contracts that imply transfers of technology with non resident or non-domiciled parties.

This tax should be paid by legal entities having licenses of use or being acquirers of technological knowledge through contracts implying technology transfer with residents or domiciled abroad. For the purposes of said law there are considered contracts of technology transfer those related to the exploitation of patents or use of trademarks and those of technology supply and technical assistance services rendering.

There are also subject to the above tax the payments made by legal entities signatories of technical services and administrative services and similar contracts, rendered by non residents, as well as by any

⁵ This chapter was made with the support of professor. Marcos Vinhas

⁶ Decree 3000, 1999 is the Income Tax Regulation

⁷ Art. 2 Law 10.168/01

⁸ Law N° 10.168/01.

person who pays, demonstrates, delivers or sends royalties by virtue of any title, to resident beneficiaries or domiciled abroad.

Notice that the referred tax is not owed by the foreigner but by the Brazilian resident that hires, with which it is not covered with the DTT⁹.

1.3. Peru

According to the income tax law, the withholding rates for overseas payments, for the purposes of our interest, are as follows:

- Royalties: 30% (section d, article 56 of the Income Tax Law - LIR for its acronym in Spanish),
- Technical assistance: 15%, so long as the domestic user obtains and submits to the National Superintendency of Tax Administration (SUNAT for its acronym in Spanish), an affidavit issued by the company not domiciled, declaring the aforesaid that it shall render the technical assistance and shall seek registration for the incomes that it generates and a report of an auditor of international prestige in which it is certified that the technical assistance has been effectively rendered (section f, article 56 of the Income Tax Law-- LIR for its acronym in Spanish).
- Live shows with the main participation of non domiciled interpreter artists and performers: 15% (section g, *ibid*)
- Other incomes: 30%

1.4. Venezuela¹⁰

The withholding rates for overseas payments pursuant to the Income Tax Law, is supported in the application of some rates at a presumptive bases, as follows:

- Enrichment of film producers and distributors abroad (art.34): presuming an income of 25% of the incomes obtained in Venezuela, for an effective rate of 8.5% over the gross payment, if it is taken into account the maximum taxrate that is of 34% (over this presumptive income it is applied Rate 2 foreseen in the Venezuelan legislation)
- Enrichment of international news agency (art. 35): the presumptive income is of 15% of the gross incomes obtained in Venezuela. According to the withholding Rate 2 applicable to this case, the maximum applicable withholding is of 5.10% in case that the yearly amount perceived is over 3000 Tax Units.
- Technological Services supplied from abroad (arts. 41 and next): The presumptive income is of 50% of the gross incomes. Taking into account Rate 2, the maximum tax burden is of 17% calculated over gross incomes.

⁹ See Solução de consulta N° 165 de 15 de Junho de 2007

¹⁰ Thank you very much to Professor and friend Jesus Sol

The law of the income tax, in addition, presumes that for those contracts implying technical assistance and technological services in which it is not distinguished each of the components, this is that they foresee a global amount it is presumed that the 25% of the total amount corresponds to technical assistance and the 75% to technological services.

In the same way the law sets forth, that when the global amount includes incomes for remunerations or fees, technological services of technical assistance services having been rendered part in Venezuela and a part abroad, it is presumed that the income is of a 60% abroad. As to the component rendered in Venezuela, on the other hand, there may be claimed territorial costs and expenses, for the purposes of defining the net income subject to tax.

- Technical Assistance Services supplied from abroad (arts 41 and next): presumptive income of the 30% of the gross incomes, for a maximum rate of the 10.2% calculated over the gross income.

In these cases applies the presumption indicated in the above point.

- Royalties (art. 48): The presumptive income is equivalent to the 90% of the gross incomes, for a maximum rate of the 30.60% calculated over the gross incomes.

1.5. Colombia

In the case of payments for royalties, exploitation of any type of technical services rendering or technical assistance, revenues or royalties coming from the literary, artistic and scientific property the withholding would be of a 33% of the par value payment. When the technical services and the technical assistance are rendered by non- resident or non domiciled people in Colombia, the withholding would be of the 10%.¹¹ As to the exploitation on any basis of cinematographic films the withholding would be determined over the 60% of the corresponding payment or deposit in account, at a rate of the 33%, for an effective rate of 19.8%.¹² As to the payment or installment for the exploitation of computer software on any basis, the withholding would be of the 80% of the same, at a rate of the 33%, for an effective rate of the 26.4%.¹³ For the remaining cases, the rate would be of the 14% over the corresponding gross value.¹⁴

It is important to quote that law 98, 1993 sets forth two assumptions of exempt income. On the one hand, there are considered as exempt the incomes obtained on copyright basis perceived by authors and translators both Colombian and foreigners residing in Colombia, for scientific and cultural books edited and printed in Colombia, for each title and for each year.

The incomes coming from copyright rights and translation of national and foreign authors residing abroad, are also exempt, but only regarding the first edition and first print run of books edited and printed in Colombia. For the next editions and print run of the same publication, the exempt only would

¹¹ Colombia. Tax Code. Article 408.

¹² Ibid. Article 410.

¹³ Ibid. Article 411

¹⁴ Op., Cit. Colombia. Tax Code. Article 415

be equivalent to the amount of sixty minimum legal salaries in force.¹⁵ The exemption covers each title and each year and is not extended to the remittance tax.

1.6. México

In all royalties different from those obtained for by the use or temporary enjoyment of railroad cars, the withholdings would be of the 25% over other gross payment. The same rate is applicable to the payments for technical assistance¹⁶

1.7. Summary chart

Country	Withholding rate derived from copyright	Technical assistance services
Argentina	- 12.25% (individuals) and 31.50% (legal entities) for royalties from copyright and software. - 17.50% for a good and considerable transfer of a good located or economically used in Argentina.	21% or 31.50% depending on the compliance of requirements.
Brazil	25% for Incomes from the exploitation of audiovisual Works in Brazil, including the payments for the acquisition or import of foreign films for a fixed Price. 15%: acquisition of any right including the transmission, via radio, television or any other mean of any film or event, even of sports competition in which Brazilian individuals participate 15%: Royalties of any class.	15% or 25% depending on whether or not there is technology transfer, respectively
Peru	30%: royalties 15%: live shows 30%: other incomes	15% under conditions

¹⁵ This is a strange case in which the law maker, apparently, set forth, the value of the exemption, independently from de taxpayer income.

¹⁶ Mexico. Income Tax Law. Article 200.

Venezuela	8.5%: enrichment of film producers and distributors. 5.10%: enrichment of international news agencies. 30.60%: Royalties	17% technological services 10.2%: technical assistance
Colombia	33%: royalties 19.8%: exploitation of cinematographic films 26.4%: Exploitation of software 14%: Residual Rate business transactions not included	10%
México	25%	25%

1.8. Conclusions

The chapter evidences that the withholding at source rates for foreign payments in business transactions related with intangibles and within them the copyright and connected rights are very high in the region. Before inquiring to experts in the different countries what are the consequences of that in their corresponding jurisdiction, which is directly related to the next paragraph, we could encounter several common points to all of them:

- Usually the foreign contractors that receive the payment refuse the withholding at source amount for not having always the possibility of deducting/crediting the tax paid in their country of residence (foreign tax credit).
- The above leads to include mechanisms as the *gross up* in the contracts, namely, an increase in the price in order for avoiding a higher damage to the foreigner. This makes the business transaction more expensive for the national person making the payment.
- In other cases it is not increased the price of the contract, but the local contractor undertakes to assume the tax. In none of the studied legislations this payment is deductible from the income tax.
- To put it briefly, the practice indicates that taxes for this type of business transactions are assumed, in many cases, by the local contractor making the payment, with which the national legislations result being damaging for their own nationals.

2. THE PROBLEM OF THE SOURCE OF INCOME AND THE CHARACTERIZATION OF TRANSACTIONS OVER INTANGIBLES ON TAX MATTERS: CONCEPTUAL HIPERTROPHY?

The problem of the “international” tax events makes any study over the local dimension of the same, to turn relevant so long as, in absence of a Double Tax Treaty and even against its existence, but accompanied by different concepts or understandings on the part of the State of Source and of Residence -, any treatment for which a State opts will affect directly or indirectly with a problem that results critical for the theory of international taxation: double taxation.

And it is within this local legal power that the States have, that may arise great problems related with the double taxation, precisely because the States, within their tax powers, have the possibility of applying *outside territorial limits*, criteria, this is, considering that taxable events taking place outside their jurisdiction are covered by their own legal tax power. This situation may result chaotic in absence of a Double Tax Treaty or DTT).

Within the traditional international commerce, perhaps with a few exceptions, the policy seems clear: the States tax taxable events taking place inside their frontiers and, this way, any traffic occurring outside the same, even if it affects them in any way, remains excluded from tax rules. Nevertheless the intangibles and services commerce has changed this perspective, not only for the impossibility existing in some cases for the determination of the local or territorial dimension of the taxable event, but also for the way in which the same may be extended over the different frontiers in which the aforesaid acts. Certainly, the intangibility in the rendering of certain services and the supply of certain goods allows individuals to easily develop their businesses from any place.

Within this context, in the intellectual property field (that covers both industrial property and copyright rights), the underdeveloped countries and in developing countries, next to others, have understood that their technology importers character (not exporters) leads them to take stricter positions over intangible commerce, and in this sense, the generalized position in said countries consists in the fact that the business transactions implying intellectual or technological imports, both in the field of goods and intangible services, are subject to a tax and, for this reason, to a withholding at source within their jurisdiction.

The above conclusion seems natural since the simple perspective of the elaboration of a tax policy. Nevertheless, its consequences are obvious:

In the first place, said decision of the developing countries does not modify the other unquestionable principle that will always apply the State of Residence, in the sense of taxing *global* income of its residents, with the income tax. In other words, we are facing complex field of double taxation that, in absence of a DTT, could turn more difficult or easier to resolve so long it exists a harmonization measure, used by the person who construes, of the two jurisdictions under discussion, which would not always be possible.

In a second place, the problem that arises of that of the efficient application of correctives that the modern legislation have in order to avoid double taxation in absence of a DTT. Indeed, each rule shall have some requirements for granting foreign tax credits or tax exemption and if the specific situation does not evidence the compliance of all of them, simply the credit would not be granted and the double taxation problem shall be reflected on its entire dimension.

In a third place, the implementation of local correctives in order to avoid double taxation also has some limits that have to be evaluated in each particular case, but in order to propose the most common situation, it is known that the foreign tax credit, as a general rule, is restricted to the amount of the applicable tax that would have to be paid by the resident on its own jurisdiction. This is reflected in the double taxation problem that, in an added way, it may be considered as important if the tax paid in the State of source has a high rate applicable to a base not purified or only partially purifiable.

And, in a fourth place, is the damaged party (the taxpayer) in a contract evidences that the particular situation will generate economic problems, we have to analyze another important field for the taxation theory that is the neutrality field. It is well known that one of the *desirable* tax principles lies precisely in the fact that the rules not having influence in the decisions from individuals at the time of making a particular business transaction. So, in the case of royalties according to what some important practitioners deem, it occurs that in our countries the foreigners not in a few cases tend to transfer *their* tax problems to the local contractor, this is, to demand local contractors to be liable of the corresponding withholding at source, without affecting the net income after taxes received by them.

Then this practice demonstrates that our countries have decided to impose high tax rates to the technology import, but the effects of said imposition are being suffered by the proper local residents that, in theory should not be affected with the tax. And the worst when said locals assume such tax burden the analyzed countries without exception, consider such payments as non deductible from the local contractor's income tax, as it is considered an expense not having a relation with the activity generating income, as it is reflected in the payment of the tax from a third party. Obviously, in order to avoid the above mentioned, what has been prevailing is the application of forms such as the *gross up* or increase in the contract's Price in order to offer the foreigner the net income after taxes that demands in each case demands, but with no doubt this practice is not desirable from the perspective of the mentioned tax neutrality.

In any case, the internal tax rule of a country should make sure that each situation is resolved in the most technical possible way. This premise, that by itself is very obvious, acquires relevance in connection with intangibles as in the practice the business transactions lying over the same are not easy to characterize, with which the rules set forth by the legislation for some cases may result being extended to others or, simply, the same legislation may result covering, under the same rules, situation that deserving a different treatment. In order to comply with the internal provisions or of a DTA and apply the same to a particular business transaction, results essential to understand what is the *purpose* of the business that is intended to be qualified, as an improper qualification of the business transaction for tax purposes may cause secondary problems as the improper application of the tax or the improper application of the base or tax rate.

However, by virtue of the qualifying autonomy of the tax legislation, it would always be absolutely possible that the own tax law proceeds to qualify a business transaction separately from the rates set forth in the common legislation. But, apart from that, the constructor shall always have to proceed to qualify each business transaction so, that based on that, it is determined the applicable tax treatment. This way the qualification has an influence in (i) the qualification of the source of income; ii) the tax base); iii) the tax rate and iv) in any other legislation being relevant for said qualification. In spite of the above, any qualification made, whether by the law maker or by the constructor, shall have serious effects over the consequences that a particular business transaction may have from the tax perspective.

Once reviewed the studied legislations, we encountered that in general terms and except for some exceptions, the same use the common legislation in order to determine which is the correct nature of an business transaction and, in a general way, they consider that the incomes coming from the exploitation of intangibles on their territories should be considered as of local source, subject to their tax jurisdiction.

Nevertheless, we encountered that the high tax rates to which we referred in the above paragraph, are being applied to business transactions that should not be subject to tax for the sake of equality that should exist between the commerce of tangible and intangible merchandise. Indeed the tension development-under-development whether reasonable or not, (according to our judgment without much sense) has served to support the tax policy of many countries, in the sense of taxing the technology transferring (whose incomes at the beginning should be considered of foreign source) should be restricted to inspire the tax over incomes attributable to the exploitation of intellectual creation considered by itself, as it constitutes the purpose, that is supposed, that is abundant in developed countries in contrast with our countries. However, our legislations – and our legislations as we would see, others different and more developed than ours in many cases tend to establish taxes over the import of the works *resulting* from these intellectual creations (**copyrighted articles**), circulating around the world as *merchandises*, with which there are caused secondary problems as it would be, the inequality in the treatment of intangible goods commerce if it is compared with the tangible goods commerce, the most tend (created by the same legislation) to develop smuggling commerce, the restrictions to traffic of goods that in principle should be transacted free and simply in a globalized world, etc.

In the case of software, for example, not in a few countries, it is understood the overseas payment for having access to a copy of a software (even in a final way) in order to satisfy the needs of a company without an intention of commercializing or *exploiting* the good, as a payment subject to taxes in the place of receipt of the software. That is made, on the basis of an unfortunate parity of this situation with the software's *author* situation or the holder of the rights over the same that takes benefit of its exploitation. In other words, there is a tend to confuse the business transactions related with copyright rights with those related with merchandises (**copyrighted articles**), that as a way a *copies*, are derived from the work covered by such copyright rights, in order to understand that in all cases it is referred to business transactions lying over a *software* and, as such, should receive similar treatments. But in addition, it would be convenient to inquire as to whether is that (the license or sale of the copy or of the *merchandise*) one of those business transactions of “import of technology” supporting the tax policy of some countries in the sense of taxing these type of business transactions as they do not have the capability of exporting the same products.

In the case of Latinamerica, all the studied legislations (except for Peru), tend to include all the payments derived from software licenses under a same categorizations and, on the basis of said categorization, they understand that all business transactions adopting such denomination (software license) remain subject to taxes within their jurisdictions, without proceeding to determine whether the license falls over copyright rights strictly speaking or over a use of a copy or merchandise derived from the copyright (**copyrighted articles**). This problem of the software industry allows its treatment to be classified as *critical* in the countries of Latin America, as business transactions that could be equalized to those normally made in commerce (the acquisition or a standardized software license is comparable to the acquisition of a musical copy for personal use, to the acquisition of a book, to the acquisition of a medicinal product covered by patents, etc., with the difference that in all the aforementioned situations

the generalized understanding- at least conceptually, is that there should not exist taxes for transnational payments) as the tax Administrations have also blurred some of these concepts-. The worst of all is that, upon inquiring, we encountered that the confusion in the qualification of business transactions has been extended to other products derived from copyright rights that are settled in commerce as merchandises, as it would be the case of the musical or electronic copies that are downloaded by a use in internet, as some countries have understood that these business transactions are within the spectrum of the business transactions charged with high tax rates as provisions given the use of copyright rights, connected rights or technology imports.

In order to continue with the examples, we also found that there is a lot of confusion in the business transactions involving the **execution of several activities** (mixed agreements). There is an example that is very clear. The franchise contracts, in which usually exists the execution of different activities/obligations and no one of them may be considered as “principal” (within which we encounter supply of goods, supply of know- how, technical services rendering and trademark licensing)), have been considered in some cases, by the authorities, as “intangibles exploitation” contracts in which the withholding at source for non residents should be made at a maximum rate¹⁷. However, it would not appear this to be a wise solution if it is taken into account that the franchise suggests the execution of other type of obligations different from the intangibles exploitation having taxes equally different and, of course, inferior. For example, in a generalized way we may state that the import of goods comparatively is not subject to income tax in the country of destination and normally the technological services may have reduced withholding rates. It would appear then, that, in these cases, it would be logical making a valuation of each one of the provisions, in order to verify the applicable *individual* withholding rate.

Other cases of *mixed* business transactions, in which it has been possible determining the exact purpose of the business subject to taxation, have also caused discussions despite their apparent clarity. For example, there have been cases in which the tax and customs authorities have considered that the value of the physical mean for purposes of customs taxes should include the value of the intangible production, for example in the cases of production of advertising abroad that is then delivered to the recipient of the service in a physical mean.¹⁸ First what we must say, tentatively, is that when an intangible is conveyed in a physical mean should be differentiated two situations: the first, when the transfer of the physical mean results in the “principal” transaction of the contract and, and the second, when said transfer is just a *mean* to comply with the “principal” provision that, for the suggested case, consists in a service. Here the mixed business transaction, in contrast to the franchise, it would seem to insinuate the application of the tax law regulating the treatment of the main provision- in our case- it is obvious that the advertising spot has a principal character, and for this reason, it has no sense to have it to be subject to some taxes that only fall over tangible goods, such as the customs taxes. In the same way, the services contracts over literary, artistic or scientific works (making of software for example), have caused many confusions.

As to the technological services is concerned (and it’s unfortunate mentioning as *technical* on the part of some legislations) we saw how the legislations have “hypertrophied “their conception, in order for

¹⁷ In Colombia see Concept of The National Directorate of Taxes and Customs (DIAN) N° 26737, 2002.

¹⁸ See in Colombia Official Letter dated February 13,1998 and concept 6 dated February, 1999, subsequently annulled by the Council of State by means of judgments dated April 28 and July 28, 2000.

taxing foreigners with incomes that should only have been subject to taxing in their jurisdiction, given the fact that our jurisdictions lead them to be subject to taxing with independence of the place of their provision.

In this sense, it is worth always taking into account that the services have a technological nature when special knowledges also technological are necessary for the provision of these services. In order to distinguish them from other services, it would have to be studied what is the purpose of the service in each case. If the obligation acquired by the service provider requires itself the use of a technological knowledge, the service shall have such character. On the contrary, it would be a common service that probably, only shall be subject to a tax in the State of Residence.

The last aforementioned is very important. In other words, the fact of being necessary the use of technology for the service rendering, does not provide the same of a technical nature. Thus, there are very debatable, the concepts and regional regulations that have blamed as technological services the "hosting" services (renting of spaces for web pages), of data storage when the fact of storage does not imply, by itself, the application of an specific technique, of software maintenance and repair, etc.

And, as to the technical assistance services, we could say the right thing. The concept of technical assistance is restricted to the services involving, as such, the technology transfer. Nevertheless, as we saw in some of our countries this concept has also been hypertrophied.

In the meantime, in any case, there may be anticipated the conclusions of this chapter: it is necessary to cause a change in the conceptions existing in connection with the rules in force in our countries- even if they have more than four decades becoming rooted in our legal-tax culture and we should redefine some institutions set forth in the different tax legislations. In connection with intangibles, the entrepreneur, academic and official sectors have a long slog ahead of them.

As follows we refer to the critical points found in each legislation.

2.1. Argentina

The Law of Income Tax – (LIG for its acronym in Spanish) lists in a generic way the incomes considered as source of Argentina and, in such measure, understands as such, the incomes coming from the goods located, placed or economically used in Argentina. On the other hand, the royalties produced by things located or rights economically used in Argentina are included in this rule (Art. 9° of regulatory decree)¹⁹.

The application of this rule, results in some situations, an easy task. For example, the registration of a copyright right before the National Office of Copyright pursuant to law 11.723, may suggest the

¹⁹ Forcada Carlos, "The Tax Jurisdiction in the electronic transactions." pages. 79/111, Chapter third, "The Software and the international transactions (Direct Taxation), pages. 145/169 Chapter Fifth, The Software and the international transactions (in Direct Taxation), "pages. 213/223, Chapter Seventh, of the book "Taxing of Business Made by Electronic Means", Coordinator Asorey, Ruben, Ed La Ley, Buenos Aires, 2005.

situation of a good in Argentina and, in such way, its transfer would be considered as giving rise to incomes of Argentine source. In the same way, if said individual holder of the copyright rights obtains incomes as a consequence of its exploitation, such incomes shall also be considered of Argentine source, under the criteria of their economic use in the country.

Nevertheless, as Carlos Forcada points out, in many cases the qualification of incomes for purposes of defining their producing source is not an easy task in light of the exposed rule, which is evidenced with the criterion that the tax authorities have been held. The author reports that said authorities identify the income producing source as the place where is to be used the incorporeal good after its negotiation. This point results critical, as it makes that, in practice, even the payments for the transfer of intangibles that are not transferred in Argentina, result being subject to tax in said country. In the case of software, for example, we encountered that the criteria of the use in the country as a main reason for deciding as to the source of income, makes all business transactions falling over the same to remain subject to taxes in the country.

The above is still paradoxical if it is taken into account that the generalized criteria in said country, as occurs with most of the tax legislations of the world, is that payments for the import of intangible goods to Argentina and the payments made to not resident individuals for common services rendering, provided abroad are of foreign source and, for this reason are not subject to taxes in said country. Fortunately, this is the criteria that has received, at least, the software “packed” or “stored” imported from abroad²⁰.

Beyond of the above, in Argentina there exist the same problems of qualification existing in other jurisdictions: the classification of some business transactions falling over software as business transactions related to copyright rights or know-how transfer (a very important difference for tax purposes, according to that mentioned), the qualification of business transactions implying the access to databases through a software, the data processing abroad, the adjustment of a software abroad, the business transactions implying the execution of several provisions having a different tax treatment, etc.

2.2. Brazil

As we already warned, Brazil adopts the principle of “the income source of payment” rather than the source of “State of Income”, which makes the obligation of practicing withholdings at source to all incomes paid, credited, proved, delivered, used or sent by Brazilian residents to non residents, the general principle, except for the incomes derived from the sale of goods to Brazilian customers, in the terms exposed.

The same legislation, at the time of regulating rates, takes into account the incomes qualification, which is useful to determine the withholding at source rate applicable to each payment. In this sense, the classification of the State of Income in Brazil is the following, as we already warned:

- Incomes derived from work with or without employment relationship, as well as the services rendering: 25% (art. 685, II (a), Decree 3000, 1999)

²⁰ Ibid

- Incomes sent to producers, distributors or intermediaries, by source of incomes derived from de exploitation of audiovisual Works in Brazil, including the payments for the acquisition or import of foreign films for a fixed price: 25% (art. 706, Decree 3000, 1999)
- Incomes derived from technical services and technical assistance not implying technology transfer, rendered to Brazilian customers by individuals or companies residing or domiciled abroad, with independence of the payment conditions, the place of the service rendering and the date of hiring: 25% (art. 708, Decree 3000, 1999)
- Acquisition of any right. This covers the transmission, via radio, television or any other mean of any film or event, even of sports competition in which Brazilian individuals participate: 15% (art. 709, Decree 3000, 1999)
- Royalties of any class: 15% (art. 710, Decree 3000, 1999)
- Residual Rate: 15% (art. 685,I, Decree 3000, 1999)
- Any income paid by residents to non residents, derived from licenses of use or acquisition of technological knowledges, as well as the contracts supposing technology transfer included those related to patents, trademarks and provision of technical services and technical assistance (art. 685-2, Decree 3000, 1999)²¹. The same rate applies for the contracts of administrative assistance and similar.²²: 15%

All the above withholdings should be made over gross payments and, and in the cases foreseen in law, already studied in the corresponding chapter, it should be added the tax burden derived from Contribuição de Intervenção no Domínio Económico (CIDE)²³, which has a rate of the 10 % .

In order to understand the application of the above principles, we should begin from the fact that in Brazil has been clear the fact the commerce of tangible goods implying the import towards the country, on the part of non- resident subjects, is not subject to tax, except in the special cases foreseen in law. The consideration taken into account is that said incomes should be attributed to productive activities made outside the Brazilian territory.

However, although the same principle should be applied to intangibles taxation in general, as long as intangible goods are imported to Brazilian territory under the same conditions of the tangible goods, the truth is that the aforesaid has not been clear.²⁴ To proceed to distinguish the cases in which the payment has as source the transfer of a good or the rendering of a taxable service has been a task full of dilemmas that for this reason, has caused multiple controversies. Mainly, in connection with the e-commerce over intangibles, the payments may result to be qualified as payments for rights, royalties, know-how transfer, etc., depending of the interpreter, with which, in the practice, in Brazil neither exist principles that equate the commerce of tangible goods with that of intangibles, at the time in which the incomes qualification has been a litigious point without a satisfactory solution on the part of the law- maker.

Unfortunately, the Brazilian law does not have a conceptual clear definition of each one of the items described above.²⁵ Perhaps the only exception is given by the definition of royalties that, for purposes

²¹ Decree 3000, 1999 is the Income Tax Regulation

²² Art. 2 of Law 10.168/01

²³ Law Nº 10.168/01.

²⁴ IFA 2001, Ob. Cit.

²⁵ DELAPIEVE Rossi, et.al. Reporte Nacional de Brasil presentado en el Congreso de la IFA, 2001. P.291 y ss

of the income tax, are understood by Law 4.506 1964, as the payments derived, among others, from the “exploitation of the copyright rights”.

From the above it is derived, for example, the fact that the tax treatment for the software acquisition has been open to multiple interpretations. Some authorities understood, for example, that both the acquisition of computer software for the distribution and commercialization in Brazil or even for personal use was subject to withholding at source according to article 685, I of the regulation. However, some regional authorities, in special cases, had doubts as to the withholding rate, and even others deemed that some of these payments were not subject to tax. Some of them also deemed that the acquisition of a copy for personal use of the acquirer should have been treated as a general service, subject to a tax of the 25% and others that the payments for software should not be subject to tax when they are referred to: i) the acquisition of copies of software destined to the Brazilian market; ii) the acquisition of software of massive production and standardized, without existing transfer of copyright rights and iii) the acquisition of software for sale.²⁶

In practice, the discussions generated by the same law have been decided by way of case-law. For example, the Federal Supreme Court of Brazil took a very important step, in connection with the qualification of business transactions over software, upon constructing that it is only considered as service the transfer of a good, the packed or stored software sales, commonly commercialized in the market.²⁷, although this judgment is not issued a decision as to the transactions made by digital means. The Administration, on its part, has understood that the values sent abroad due to the acquisition of the software commercialization rights in the modality of multiple copies (commercial software) are not subject to income tax.²⁸

To put it briefly, the qualification of some business transactions as a sale, royalty or service, is far of being clear in the Brazilian legislation. Principles that are applicable, in a general and transparent way to the intangible goods taxation are no longer when it is referred to intangibles, which is not technical nor desirable under any point of view.

On the other hand, by means of a normative declarative writ N° 1 dated January 5, 2000, the Administration set forth that the technical services and of technical assistance in which there is no technology transfer, are subject to tax according to article 685, subsection 2, section a), this is, at the general rate of 25%. For said services, the mentioned regulation understands as those that are not subject to registration before the Brazilian Institute of Intellectual Property (INPI for its Spanish Acronym). This position with no doubt worsens the great confusion existing in Brazil over the qualification of some incomes falling over intangible business transactions.

²⁶ DELAPIEVE Rossi, et.al. Reporte Nacional de Brasil presentado en el Congreso de la IFA, 2001. P.291 y ss

²⁷ RE 285870 AgR / SP - SÃO PAULO [../jurisprudencia/](#) [RE-AgR285870/](#) AG.REG.NO RECURSO EXTRAORDINÁRIO. Julgamento: 17/06/2008 Órgão Julgador: Segunda Turma. Publicação DJe-142 DIVULG 31-07-2008 PUBLIC 01-08-2008 EMENT VOL-02326-06 PP-01078.

²⁸ solução de divergência N° 27 de 30 de Maio de 2008

2.3. Peru²⁹

According to article 6 of the Income Tax Law, the taxpayers not domiciled in Peru, their branches, agencies or permanent establishments, are subject to tax only over their incomes of Peruvian Source. In general terms, all incomes whose taxable facts are verified in Peru are considered as Peruvian source³⁰. In this regard, articles 9 and 10 of the de Income Tax Law (LIR for its Acronym in Spanish) set forth the different criterion that have to be taken into account for the incomes determination as of Peruvian source.

From said provisions, the one that refers to the incomes under study, is article 9b, according to which are considered as of Peruvian source “those produced by goods or rights, when the same are physically located or economically used in the country. With regard to the royalties to which article 27, refers to, the income is of Peruvian source when the goods or rights for which the royalties are paid, are economically used in the country or when the royalties are paid by an individual domiciled in the country.

The first part of the provision has caused quite a lot controversies, indeed, it is discussed whether the criteria of economic use covers both the intangible and intangible goods and, in case of being only referred to the latter, in what measure. For example, the Administration at a time considered as income of local source the submarine wire on the part of companies rendering telecommunication services, despite the fact only a part of the same was located in Peruvian territory.³¹ This position was defined, in an opposite sense, my means of the Tax Court Case-Law³², with which presently, the majority position, and points to the fact that this criterion of economic use only refers to intangible goods.

As the definition of royalties, article 27 of the LIR qualifies them “any consideration in cash or in species kind originated by the use or the privilege of using patents, trademarks, designs or models, plans, procedures, or secret formulas and copyright rights of literary, artistic or scientific works, as well as any consideration for the assignment in use of the programs of instructions for computers (software) and for the information related to the industrial, commercial or scientific experience”. However, the law understands for information related to the industrial, commercial or scientific experience “any transmission of knowledge, secret or not, of technical, economic, financial or of other kind referred to commercial or industrial activities, disregarding the relation that the transmitted knowledge’s have with generation of incomes by those who receive the same and the use of them made by the former.³³”

This definition could result dangerous-besides of anti-technical- for the business transactions falling over software, as its wording would determine the obligation of practicing withholding at source of the

²⁹ For the preparation of this chapter it was very useful the assistance of Professor Alex Córdoba

³⁰ CÓRDOVA Arce, Alex. Rentas Producidas por Bienes o Derechos y Regalías por Uso de Software. Jornadas Nacionales de Derecho Tributario, Instituto Peruano de Derecho Tributario, Perú, 2008.

³¹ Ibid

³² Ibid. Cite RTF 01204-2-2008 dated January 30, 2008

³³ Article 16 of the Regulation sets forth that “knowledge transfers to which the second paragraph of Article 27 of the law refers to are those related the specialized knowledges that translated in instructions, formulas, plans, models, designs, drawings and other similar elements , allow the use in economic activities, of accumulated experiences of industrial, commercial, technical or scientific ”.

30% over payments made for the use of *copies* of computer software for use strictly personal or entrepreneurial, which it would appear that does not classify within the royalties definition context. Nevertheless, by means of article 16 of the Supreme Decree 134-2004-EF was construed said article 27, in the sense that for the software case, the so called “assignment in use” covers both the *licenses of use* falling over *proprietary rights* over the software and the partial assignment of the same rights, made for the software exploitation on the part of the assignee. And, in addition, the rule specified that it is not considered as payment for royalties “when the consideration corresponds to the final, unlimited and exclusive assignment of the proprietary rights over the software or pays the acquisition of one copy of the software for the acquirers personal use”, in which case the business transaction is qualified as a real transfer. On the other hand, SUNAT has deemed that within this last provision that refers to the “acquisition” of software copies, it should be understood that licenses of personal use are covered.³⁴

Obviously, the above provision contributes to a better understanding of the business transactions over software, and at the same time is getting closer to the modern trends and international taxation standards. However, it has a wording that may be criticized, as it is not technical talking about “licenses of *use* over the author’s *proprietary rights*” and perhaps it would have been better referring to the licenses of exploitation over said rights.³⁵

Notwithstanding the above, SUNAT has considered that payments made to individuals abroad for the acquisition of one or more copies of standardized computer software, should be qualified as royalties, in order for them to be commercialized as merchandise within Peru.³⁶

On the other hand, the LIR qualifies as Peruvian State of Income “those obtained for digital services rendered through internet or of any adjustment or application of protocols, platforms, or of technology used by internet or any other network through which are rendered equivalent services, when the service is utilized economically, used or extinguished in the country” (section i, article 9). This leads the digital services to be taxed in Peru, with independence of the place of their rendering. The regulation qualifies the digital services as those that are for the user’s disposal through internet.

The regulation qualifies digital services as those which are available for the user through internet or of any adaptation or protocols application, platforms or of the technology used by internet or any other network through which are rendered equivalent services by means of online access and characterized for being essentially automatic and not being feasible in absence of technology of information. For purposes of the regulation, references to web pages, internet providers, internet operators or internet cover both internet and any other network, public or private.

The same regulation states that, are considered as digital services among others, the services of software maintenance that may cover software updates of the acquired computer software and technical assistance in network, technical support services to the customer in network, provision online of technical documentation for problem solving or automatic connection with technical personnel through electronic-mail. Storage of information services, hosting, services of application, web pages storage, electronic access to consulting, advertising, auction online, distribution of information, access to interactive web pages, interactive training, portals online for purchase and sale. All these services are

³⁴ National Legal Intendency of SUNAT, Report 311-2005-2005-SUNAT/B0000 dated December 22, 2005.

³⁵ Ibid

³⁶ Informa 311-2005-SUNAT/2B0000

taxed in Peru, so long their “economic use” occurs in the country, for which purpose the regulation provides the guidelines for the interpretation of this undetermined concept.

In the same way, section j) of the same rule taxes the technical assistance services, when the same are economically used in the country. Within the technical assistance services are the engineering, investigation and projects development, financial counseling and consultancy services.

Finally, the regulation has an important provision, in agreement to all international studies in connection with electronic commerce and, in general, intangibles taxation, in the sense that in case that “they jointly concur with the provision of the digital service or with the technical assistance or with any other business transaction, other provisions of different nature, the amounts related to each one of them should be distinguished in order to give the treatment corresponding to each individualized business transaction. However, if due to the nature of the business transaction is not possible to make this discrimination, it shall be granted the treatment that corresponds to the main and predominant part of the transaction.

2.4. Venezuela

According to article 6 of the Income Tax Law, “an enrichment is derived from economic activities made in Venezuela, when any of the causes generating the same occurs within the national territory, whether these causes refer to the soil or subsoil exploitation, the formation, transfer, change or assignment of the use or enjoy of the movable or immovable, corporeal or incorporeal or to services rendered by people domiciled, residing or passing-by in Venezuela and those obtained for technical assistance or technological services used in the country”.

And, by way of information, the rule sets forth that are understood as incomes of Venezuelan source, among others:

- Royalties, the rights for the use of trademarks and other similar provisions derived from the exploitation in Venezuela of industrial or intellectual property.
- Enrichments derived from the production and distribution of films and similar for movies and television.

Upon reading the provision, may be noted that with the occurrence in the country of one of the *causes* of enrichment, is sufficient in order for it to be considered as income of Venezuelan source. However, in the case of royalties and other similar payments, as well as the technological services or technical assistance used in Venezuela, the incomes are understood as of Venezuelan source independently of the place of the occurrence of the *cause* originating them.

In order to understand the content of this provision, article 42 of the Income Tax Law defines the technical assistance in terms that overflow the natural and obvious sense of the term, upon understanding that for income is understood “*the provision of instructions, briefs, recordings, films and other similar instruments of technical character, destined to the elaboration of a work or product for the sale or provision of an specific service for the same purposes of sale*”. The Law also sets forth that the provision of technical assistance may cover the technical knowledge transfer, the engineering,

investigation and projects development services of financial counseling and consultancy services, services, and the supply of procedures or formulas of data production, technical information and specification, diagrams, plans and technical instructive, and the supply of elements of basic engineering and of detail³⁷.

On the other hand, article 43 of the law defines as technological services “the concession for their use and exploitation, of letters patent, models, drawings and industrial designs, improvements, formulations, instructions, and all those technical elements subject to patenting”.

Professor Jesús Sol deems: “The technological services consist in assigning the right to use and exploit, from the economic standpoint, all those technical elements subject to patenting; consequently, they must be considered as technological services when the concession is granted for the use and exploitation in Venezuela of letters patent, improvements, and all those elements subject to patenting, which is different from what is known in the international sphere as “*Know-how*”³⁸.

As can be noticed, the payments to non residents pursuant to the Venezuelan legislation, are too widely defined which has caused multiple debates.

2.5 Colombia

Colombia sets forth, in articles 24 and 25 of the Tax Code, the following rules of source of income according to its characterization, as follows:

Payments for the *exploitation* of intangibles within the country constitute income from national source (first subsection of article 24, in accordance with numeral 7 of the same provision).

As to the *services* rendering within the country originate income of national source, as long as they are provided in Colombia (first subsection of article 24, in accordance with numeral 5 of the same provision).

From the previous rule are excluded the *technical services* and the *technical assistance*, which are taxed in Colombia independently of the fact that they are performed in the country or from abroad. However, services of repair and maintenance of equipment rendered abroad, as well as services of staff training abroad in favor of public sector entities only are taxed in Colombia if they are rendered in Colombia.

The *transfer* of intangibles is taxed in Colombia if they are in the country at the time of their transfer. On the contrary, Colombia cannot benefit from income derived of the same.

Engineering services: The execution and supervision of the assembly, installation and start up of the machines, equipments and productive plants, the calibration, inspection, repair and maintenance of the machines and equipments, and the making of tests and trials, including quality control.

2.-Investigation and projects development: The elaboration and execution of pilot programs, the investigation and laboratory tests; the exploitation services and the planning or technical programming of productive units;

3.-Counseling and Consulting: The processing of external purchases, the representation, the counseling and the instructions provided by technicians for the administration and management of companies in any of the activities or business transactions.

³⁸ SOL Gil, Jesús. Enriquecimientos Sujetos al Régimen de Rentas Presuntas. Caracas, 2003.

As to the intangibles, *exploitation*, the position of the National Directorate of Taxes and Customs- (DIAN for its Acronym in Spanish) has been that most of the business transactions related to an intangible imply its *exploitation*. Based on this premise the entity has concluded that payments abroad coming from those business transactions are subject to withholding at source at the rate of 33%, 26.4% or 19.08% pursuant to the gross amount of the payment, according to each case³⁹.

In order to justify its position, the entity has sustained that over intangibles “only”⁴⁰ two types of business transactions may fall, and both of them are defined by the entity as exploitation: (i) the sale of the rights derived from the intangible (e.g. copyright rights) and (ii) its license. To this effect, the entity has not reviewed in detail the different hypothesis reflected in the reality of business and that have call the entity’s attention as to this fact, and, consequently, practically all cross -border business transactions over intangibles, according to DIAN’s opinion over a subject numeral 7 of article 24 of the Tax Code.

Within this context, the entity has deeded that all licenses of intangibles, both of use and of exploitation, generate income of national source, since in all cases, according to DIAN, a foreigner “is economically taking advantage (exploiting) of a right over a good located in Colombia”.⁴¹.. And within this context has considered as *payments for exploitation*, among others, those made for licenses for personal use of software,⁴²the acquisition of music and books by electronic means,⁴³the contracts for distribution of intangibles⁴⁴and even the payments for the assignment of the contractual position over a license.⁴⁵

However, as to the hypothesis of *transfer* of intangibles in the country over the part of a non-resident foreigner, the official opinions are very confusing. No concept of DIAN, for example, states expressly that the sale of intangibles over the part of a foreigner to a resident is considered an income of foreign source if the intangible is outside the country at the time of its transfer, although the same has not been neither emphatic over the contrary statement, this is, in the sense that this income is considered as of national source.

In fact, when DIAN has been inquired as to the hypothesis of transfer, it has always answered evasively, stating that “licenses” are considered a form of exploitation and thereby are taxed in Colombia.

However, as can be noticed from the previously transcribed concepts, DIAN considers that the sale of an intangible or the transfer of the rights involved in the same consist of a hypothesis of “exploitation”.

³⁹ Effective rate by way of income and remittances.

⁴⁰ I did not find any concept of the entity that considered diverse hypothesis.

⁴¹ See, among others, concept 125326 of 2000

⁴² Concept 054967 of 2000

⁴³ Concepts 1933 and 37529 of 2002

⁴⁴ Concept 44241 of 1999

⁴⁵ Concept N° 25826 of 2001

Although, in strict sense, in the research we made no concept was found expressly accepting that those payments must be subject in all cases, to withholding at source in Colombia, it seems that this is DIAN's position. No relevant pronouncements from the Council of State or the Constitutional Court were found either.

In connection with the technical assistance services DIAN has always opted for the notion that the same is foreseen in article 2 of decree 2123, 1975. This provision understands for technical assistance services the "advice given through business transaction of corporal services for the use of technological knowledge, applied by means of the exercise of an art or technique and capable of being assigned for its efficient application in the same area".

As far as technical services are concerned, the entity has adopted the definition made by the Council of State in writ of July 26, 1984, and judgments of April 29, 1988 and February 12, 2004.⁴⁶ According to these pronouncements, technical services imply the direct application of a technique on the part of an operator or the application of special knowledge, differing from the technical assistance services in the sense that in the latter modality transmission of knowledge takes place at the time of performing the contracted service. Among the modalities of technical services DIAN has included payments for data processing through a software (concept 054967 of 2000); elaboration of advertising abroad (concept 063071 of 2000) and, in general, all activities related to advertising (concept 042388 of 2002); services of water treatment (in concept 060574, of 2001 these are defined as technical services), and services of "hosting" or space rental for the accommodation of web sites (concept 076974 of 2002). According to DIAN, the latter are technical services "of intangible virtual character".

Regarding mixed business transactions, that is, those that imply the execution of several provisions, pronouncements are found referring to franchise contracts. DIAN has sustained that these contracts imply the execution of various main activities, that is, licensing or assignment of trademarks, licensing or assignment of know-how, provision of technical assistance services and provision of goods. Although all of them can be seen as individual ones and have different rates depending over the content of the contractual clauses, the entity has affirmed that the business transaction in full must be subject to a sole rate of 33%, since payment made by the franchiser implies an income for the *exploitation* of an intangible.⁴⁷ The Council of State, on its part, once made a pronouncement over the contracts that imply the execution of several activities having a main one clearly determined⁴⁸ in the sense that in those situations the tax effects foreseen in the law for said main provision should be applied.

In sum, proceeding to *define* business transactions over intangibles has been a true chaos in the Colombian legislation. In this regard, the Administration and many operators have understood things

⁴⁶ Council of State, Writ of July 26, 1984, Fourth Section, File 0154. In the same sense: Judgments of April 29, 1988, rad. 1126 and judgment of February 12, 2004, Rad. 11001-03-27-000-2002-00112-01-13623. The latter, moreover, was ratified in all its parts by judgment of December 7, 2004, case 11001032700020030007501.

⁴⁷ Concept 26737 of 2002

⁴⁸ Council of State, Fourth Section. Judgment of April 30, 1992 issued within case 3887, with paper by dr. Guillermo Chahín Lizcano. That judgment reads: "In the case *sub-judice* there is no doubt whatsoever that the business transaction celebrated between society xxx and zzzz is an agreement with the purpose of granting the use of the trademark yyy to the products made by the contributor. And although it contains clauses that establish conditions for advising and technical assistance in the manufacturing and commercialization over the items made by them, such stipulations are not only necessary but obligatory within the concession agreement with the primordial purpose of watching for the good use of the trademark, which guarantees that the products sold under the protection of such name respond to the technical conditions used by the grantor".

like these: if someone buys music from a foreign supplier by physical means, such business transaction is not subject to income tax in Colombia, over the basis that it can be defined as a “transfer” that, taking place abroad, is not connected to income from a national source. On the contrary, if the music is bought by electronic ⁴⁹ means, it is considered the exploitation of an intangible asset if obtained from a non-resident foreigner, therefore subject to withholding at source at the maximum rate of 33% (as if the two business transactions were different or as if the person who acquires an electronic copy of a record did a negotiation over the “copyright rights” of the interpreter or composer and, in that sense, it could be understood that the payment originates in an “*exploitation*”).

The Administration also has understood that the uploading from abroad of a software for personal use (let’s suppose it is a software for purposes of massive use) is a business transaction similar to the license of rights (copyright) from such software (and which payment would make sense over the basis of a commercial *exploitation*), to understand that the two business transactions are comparable and, therefore, must receive the same tax treatment. And this has been conceived even in the cases where the software has been delivered by physical means (that is, through import), as if the acquisition of a software by physical means (following with the example of massive use with a personal purpose) was a substantially different business transaction from the acquirer of a musical work contained in a physical mean. ⁵⁰

On the other hand, even when its doctrine is not explicit, the Administration seems to understand that whenever we are in the presence of a software there is a “license” and, for this reason, if a distributor exports abroad a software for massive use in physical means, this implies an export of services that, as such, must be completely submitted to the treatment foreseen in article 485-3 of the Tax Code that requires complying with certain formal requirements to be able to exert the right of exemption from VAT. However, if someone exports a record that contains a musical work (business transaction seems the same, since ultimately it consists of the commercialization of a copy (merchandise) of a work protected by copyright rights), then it does understand that it is an export of goods that, as such, is not subject to the others requirements set forth in the legislation over export of services, to benefit from the exemption of VAT.

Mexico

According to article 179 of the Income Tax Law (Law published in the “*Diario Oficial de la Federación* January 1, 2002”)-(Official Publication wherein the approved laws and regulations are published by the Mexican Government-). residents abroad who receive income from wealth sources located in the national territory are obliged to pay income tax when they do not have a permanent establishment in the country or when, having it, the income is not attributable to it.

Over its part, article 200 sets forth that regarding income from royalties, for technical assistance or advertising, it will be considered that the wealth source is located in the national territory when the goods or rights for which royalties or technical assistance are paid are used in Mexico or when royalties, technical assistance or advertising are paid by a resident in the national territory or a resident abroad with a permanent establishment in the country.

⁴⁹ Concept 37529 of 2002

⁵⁰ Concepts 4948 of 2002, 8141 of 2001, 3133 of 2002, 69220 of 2003 and 81536 of 2005.

However, the same provision sets forth: “For the effects of this article, the use or assignment for the use of a copyright right of an artistic, scientific or literary work is implied, among other concepts, by the retransmission of visual images, sounds or both of them, or the right to allow public access to such images or sounds, when in both cases they are transmitted via satellite, cable, optical fiber or other similar means, and when the content that is retransmitted is protected by copyright”.

Article 15-B of the Tax Code of the Federation defines royalties, copyright and retransmission of images as follows:

Royalties are, among others, the payments of any kind for the temporal use or enjoyment of patents, certificates of invention or improvement, trademarks, commercial names, copyright rights over literary, artistic, or scientific works, including the films and tapings for radio or television, as well as drawings, or models, plans, formulas or industrial, commercial or scientific procedures and equipment, as well as the amounts paid for the transfer of technology or information related to industrial, commercial or scientific experiences, or other similar right or property.

For the effects of the previous paragraph, the temporal use or enjoyment of copyright rights over scientific works include that of programs or sets of instructions for computers required for the business transactional processes of the same or for carrying out application tasks, independently from the mean by which they are transmitted.

Also considered royalties are the payments made for the right to receive in order to retransmit visual images, sounds or both, or the payments made for the right to allow public access to such images and sounds, when in both cases they are transmitted via satellite, cable, optic fiber or other similar means.

On the basis of the previous provisions, Mexico also taxes the totality of its royalties for copyright at high rates, and also its authorities have construed via doctrine that some payments for the acquisition of merchandise from a non resident foreigner, in concrete for *software*, are included in the notion of royalties. Presently there are two cases before the courts that we hope will solve this question in a satisfactory way.

2. 7. Conclusions and reflections for Latin America: In search of a theory regarding the qualification of business transactions over intangibles.

There is no doubt that intangibles, in general, can be the object of appropriation. However, the property that may exist over the same differs from that of tangible goods; that is why the discussion over the attributes of the former has become so acute. Its characteristics and, over all, the fact that in the cases of the so called intellectual property the attributes for the author or holder of the intangible are reduced to what each legal system recognizes, makes that the concept of “intellectual property” be the object of many controversies.

As an initial approximation to the subject, the first thing we must say is that most legislations recognize that intangibles can be the object of property, which directly reflects in the fact that, in principle, they may be the object of all transactions that the legal world may conceive. However, in the case of some intangibles, what each legislation recognizes to its title holder is not the property over the *intangible* as

an abstract figure, but over some *rights* derived from the creation over the same that also have an intangible nature. In the same way, the rights of the title holders of certain intangibles cause in some cases to the emergence of *other intangibles* that, obviously, acquire a different substance from those that originated them and can also be the object of diverse transactions.

We do not intend to propose a unique formula that solves all the problems related to the legal transactions related to the immaterial goods. However, regarding the theory of intangible goods we can make some considerations that can be useful for the theory over taxation. To comply with the provisions of an internal regulation or of a DTT and apply it to a determined business transaction, it is fundamental to understand the *object* of the business transaction being characterized. For this effect, we will make a reflection over the subject of the intangible *goods* or *assets*, in order to facilitate the analysis and classification of the legal transactions that may be related to the aforesaid and in this way, proposing legislation for Latin America.

There are occasions in which we state that an “intangible” belongs to someone in a generic way. So we talk about the owner of “the *patent*”, the owner of “the *work*” and the owner “of the *software*”. However, in the internal legal systems, the laws that regulate the discussed “property” over these intangibles also regulate the *rights* that *derive* from that property. For example, among the *proprietary rights* of the author of a work are generally included those of reproducing the work, translating it, adapting it, arranging it or transforming it, and communicating it to the public and, naturally, exploiting it with economic purposes. In this way, each one of these *rights* can be considered in turn as an intangible good and individually conceived, which in essence is different from the intangible in connection with which those rights are exercised. So the right to reproduce a work cannot be confused with the work itself, in the same way that the right to exploit a patentable invention cannot be confused with the invention itself.

Notice that up to here we have mentioned two categories of intangible goods: one consisting in the works of talent and inventiveness (trademarks, patents, literary works, etc.) which recognition as *goods* or *assets* will depend on the treatment given by each legislation, and another, referred to the *rights* derived from those works that, in themselves, are *intangible goods* different from the source that gives legal existence to them.

In turn, the *rights* derived from the intangible can give origin to the production of other goods that can be seen as simple *merchandises*. For example, in the exercise of the right to exploit a patent “patented goods” may be manufactured, and by the right to “reproduce” a work a “copy” of the same may arise. This copy can ontologically be distinguished both from the work and from the right of reproduction of the work.

With the aforementioned we want to signify that the possibilities of commerce over intangibles can be diverse:

In the first place, in some cases the intangible as such may be the subject of business. A situation could be considered in which someone conveys its own trademark or grants a license over the same. For didactic purposes, we will call this kind of intangibles *primary* intangibles.

There are other cases in which the *primary* intangible cannot be the object of certain legal transactions. For example, nobody can sell a literary “work”, since some rights derived from the same have a “moral” character that the different legal systems and treaties recognize as inalienable.

In the second place, in other situations the legal transactions can affect, instead of the intangible itself, the *rights* derived from it. So, the author of a book can make his right to reproduce his work the object of *transfer* or *licensing* while at the same time keeps in his power the other proprietary rights over the same, since, as we have already mentioned, the same constitutes an independent right that, in general terms and at least from the standpoint of private law, different legislations recognize that can be transferred or licensed independently and autonomously. For the purposes of this brief, we will call these “*rights over the primary intangible*”. This category has practical effects in the matter of copyright.

Finally, legal transactions also can affect goods that are the *result* of the rights over the primary intangible. For example, when someone acquires a record of an artist, such negotiation does not affect his musical work (primary intangible) nor over the rights the artist and his successors have over such musical work (rights over the primary intangible), even when such questions could have been determinant factors in the definition of the price of the same (books of certain authors, recording reproductions of some artists, some computer programs for massive use and some medical products may be more expensive than others because of certain intrinsic attributes). Equally, when software is acquired for the specific use of a company, it is not acquired with the same primary intangible neither the rights pertaining to it,⁵¹ but as an independent product that, although takes part in some of the qualities of such intangibles, does not confuse itself with them.⁵² In this case the interest is centered in a *product* or *merchandise*, independently from the rules that govern it. For our purposes, these goods will be called simple “merchandises”.

Understanding the business transactions about *copies* or *merchandises* is very important for purposes of their qualification in the light of internal legislations and the DTT because many legal systems – particularly those that are not aligned with the OCDE model– tend to consider (as we explained is the case of Latin American legislations) that such business transactions in certain way affect the primary intangible or the rights over the primary intangible from which the copies come. Thereby the tendency to understand that over the derived goods (here called *merchandises*) no business transactions of *transfer* can be made while the author keeps the rights over his work; or to catalogue as “royalties” some payments falling over *merchandises*.⁵³ The problem with this understanding is evident: usually the royalties are severely treated by tax legislations and, in our opinion it is unacceptable for a legislation to give different treatments to substantially equal business transactions. Treatment given to tangible

⁵¹ Excepting the authorizations strictly necessary to comply with the purpose of the provision, as could be the case of the permit to make a back-up of the software or of the copies needed for the exclusive use of the company.

⁵² Identical situation occurs when a patented good (e.g., a drug) is acquired, since in that case the business transaction does not deal with the invention itself (primary intangible) or with the rights of its title holder (rights over the primary intangible) and nobody would dare to say that buying of the drug relates to an intangible.

⁵³ Decision 578 of the CAN reflects this discussion and, given the unfortunate wording of article 9, within the concept of royalties were finally included all the business transactions granting the use or right of use of *any* intangible (independently of the same being a *primary* intangible, a *right derived from the primary intangible* or a *derived* intangible). With this, the business transactions that cede the use or the right of use of the copies (derived intangibles), to the extent that such copies can be considered intangibles, could be characterized as business transactions from which royalties originate. It is to be wished that the pronouncements of the Community organisms help to fill this void

merchandise is clear in light of all legislations and the same should be equally applicable to merchandise derived from intangible creations, being in danger of ignoring the principle of neutrality in tax matters.

However, it is erroneous to understanding that *copies* or *merchandises* (which, for their understanding in the case of copyright, have been labeled for tax purposes as *copyrighted articles/works*) cannot be transferred or that their possibilities of transfer are limited. For example, a real right of property that the acquirer can oppose to other parties, including the author himself, may arise as a consequence of the acquisitions of music via Internet, or of publications and software commercialized to the public for the exclusive use of the user as acquisitions of *merchandises*. The acquirer, in these cases, is the owner of “his copy” considered as *merchandise*, without even being possible to conceive that the author of the primary intangible has the right to enter the home of the acquirer to retrieve it with the pretext of claiming or exercising his rights over the work. If any of us goes into a book store and acquires a copy of *The Name of the Rose*, the author of the “work” (primary intangible), that is, Mr. Umberto Eco, cannot claim any right of property over such copy under the consideration that he is his author. The copy “belongs” to whoever buys it and such conclusion is applicable to all “merchandise” originated in works of talent and inventiveness.

There are also business transactions about intangibles that entail a *combination* of services of different nature, of which the study can become very sensible in light of the internal legislation and the DTT due to the confusions they can originate. For example, when someone contracts the elaboration of software, it is common that upon delivery of the product, once the work is finished, a *transfer* underlies concerning all the proprietary rights over the same. ¿Does this mean that the business transaction must be classified as *transfer*, subject for this to the tax rules that regulate this kind of business transactions? Or must it be catalogued as *service* and, to that extent, be subject to the pertinent rules, depending of the case?

For example, business transactions concerning copies (merchandises) that in many cases can be characterized as real *sales* (e.g. the transfer of a copy that contains a musical work or of a software for the personal use of the acquirer), are usually accompanied of some “licenses” that, in some cases, refer to the rights over the primary intangible (e.g. the authorization to make the copies needed for the personal or particular use of the merchandise). In principle, it could be thought that the classification of a business transaction like these can be innocuous, be it as a sale or as a license, but considering the consequences in internal law and in some DTT, the different qualification may constitute a great difference.

The case also could happen –of which the solution is more evident but not for the aforesaid is less illustrative– of a business transaction by which a *copy* of an intangible is transferred for the purpose that the acquirer reproduces and distributes it to the public (e.g. a film). In this case, it is obvious that the business transaction, together with the transfer of the property right over the copy (merchandise) implies a real negotiation over the *rights over the primary intangible* (copyright). And, besides, this latter transaction is the one that becomes truly relevant in the proposed negotiation.

In such situations, the consensus to which has been arrived in compared law, which should be considered in Latin American legislations, is very clear: in the business transactions that could be catalogued as “mixed” two situations must be distinguished: The first one implies, that although from a business transaction several provisions are derived, the “relevant” or “predominant” provision should

always be complied within the contract in order to define its real legal nature and, consequently, its tax treatment. In this respect it should be reviewed, in essence, which is the *condition* for the *payment made* by the one who makes it. In our first example, the *condition for the payment*, that is, the preponderant provision in the contract was to obtain a service in relation to which the transfer of property only constituted a *mean* to be able to duly comply with the essential purpose of the business transaction. For this reason, although to said business transaction can be redirected the transfer of a good, the essence of the same was the service rendering and for tax purposes the business transaction should be classified in such way.

Our second example also can be solved in the same sense: if the essential condition for the payment was the acquisition of a copy, the eventual license over some rights over the primary intangible does not constitute more than an accessory service with the purpose of complying with the principal obligation, which is the *acquisition* of a copy. In such extent, such licenses not even be taken into account to characterize the business transaction, since in the same underlies, as principal service, the transfer of the property right over a copy.

And the third example is solved in an identical form as the previous one, but in the opposite way: in this case the transfer of the copy is a simple *mean* to comply with the principal provision, which is the granting of a license to exploit the *primary intangible* or, better said, the *rights over such primary intangible*. To that extent, the business transaction in no way could be characterized as the transfer or license of a *merchandise* but as a license for the exploitation of the *rights over the primary intangible* that, consequently, must be ruled by the pertinent regulations.

But there are also situations in which all the services in a contract are so relevant, that neither of them can be catalogued as “principal” or the one that constitutes “condition” for payment. In these situations, must be applied the typical treatment for each provision, according to the legislation, or the corresponding DTT. For this reason, in these cases it is advisable (and in order to avoid confusions and discussions) to assign a value to each performance and in this way to make easier the application of norm regulating the country required to tax each of the incomes. On the contrary, the interested tax authorities will become legitimized to distribute the income and in this way to make effective the tax over the reasonable portion destined to generate incomes for the corresponding State.⁵⁴

On the other hand, in connection with technological services (for purposes of this work we avoid the use of the concept of technical service as we consider it too wide and unrelated to the taxing of intangibles, except it reflects in a properly technological service) and of technical assistance, our legislations have a lot to review. In the first ones, in order to avoid the hypertrophy of concepts that appear in different legislations, it is important to take into account that the technological services characterize themselves as the obligation acquired by the supplier of the service implies in itself the application of a technological knowledge or, in the contrary case, it will be a common service that probably will not be subject to tax in the State of Source if the same is rendered from abroad by a non resident. In other words, the use of technology for the service rendering does not give it the technological nature if the service does not have a technological nature in itself. For this reason, the Latin American concepts and legislations that have labeled as technological services the “hosting” services (leasing of spaces for web pages), those of data storage when the fact of storage does not imply by itself the application of a specific technique, of maintenance and repair of software, etc.), are debatable.

⁵⁴ DU TOIT, CHARL., *Beneficial Ownership of royalties in bilateral tax treaties*, 1999, IBFD, p.50.

From this whole chapter our conclusions cannot be clearer: It is necessary, for the sake of technicality, neutrality and promoting the business transactions of literary, artistic, and scientific works, as well as of all those that derive from the intellectual property, the different tax laws must deal with:

- 1 - Revise that their conceptions of extraterritorial income derived from these business transactions are based on technical, neutral and fair criteria
- 2 - Incorporate into their legislation rules on the qualification of intellectual property transactions that do not lead to misunderstandings. These rules are intended to distinguish the hypotheses that should be classified as sales, licenses and services, as well as the objects affected by such transactions, i.e. the intangible considered in the abstract or on goods that are the product of these intangibles (copyright rights or copyrighted articles/works) and, in recent cases, legislation has to go to make distinctions on the tax treatment of these different transactions , which take equality, neutrality, and normal business transactions in a globalized world into account.
- 3 - Ensure that by way of legislation or administrative interpretations the tangible assets are treated in the same way as intangibles. There can be no distinctions in tax treatment, except those arising from the special nature a business transaction may have.

3. THE APPLICATION OF ARTICLE 12 OF THE MODELS OF DOUBLE TAXATION CONVENTION IN THE COUNTRIES STUDIED

A good way to review how countries make a rating of their income from intangibles, is a by undergoing a revision of interpretation, reserves or changes in their own conventions, in relation to Article 12 of the Model of Double Taxation Convention OECD.

Article 12 is clear in that royalties can only be considered within the meaning of the agreement, those payments involving considerations for the use or right of use of copyright rights, which in general are derived from intellectual property rights.

In this article, the comments to MOCDE are equally clear that payments from business transactions such as personal use of digital copies of software, software development services, and intangibles in general, not be governed by the clause related to royalties, but by other clauses, especially business profits (Article 7 of MOCDE). Indeed, in the case of the transaction of copies, payment is not made under the consideration of the use or right to use the copyright right, and in the case of the development of software and other intangibles, payment source is not a royalty but a service.

Note that if any country takes a different interpretation of the contents of the model of the agreement for example, because it believes that payments for the personal use of digital copies in itself constitutes a software royalty, then such cases could lead to problems of double taxation on basis that a country interprets the clause in one way, while the other country does it in another. However, in cases where the modification to the wording used by the OECD in the respective Agreement is clear, (for example, if the agreement expressly includes the concept of royalty payments that are not formally such), but may not generate a conflict of double taxation (since the problem is not left open to interpretation). This at least evidences the tendency which the corresponding country may have, and at most the understanding regarding the tax treatment given to the intangibles that the authorities have.

Let's see what the experience in our countries is:

3.1. Argentina

In terms of royalties, Argentina has used elements of both the UN and the OECD model agreements for purposes of its own agreements. The first model emphasizes the tendency to allow shared between the state of residence taxation and the state of the source taxation, although in the latter case, the tax is limited to certain percentages.⁵⁵

In this sense, as an observer country of the OECD, Argentina has "reserved"⁵⁶ the right to tax the royalty income in place of the source, the right to include in the concept of royalty, income earned by the leasing of industrial, commercial and scientific equipment, and the right to include the fees for technical services within the definition of royalties.^{57 / 58}

About the interpretation of other aspects contained in the ordinary definition of royalties, we find that Argentina has drifted away from the commentary on the OECD model in software, and specifically has said not to adhere to the interpretation contained in paragraphs 14 and 15 of the commentaries to the model.⁵⁹ In comments to MOCD, we read that: "Argentina, Morocco, Serbia and Tunisia ... maintain

⁵⁵ Argentina is not a member country, but OECD Observer Country. However, to make treaties aimed at avoiding double taxation (DTT), many of them follow the guidelines of MOCDE. However, it remains in many other conventions, the Model United Nations. According to Dario Rasmilovich, tax manager at Deloitte in Buenos Aires, "*it probably derives from the absence of a genuine policy of double taxation treaties by Argentina, a situation that is emerging in the lack of definition of guidelines suitable for forming a position negotiating coherent and consistent over time, which can be seen from differences in the wording of its provisions without a rational purpose justifying them, and more importantly, the orphan of a strategic decision on whether or not to sign treaties in the matter.*" View: RASMILOVICH, Darío., "*The Art. 12 (Royalties) in the Convention for the Avoidance of Double Taxation with respect to Income Taxes signed by Argentina that followed the United Nations or OECD Model: Interpretative Issues.*" National Taxation. International Doctrine. Tax Law Review. Page 205

⁵⁶ At this point we have to define whether the comments to the articles of MCOECD you are binding or not, because unless you are binding what for making reservations?

⁵⁷ However, in reviewing the various agreements signed by Argentina, we can see how many more concepts included within the definition of royalties, as discussed in the examples below. Argentina-Sweden: "*Use or right to use news, use or any right to use any intangible property, film, videotape or other means of reproduction in relation to television broadcasts, use or grant use, industrial, commercial or scientific equipment, but only to the extent that the use or right of use is connected with technology transfer, provision of technical assistance*", Argentina, Australia: "*Use or right to use goods or similar rights to the copyright, patent, design, plan, secret formula or process or other intangible good, brand or trademarks, use or grant the use of industrial, commercial or scientific equipment provision of information or scientific, technical or industrial knowledge, supply of any auxiliary aids and subsidiary for the purpose of enabling the application or enjoyment of any property or right referred to in 1 above, equipments in 2, or information referred to in 3, to provide any technical assistance not provided for in 4, receiving or entitled to receive visual images, sounds or both, or other means of reproduction for use in relation to television emissions or radio broadcast by satellite, cable, fiber optics or other similar technology*".

⁵⁸ We can also see how many more concepts Argentina included within the definition of royalties in Article 47 of the Law on Income Tax, which provides that royalty is considered "any consideration received, in cash or in kind, by the domain transfer, use or enjoyment of things or the transfer of rights, which amount will be determined in relation to a unit of production, sales, business transactional, etc., whatever the denomination"

⁵⁹ The Intellectual Property Law Argentina 11 723 as amended by Law 25 036, the software treats literary works (Article 1) and speaks of "the exploitation of intellectual property including computer programs, among other

the position that payments for software are covered by Article 12 of the model, at least as to the transfer of all software rights, regardless of whether payments are made for the right to use a copyright on the software for commercial purposes or if instead they relate to software that is purchased for personal use or commercial business use of the acquirer "⁶⁰ / ⁶¹. We must reiterate that this is just a friendly comment, as far as Argentina is not part of the OECD. This view has led some of the agreements signed by Argentina, including a demonstration that royalty payments made to be understood by the use or right to use "any intangible property"⁶² or even including payments made by the "use of computer programs"⁶³ in that concept.

This means, in simple terms which Argentina considers that the payments for the use of copies, as well as payments for the use of copyright are both true royalties. That is, it tends to equate two totally different transactions, even though those on *copies* come closer to being business transactions, subject as such to other principles. Indeed, under the comments on the OECD model, such business transactions would fit into the concept of "business profits", as such, would be taxed exclusively in the State of residence.

For its part, Argentina tends to include in their models, as royalties, payments that are not, as would be those associated with the use of industrial, commercial or scientific equipment (which are also maintained in the current wording of the Model UN) and payments for technical assistance.

3.2. Brazil

Brazil is an observer of the OECD and, as such, has argued that i) it reserves the right to tax the royalties in the source country, ii) to include within the concept of royalties the industrial, commercial and scientific equipment iii) to include payments for technical services and technical assistance in the form of royalties. For its part, with the interpretation given to comments 17.1 to 17.4 MOCDE Article 12, which relates specifically to the digital media as not constitutive of royalties, as long as these reflect the simple use of a single copy for personal or business use.

Besides the above, Brazil, via its internal legislation, has included regulations to "interpret" the contents of the DTT. Through Declarative Auto # 1 policy statements, the Tax Administration established that in the Double Tax Treaties signed by Brazil, payments for technical services and technical assistance in which there is no technology transfer (i.e. not subject registration at the National Institute of Industrial

license agreements for use or reproduction "See in this regard: Ob., Cit., RASMILOVICH, Darío., Page 224.

⁶⁰ View comments to MOCD. Article 12. Positions on the comments (in the chapter on the position taken by non-members)

⁶¹ Ob., Cit., OECD Committee on Fiscal Affairs. Model Tax Convention on Income and on capital. Condensed version. 17 July 2008.

⁶² Agreements between Argentina and Canada (1994), England (1996), Denmark (1997), Sweden (1997), Australia (1999) and Norway (2001). These contrast with the Commission signed with Germany (1979), France (1980), Austria (1982), Brazil (1982) and Italy (1983), in which it is clear that can be understood only by royalty payment made by the use or right to use rights associated with intellectual property.

⁶³ Agreements signed with Spain (1993), Finland (1996), Belgium (1997) and Netherlands (1998).

Property INPI), should be classified as "other undefined income " in the DTT and therefore are subject to tax in Brazil according to Article 685, subsection II, paragraph a), Decree 3000 of 1999, at the rate of 25%.

3.3. Peru

Peru only has outstanding three DTT with Chile, Canada, and Brazil.

The three DTT, in our opinion, are somewhat against the progress that Peru has achieved within its legislation on electronic commerce. In fact, these conventions mean by royalty, in addition to all payments made by the use or right to use rights associated with intellectual property, all payments made by the use or right to use "any" intangible property.

Peru also tends to include in their DTT, in the form of royalties, payments for the use of industrial, commercial or scientific equipment.

3.4. Venezuela

Venezuela is not a member country, nor an OECD observer country, nor is there any law requiring the authorities to follow the guidelines of MCOECD. The foregoing is without prejudice to the judges, who can adopt them in their rulings.

3.5. Colombia

Country Colombia is neither a member nor an observer of the OECD and, up to date, has only two outstanding DTTs in force, i. e., those with Spain and Chile.

However, as can be seen that the country's position will be to divert the traditional form of royalties, because there are already statements from the administration that the use of copies of software falls within the definition of royalties, for purposes of DTT Colombia-Spain, although it has at that specific point, an identical definition to that of MOCDE.⁶⁴ Similarly, the Agreement with Chile includes within the definition of royalties, all payments for the use or right to use "intangibles" in general.

For their part, both of the outstanding DTT as well as those which are currently being signed, the country has included within the concept of royalties, payments for consulting, technical services, and technical assistance, as well as payments for the use of industrial, commercial, or scientific equipment.

3.6. Mexico

As a member of the OECD it states in the Official Journal of the Federation that for the interpretation of the DTT subscribed by the country, the comments to MOCDE 1995 and after shall apply, provided that

⁶⁴ Concept 95029 of 2009.

they conform to the legal requirements and provisions of the relevant laws. ⁶⁵

However, it reserves i) the right to tax royalties at source, ii) the right to include within the concept of royalty payments for the use of industrial, commercial and scientific equipment and iii) the right to include within the concept of royalty to any profit on the sale of the property, if this profit is subject to the productivity, use or disposition of the property.

Similarly, the country does not adhere to the interpretation of paragraphs 14, 14.4, 15, 16, 17.1 and 17.4 of Article 12 of that model related to transactions regarding software, since it considers them be within the royalties⁶⁶ payments regardless of whether they meet the right to use a copy of the software for commercial or personal use or business of the purchaser.

Mexico also adheres to the interpretation of the comment 8.2. Article 12, because it considers that payments made by the transfer of limited rights in time be regarded as royalties, when transmitted less than the full rights of ownership. ⁶⁷

It also reserves the right to exclude the benefits granted by the article to the royalties to be agreed in order to take advantage of applying the treaty and not for bona fide⁶⁸ commercial reasons and the right to determine the source of royalties according to the State in which the payer is a resident thereof. ^{69/70}

3.7. Conclusions

From the aforesaid it is evident that our countries also tend to hypertrophy, either by way of agreements in particular or by means of the interpretation of existing agreements as to royalty regulations of Double Taxation Treaties. This fact not only has an impact on a poor rating of revenues according to the

⁶⁵ Mexico. Official Journal of the Federation. Ministry of the Interior. Relevant publications in: <http://dof.gob.mx/publicacionesRelevantes.php>

⁶⁶ Regarding the much debated Software, the Copyright Act of Mexico, stated in Article 13, No. XI, it shall be considered a copyright, and therefore constitute royalties. Mexico. Copyright Act. Article 13, paragraph XI.

⁶⁷ Ob., Cit., OECD Committee on Fiscal Affairs. Model Tax Convention on Income and on capital. Condensed version. 17 July 2008.

⁶⁸ As seen in the Mexico- Germany, 1994 and Mexico-Austria , 2005. In the first section 7 of Article 12 states that "*The provisions of this Article shall not apply when the right for which the royalties are paid is entered into or assigned mainly for the purpose of taking advantage of this article. The competent authorities should be consulted before the application of this paragraph.*" In the second, the same numeral in the same article establishes that "*The provisions of this Article shall not apply if the rights for which the royalties are paid or assigned to agree with the main purpose of taking advantage of this Article. In this case the provisions of domestic law of the Contracting State from which the royalties. Where a Contracting State intends to implement this paragraph, the competent authority shall, in advance, consult with the competent authority of another Contracting State.*"

⁶⁹ Ob., Cit., OECD Committee on Fiscal Affairs. Model Tax Convention on Income and on Capital. Condensed version. July 17, 2008.

⁷⁰ MOREYRA SUAREZ, Raúl. "Treaties to Avoid Double Taxation" page 17. Goodrich, Riquelme y Asociados, July 2004 Conference.

agreement, but in other related problems, such as unequal treatment in the light of the conventions, toward some income that should receive different treatment.

Similarly, this may result in double taxation disputes, which can occur when the two tax authorities interpret the same business transaction involved, in two different ways, with different treatment.

That is, in conventions, we believe that Latin America should accurately approximate to the comments of the OECD Model, which are very much in the way of the comments made on the qualification of the income on intangibles.

4. COPYRIGHT IN DECISION 578 OF THE ANDEAN COMMUNITY OF NATIONS-CAN

Decision 578 of May 4, 2004, issued by the Commission of the Andean Community, is the compendium of regulations governing the rules of territoriality of the income from the intra-community activities between Colombia, Peru, Ecuador and Bolivia. It came into force on January 1, 2005.

4.1. Royalties

The wording of the Community rules on intangible trade, particularly those governing the income from royalties, is unclear and may be misleading.

The Double Tax Treaties (DTT), as a rule and to ensure transparency in tax rules, seeks to maintain the principle of taxation in the country of residence or where the permanent headquarters of the establishment for income derived from royalties, but maintaining the possibility of a limited tax in the source country. This is because, finally, is the country of residence which is affected by costs associated with the development of intangibles from which they derive the same and, therefore, it is *fair* to keep the right to tax the richness product of those assets that were developed within its territory.

This situation is clearly reflected in the rules in which such Commission regulate the issue of royalties.

⁷¹ However, in the Andean Community was chosen the opposite way and that is how Article 9 of Decision 578 of 2004 provides that "royalties shall be taxable only in the Member Country where it is used or has the right to use the intangible asset". This principle is no less worrisome and questionable when taking into account that all our countries have high withholding tax rates, calculated on gross income, which determine that the tax paid at source is the definite one that the taxpayer is subject to. This is compounded if one considers that according to the same Decision, the taxable income should thus be taken by the other country as an *exempt* income, with the consequence that it cannot be accounted for in the State of residence for effect of taxes paid abroad deduction. In other words, if in the State of residence of the person would be able to allocate an effective income deduction for taxes paid abroad, and deduct all costs attributable to it and therefore, pay tax on a net basis, the option of Decision 578 requires the taxpayer to be taxed on a gross basis in the State of source.

In addition to the above, when one turns to the law that defines what is meant by royalties for the effects of the Decision, we find that his concept is so wide, that all business transactions seem to shelter allowance for the use of intangible, whether or not as in the case of copyright rights, the goods

⁷¹ Vogel, Klaus. Double Taxation Conventions. Kluwer Law International, Third Edition, 1991, P. 772

themselves bear the copyright or they are *goods* resulting from copyright (copyrighted articles).

Indeed, the letter f) of Article 2 of the Decision defines the term "royalty" as:

"The term" royalty "refers to any benefits, 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 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 included in Decision 351."

Double taxation Models and agreements and along with them the following Models OECD, UN and USA, have taken care of by the concept of *royalty* are not included the payments by the use or right to use goods derived from copyright (copyrighted articles or merchandises), which have been treated, for purposes of the Conventions, as Business Profits (with the consequence of being taxed exclusively at the State of Residence) . Therefore, their drafting tended towards the sense that payments considered by the Treaty as royalty are those received for the use or right to use of copyright rights or patents, trademarks, designs, industrial designs, trade secrets or use or right to use the know-how.

Note then that Decision 578 went further than the DTT to include in royalty payments for any compensation for the use or right to use "any intangible." This slight change of wording in relation to other Treaties can have very important and will certainly lead to discussions on intangibles, especially when they relate to copyright. Also, the wording of the regulation is so widely criticized as not all payments for use of intangibles are constitutive of what is ordinarily known as "royalty."

According to the definition and if we consider that in our region copies of intangible products have also been classified as intangibles it seems to be that within this scope payments for use of goods for purposes of personal care needs, despite that the same should be considered ordinary income from "business profits" to be taxed in the country of residence under the usual rules. For example, if a company is based in Colombia and receives income solely from the granting of licenses for use on programs or antivirus computer games for a certain time in Ecuador; Colombia could understand that there is no possibility of taxing the company, unless its business transactions are characterized as temporary disposals of copies, which would seem to be technical but not obvious after hearing the history behind this issue.

The problem with this latter interpretation is that very likely it will be used as an argument by the State of residence for purpose of qualifying for the tax on those profits, which may affect emerging problems of double taxation. As seen, the wording of Decision 578 will most likely generate discrepancies between member countries, especially in cases where the State Residence restrictions do not consecrate the deductibility of costs and expenses attributable to income that is not considered income. Hopefully the courts and doctrine will clarify the meaning of the provision.

4.2. Transfer of Intangibles

The transfer of intangible Community transactions should be characterized, either under Article 6 of Decision or under Article 12. The first regulation e refers to income from business profits and the second

to capital gains.

It should be noted, on this particular, that the regulation on capital gains is special compared to that of business profits and therefore takes precedence if the situation shows that the rent may be covered by the rules which govern it. Thus, in the case of Transfer of intangibles, the first thing to be considered is whether the income from them may be considered a capital gain. The regulation about it written in Article 12 is that capital gains may be taxed only by the Member Country in whose territory the goods were located at the time of sale, except for those arising from the Transfer of transport vehicles and of bonds, shares and other securities. It means capital gains, according to the literal j) of Article 2 of the Decision, the "benefit to a person in the disposal of property that does not acquire, produce or transfer/usually within the ordinary course of its activities."

On the contrary, if the income from the Transfer of the intangible cannot be classified as capital gain, the transaction must be subject to taxation in accordance with article 6, according to which "the benefits of Business Profitss can only be taxed by the Member Country where these were obtained."

4.3. Services

Two rules govern the issue of services in the CAN:

Article 13, which refers to "income from personal services" and Article 14, which regulates "business profits by providing services, technical services, technical assistance and consulting."

Article 13 of the Decision states:

"Income derived from personal services. Payments, fees, salaries, wages, benefits and similar compensation received in return for services rendered by employees, professionals, technicians or for personal services in general, including consultancy services shall be taxable only in the territory in which such services are provided, except for wages, salaries, wages and similar compensation received by:

a) Persons who provide services to a Member Country, in the exercise of duly accredited official, such income shall be taxable only by that country, although the services are provided within the territory of another member country."

b) The crews of ships, airplanes, buses and other vehicles that provide international transport, such income shall be taxable only by the Member Country in which the employer is domiciled. "

For its part, Article 14 stipulates:

"Business Benefits for the provision of services, technical services, technical support and consulting. The income earned by companies that provide services from professionals, technicians, and technical assistance or consulting services shall be taxable only in the member country in whose territory the benefit of producing such services. Unless proved otherwise, it is presumed that the place

where the benefit occurs is one in which he is charged and recorded a corresponding expense."

The reconciliation of these two standards is a complicated task. The first refers to "personal services", within which includes those of "consultants" to determine that they are taxable in the country of benefit (source). The second, starting with the title of the standard, refers to "services (not rated), technical services, technical assistance and consultancy, to order that they are taxable in the country where you get the benefit of the same (destination).

As for consulting services, we would understand that the same would be taxable by the country's benefit in accordance with Article 14, when they are supplied by companies.⁷² If, however, are provided by individuals, the regulation to abide by is Article 13 and, consequently, they must be taxed by the country where the same are provided. This unfortunate solution given by the Decision, most certainly will give rise to manipulating the place where Income is obtained for these effects.

The technical services and technical assistance provided by companies are also subject to the above regulation: if they are provided by companies are governed by Article 14 (given the specialty of the norm) and if they are provided by individuals it is governed by Article 13.

Personal services rendered by individuals, for example is governed by Article 13. However, the situation for other services as they are provided by companies, on the other hand, is far from clear. Article 13, unlike Article 14, do not include individuals who are understood to be sheltered by the provision (except in the first paragraphs of the standard where it can be inferred that it refers to individuals) and, within this context, speech that "compensation for personal services in general" are taxable at the place of the service from which they originated. However Article 14 speaks of the income from "professional services", which can only be taxed by the country where the benefit of them is produced.

The Decision does not define what is meant by "personal services" for purposes of Article 13, or what "professional services" means for purposes of Article 14. Even though we might say, to begin with, that all professional services fall into the second provision, disputes will surely arise as to which services should be understood as "personal" (that which is given to a person to suit their convenience) and "professional", which may cause problems of double taxation.

Lastly, it is noted that the Decision does not provide a definition of what is meant by technical services, technical assistance and consultancy, which may add more uncertainty to this, already, grim picture.

4.4. Conclusions

The countries of the Andean Community, in order to innovate in the face of a Multilateral Agreement on Double Taxation, eventually included in the same terms that are not standard in international tax law at the time that included a distribution of the right to tax that they do not very deliberately promote the rule of the source. This, as noted, has an impact on sub-regional trade charges end up being overly taxed, as soon as these fall on gross basis at high rates and without the possibility of crediting the tax paid in the

⁷² Company for purposes of the Decision, means "an organization consisting of one or more persons who engaged in gainful activity" (paragraph d) of Article 2 of Decision 578 of 2004).

source State. In this regard, we believe much more technical to adopt principles of taxation in the State of residence, and be moderate with limited combination with other taxes at the source (like the model double taxation agreement of the UN), especially if takes into account that in the region, there is no tension development-underdevelopment that justifies the charges claim at the source. In a community where members are developing countries or via developing and where what you want to promote are precisely sub-regional trade, taxes at source do not have much reason to be.

And, as this rule applies to business transactions where all countries are developing, definitely the Agreement does not promote intangible business transactions in the region.

5. GENERAL CONCLUSIONS AND LEGISLATIVE PROPOSAL FOR LATIN AMERICA

In addition to the individual findings that were outlined in each chapter, our conclusions and recommendations are the following:

5.1. The simple description of the laws of Latin America shows that they are far from obeying a dogmatic, consistent, and aligned with the legal principles and, above all, the principles of taxation.

5.2. Latin American laws severely tax import business transactions of intellectual property rights and, in general, technology business transactions.

5.3. In many cases, higher tax rates affect the inability for the foreigner to be given credit for tax paid abroad in their country of origin.

5.4. Due to the above mentioned, high taxation is given on this type of transnational business transactions (cross border transactions), because of its severity, this burden is not being supported by the taxpayers of these taxes (foreigners), but by the Latin American locals who hire them, who are doomed to bear the tax burden of their contractors.

5.5. Latin America has based its policy of severely taxing these transactions under the premise that their countries are net importers of technology or intellectual creations. However, this goal has hypertrophied to the point where drastic tax treatments are being applied to transactions that have nothing to do with this premise, and which in essence are so common in commerce. For example, all copies of intellectual creations that are traded as commodities in the world should not be subject to tax treatments specific to the business transactions that serve as a source, but they should have the same tax treatment, common, given to all trade in tangible goods.

5.6. The Latin American legislations laws should study their laws and doctrines in depth in search of neutrality. Business Transactions involving copyright cannot be equated to a single tax category and are not to be confused with the goods levied on by the transactions (copyrighted articles).

5.7. Given the preconceptions that exist in Latin America on business transactions arising from intellectual property, each Country should promote reform in order to provide clarity on the status they should have certain business transactions for tax purposes. For example, it is important to regulate the

business transactions of the transfer of intangibles (both rights and merchandises), technological services and technical assistance (to avoid categories that can be considered as such are not covered by these concepts), mixed business transactions (to give an indication of the regulations in these cases), etc. The laws at present are very confusing.

5.8. The software deserves a separate chapter in all legislations. The software business transactions are usually poorly understood and hence the need to regulate them. The legislation must discern and differentiate all transactions that may depend on it, for the purpose of giving each of them the appropriate treatment.

5.9. Latin America lacks regulations relating to electronic commerce as such. The theory of taxation, in particular legal regulations should be absolutely clear on this point to avoid all controversies that are occurring in the practice.

5.10. The laws have to rethink their views on territoriality of income, so as not to discourage the trade on intangibles. There is hypertrophy on the subject of intellectual property and related transactions, as well as on the transactions that are covered by the taxing power of the States. You have to narrow down the spectrum of business transactions on intangibles subject to taxation in our countries, for purposes of promoting development, preventing smuggling economies, and preventing the countries from being subject to improper treatments.

5.11. The conceptualization of transactions on intangibles should be extended to double taxation treaties. Our countries, when negotiating agreements or interpretations, are using non-technical criteria, while they are promoting inequality in the treatment of transactions that should be treated the same way as their peers. Latin America widens inappropriately the concept of royalties.

5.12. Decision 578 of the CAN does not endorse the Andean Community trade. Besides being confusing and not satisfying the criteria of any model double taxation agreement in the world, chose a criterion of the source means that taxing Latin American actors, these business transactions, by applying high tax rates gross basis. Decision 578 is worth a total rethinking.

5.13. In short, the tax status of transactions by copyright in Latin America is critical and deserves a complete rethinking.

BIBLIOGRAPHY

- AULT, J. J., "The role of the OECD commentaries in the interpretation of tax treaties". Intertax. 1994.
- AVERY JONES, J. F., "The Interpretation of Tax Treaties with particular reference to Article 2, 3 of the OECD Model". Diritto e Pratica Tributaria. Tomo I: 1984.
- ADVANI Suresh; Characterizing the New Transfers of Intellectual Property, Taxes Vol. 79 No. 3, Chicago, 2001.
- ANDRIESSEN Daniel; Making Sense of Intellectual Capital Designing a Method for the Valuation of Intangibles, Ed. Elsevier Butterworth-Heinemann, 2004.
- BUITRAGO DÍAZ, E., El concepto de cánones y/o regalías en los convenios para evitar la doble Tributación sobre la Renta. Valencia: CISS, Grupo Wolters Kluwer. 2007.
- BERNSTEIN Jack; Canada-U.S. Transfer of Technology: A Canadian Perspective, En: Tax Notes International Vol. 15 No. 21, 1997.
- BEUTEL Phillip, Ray Bryan; Grasping the Value of Intangible Assets, En: International Tax Journal, Volume 30, New York, 2004.

BITTKER Boris, Lokken Lawrence; Fundamentals of International Taxation. U.S. Taxation of Foreign Income And Foreign Tax Payers, 2004/2005 Edition, Ed. Warren, Gorham & Lamont, 2004.

BROWN Catherine; The Canadian Income Tax Treatment of Computer Software Payments; En: Canadian Tax Journal Vol. 42 No. 3, 1994.

CCH EDITORIAL STAFF PUBLICATION; How the States Tax Sales of Computer Software; En: State Tax Review Vol. 46 No. 49; 1985.

CIGOLES James, Burrit Harry, Stinnett Susan; Cyberspace: The Final Frontier for International Tax Concepts?; En: Journal of Taxation, Vol. 7 No. 8, 1996.

De GIVRE Yann, Charges Ou Imobilisations Incorporelles: Les Criteres Jurisprudentiels, En: La Semaine Juridique Entreprise et Affaires, 1998.

DEAK Daniel; Taxation of Intangible Assets in Hungary; En: International Tax Review Vol. 31 No. 12, The Hague, 2003.

DREYFUSS Rochelle, Zimmerman, Diane, First Harry; Expanding the Boundaries of Intellectual Property. Innovation Policy for the Knowledge Society, Ed. Oxford University Press, 2001.

DU TOIT Charl; Beneficial Ownership of Royalties in Bilateral Tax Treaties, International Bureau of Fiscal Documentation Publications, Amsterdam, 1999.

EASTAWAY Nigel; Gallafent Richard, Dauppe Victor. Intellectual Property Law and Taxation, Ed. Thomson Sweet & Maxwell, Sexta Edición, Reino Unido.

FULLER James, The Tax treatment of Intangible Property Rights in International Tax Planning; En: The Tax Magazine Vol. 70 No. 12, Chicago, 1992.

FULLER James; International Tax Aspects of the Transfer or Use of Intangibles; En: Bulletin for International Fiscal Documentation Vol. 40, Amsterdam, 1986.

GETTING A GRIP ON INTANGIBLES; En: The Tax Journal No. 362, 1996.

GOEDE Jan, Holmes Kevin; The International Guide to Taxation Of Transfers of Technology, International Bureau of Fiscal Documentation, Amsterdam, 2004.

GOPALAKRISFNAN K.C. Aruna Kanthi; Taxation of Electronic Commerce, Snow White Publication, India, 2001.

GOVIND Har; India: Tax Treatment of Intangible Assets; En: International Tax Report, London, 2004.

GOVIND Har; Tax Treatment of Intangible Assets; En: International Tax No. 1, New Delhi, 1995.

GOVIND Har; USA: Tax Treatment of Intangible Assets; En: International Tax Report, London, 2004.

GRANWELL Alan; Intangibles: Licensing, Contract Research, and Cost-Sharing Arrangments; En: Tax Notes International Vol. 14 No. 10, 1997.

GREENFIELD Roy; Kwok's Case: Locality of Intangible Property and the Ramsay Principle; En: Tax Planning International Review Vol. 16 No. 3, London, 1989.

HALPERIN Graeme; Taxing the Mind: Is Know How an Asset for Capital Gains Tax Purposes?, En: Australian Tax Forum Vol. 6 No. 2, Clayton, 1989.

HALPERN Lionel; Intangibles-Pricing and Planning for Multinationals: Role of U.K. and U.S. Courts; En: Tax Planning International No. 10, 1989.

HELLERSTEIN Walter; State Taxation of Corporate Income From Intangibles: Allied – Signal and Beyond En: Tax Law Review Volume 48, 1993.

HENSHALL John; Intellectual Property – Horror Stories 2002; En: Tax Planning International Transfer Pricing Vol. 3 No. 12, London, 2002.

HOYOS JIMÉNEZ, Catalina; Tributación de Intangibles en Colombia, En Memorias XXIX Jornadas Colombianas de Derecho Tributario, 2005.

HOYOS JIMÉNEZ, Catalina; Los cánones y regalías en los convenios de doble imposición. En: GODOY, Juan (Coordinador), Estudios de derecho internacional tributario. Los convenios de doble imposición. ICDT- LEGIS, 1° edición, 2006.

HOYOS JIMÉNEZ, Catalina; La caracterización de las operaciones sobre intangibles en los convenios de doble imposición. En: Pistone y Taveira (Coordinadores), Estudios de derecho tributario constitucional e internacional. Editorial Ábaco de Rodolfo Depalma, Buenos Aires, 2006.

HOYOS JIMÉNEZ, Catalina; “Fundamentos para el estudio de la tributación de intangibles en Colombia- Aspectos locales e internacionales”. En: El impuesto sobre la renta en el Derecho Comparado, Reflexiones para Colombia. ICDT, 2008.

INTERNATIONAL FISCAL ASSOCIATION; Cahiers de droit fiscal international, Tax treatment of computer software, Volume LXXIIIb, Amsterdam, 1988.

INTERNATIONAL FISCAL ASSOCIATION; Cahiers de droit fiscal international, Tax treatment of the import and exploitation of technology – Know How, patents, other intangibles and technical assistance, Volume LXa, London, 1973.

INTERNATIONAL FISCAL ASSOCIATION; Cahiers de droit fiscal international; The taxation of income derived from the supply of technology, Volume LXXXIIa, Kluwer, 1997, New Delhi Congress.

INTERNATIONAL FISCAL ASSOCIATION; Cahiers de droit fiscal international; Taxation of income derived from electronic commerce, Volume LXXXVIa, Kluwer, 2001, San Francisco Congress

INTERNATIONAL TAX CENTER LEIDEN; Materials on International & EC Tax Law 2007-2008 Volume 1 & 2, Seventh Edition, 2007.

LEV, Baruch; Intangibles: Medición, Gestión e Información; Ediciones Deusto, Bilbao, 2003.

LYMER Andrew, Onyekwe David, McGill Gary, Walpole Michael; Taxing the Intangible: Overview of Global Approaches and a Review of Recent Policy Changes in the UK; Australian Tax Forum Vol. 18 No. 4, Sydney, 2003.

MASSAGUER FUENTES, J., El contrato de licencia de know-how. Barcelona: Ed. Librería Bosch. Barcelona, 1989.

MAINE Jeffrey, Nguyen Xuan-Thao; Intellectual Property Taxation and Litigation Issues, BNA Books, 2004.

MANN Geoff, Parsons Michelle; Taxation of Intellectual Property: A Summary of Australian Tax Issues; En: Asia-Pacif Tax Bulletin, 2002.

MARTÍN Adolfo; Algunas reflexiones sobre el régimen tributario de los cánones en la legislación española y su compatibilidad con el derecho comunitario. En Doctrina Fiscal No. 52, 1995.

McLURE Charles; Taxation of Electronic Commerce in the European Union.

McLURE Charles; U.S. Federal Use of Formula Apportionment to Tax Income from Intangibles; En: Tax Notes Vol. 14 No. 10, Arlington, 1997.

MURAI Tadashi; Source Rule in Japanese Taxation – Some Experience of Intangible Assets; International And Comparative Taxation: Essays in Honour of Klaus Vogel, 2002.

PEGUERA POCH, M., “Servicios de la Sociedad de la Información: Su caracterización Legal en Europa”. En: AR: Revista de Derecho Informático. Nº 1000. Noviembre de 2006. Editorial Alfa-Redi.

SHAH Nirav; Tax Treatment of Software License Payments – An Indian Perspective; En: Asia – Pacific Tax Bulletin Vol. 9 No. 7, Amsterdam.

SHIPWRIGHT Adrian, Price Jeffrey ; U.K. Taxation and Intellectual Property, Second Edition , Ed. Sweet & Maxwell, London, 1996.

UNITED STATES MODEL INCOME TAX CONVENTION of November 15, 2006. Technical explanation.

VOGEL Klaus; Klaus Vogel on Double Taxation Conventions, Ed. Kluwer Law International, Third Edition, 1997.

WOELLNER, R.H. et. al., Australian Taxation Law. Sydney: CCH Australia Limited, 6th edition, 1996.

VARÌ, P., La natura giuridica dei nomi di dominio. Padova: Cedam. 2001.

VÁZQUEZ DEL REY VILLANUEVA, A., “Cánones del software: interpretación de los convenios de doble imposición” Revista de Derecho Financiero y de Hacienda Pública. Vol. 53. Núm. 267. 2003.

VICENT CHULIÁ, F., Introducción al Derecho Mercantil. Madrid: Tirant Lo Blanch. 2007.

VILLAR EZCURRA, M., Las disposiciones aclaratorias en la práctica jurídica (Análisis crítico de su aplicación en el Derecho Público español y comunitario). Barcelona: Cedecs. 1996.

WU Keye; Host Country Taxation of Intellectual Property Transfers in Asia-Pacific Region: Taiwan, En: Asia-Pacific Tax Bulletin Vol. 3 No. 11, Taiwan, 1997.