The Taxation of Services. Colombian Report

Colombia

Branch Reporters
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Summary and conclusions

Colombian residents are taxed on their worldwide income, whereas non-residents are only taxed on their Colombian source income. Income derived from the performance of services by non-residents is subject to withholding tax in Colombia if the income is considered from Colombian sources. The non-resident withholding tax (WHT) is a final tax. For residents the concept and scope of the source rules determine the deductibility of foreign expenses and tax credits.

Branches of foreign companies that derive income in Colombia must file tax declarations. Expenses necessary to obtain taxable income in Colombia are deductible. The foreign WHT is creditable against the final income tax liability of Colombian residents if the foreign tax does not exceed the tax which would have been due in Colombia on that income. Income from Colombian sources derived by foreign companies without a permanent presence in Colombia is subject to WHT. If the withholding is applied a tax declaration is not required.

The Colombian Income Tax Act (ITA) distinguishes several types of services, and applies different WHT rates and compliance obligations to each one of them. Case law and the interpretative rulings of the tax administration evidence inconsistencies related to: (a) the lack of tax definitions; (b) the many distinctions introduced by the types of services; (c) the influence of non-tax law on the application of tax law.

Unless explicitly stated otherwise, necessary and proportionate expenses with a cause–effect relationship to income from Colombian sources are fully deductible. Foreign expenses are deductible provided that the mandatory WHT were applied. For foreign expenses exceeding 15 per cent of the net income calculated before such expenses, the excess is not deductible unless the payments were subject to WHT. If the income is not considered of Colombian source, the deduction is not available. Direct or indirect payments to foreign parent companies for management fees, royalties and exploitation or acquisition of intangibles are deductible provided they were subject to the mandatory WHT. Registration of contracts regarding

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the license of technology, technical assistance, basic engineering and other technological contracts with the Ministry of Commerce is required for the availability of the deduction.

The concept of services is cumbersome and tricky. This is caused by the different WHT rates and the difficulties in drawing the dividing line between royalties and services, including the lack of a clear legal frame. The definition adopted for technical assistance involves the transfer of knowledge, making it more difficult to establish differences between income from services and other income, i.e. royalties. Case law dealing with technology related services shows that although these are not exempt from WHT it is not difficult to break the chain leading to the application of the source rule. This is more difficult for hosting services.

The substantial difference between relatively high WHT rates on royalties (33 per cent) compared to services (10 per cent) can easily result in (a) the economic transfer of the tax burden to the Colombian company, or (b) a preference for contracts for services. Domestic tax law does not include a specific provision dealing with disaggregation of payments related to transfers of intangible property and the provision of services.

Tax treaties (DTCs) deviate from the OECD model. The deviations create a complex frame for the taxation of services making evident a strong trend to source taxation and issues often related to developing countries. The DTC with Chile creates a close relation between the permanent establishment (PE) and the supply of services. The inclusion of technical assistance, technical services and consulting services under the scope of royalties, and under services in other DTC articles, may create many conflicts of characterization. Given the status of issues identified at the domestic level it is unfortunate that none of the Colombian DTCs defines services for treaty purposes.

Community law also relies on source as the criterion to establish which country has the right to tax the income, including income from services and royalties. All income taxed in other Andean countries should be considered exempt in Colombia. Expenses incurred to obtain such exempt income are not deductible according to the ITA.

In Colombia source rules play an important role in the taxation of services and intangible property. For non-resident service providers (SPs), WHT applies and its application determines the availability of deductions and compliance with formal obligations such as tax declarations. The non-resident WHT is a final tax. For residents the concept and scope of the source rules determine the deductibility of foreign expenses and tax credits.

The different types of services, the lack of tax definitions as well as the different WHT regimes applicable to services and royalties render the application of the rules very difficult. It also provides the tax administration with a wide range of discretionary powers regarding the interpretation and application of the ITA, leaving many uncertainties for taxpayers. The influence of non-tax law on the application of tax law is evident, and the importance of the tax administration's rulings is disproportionate. In addition, the substantial difference between the WHT rates on royalties (33 per cent) compared to services (10 per cent) produces undesired consequences and may not achieve the objective pursued with its establishment. This situation encourages (foreign) investors to try to manipulate the characterization of such payments and/or impose a gross-up provision on Colombian payers.

Colombian DTCs create a complex framework for the taxation of services, making evident a strong trend to source taxation and issues often related to developing countries. The treaties include deviations from the OECD model regarding (a) allocation rules, (b) scope and definitions of business profits, PE and royalties, and as a result cause chaos. Given the status of issues identified at the domestic level it is unfortunate that none of the Colombian DTCs defines services for treaty purposes.

Andean Community (AC) tax rules on services and royalties are also based on source as the criterion to establish which country has the right to tax the income. The system works within the Community, although it has been highly criticized.

1. Taxation of income from services under domestic law

1.1. Basic rules

Under the ITA residents are taxed on their worldwide income, whereas non-resident companies are only taxed on their domestic source income. All types of income (including income from the performance of services) are taxed equally and are not treated under different schedules. Special rules apply for AC members.

Non-residents are taxed depending on whether they perform their activities directly or through a branch. If the latter is the case, branches are subject to the same rules as residents but are taxed only on their income of domestic source. The concept and scope of income of Colombian source is extremely important because: (a) income derived by non-residents from directly performing services is only taxable in Colombia if it is from a domestic source. If this is the case WHT applies and the rates vary depending on the types of services and circumstances. Under domestic law, this WHT is a final tax. (b) For the impact on the deductibility and tax credit available to residents for foreign source expenses and income respectively see section 1.3. Tax credits for income considered to be of foreign source are granted if the foreign tax does not exceed that which would have been due in Colombia.

In general, domestic expenses incurred to generate taxable income are deductible, provided that the expense: (a) has a cause–effect relation to the income-producing activities; (b) is necessary; and (c) is proportionate to the activity.[1] Expenses incurred abroad are deductible if: (a) the expense has a cause–effect relationship with income from a domestic source; (b) the WHT was applied if the payment was taxable in Colombia for its beneficiary; and (c) the WHT is documented.[2] Registration of the contract with the Ministry of Commerce is not required for WHT purposes. However, the tax administration (DIAN) considers it mandatory (see section 1.5).[3] As from 2014, cash payments may qualify as deductions provided they meet certain requirements.

1 Art. 107 of the ITA. The ITA was issued by Decree 624/1989, available at: http://www.secretariasenado.gov.co/senado/basedoc/codigo/estatuto_tributario.html#TITULO%20PRE.

2 Art. 121 ITA.

3 Law 1,430/2010 establishes other requirements, subject to regulation by the government.

Foreign source expenses are fully deductible if the expense incurred by the Colombian resident is income of a domestic source for the non-resident beneficiary and the corresponding WHT has been applied, unless the ITA establishes otherwise. The deductibility of foreign expenses is, unless otherwise stated, limited to 15 per cent of the Colombian taxpayer's net income, calculated before such expenses.[4] If the income is not considered of domestic source, the deduction is not available even though the WHT was not mandatory for a specific case.[5] Direct or indirect payments to foreign parent companies for management fees, royalties and exploitation or acquisition of intangibles are deductible provided they were subject to WHT if mandatory. However, this does not apply if the payment is channelled through the foreign exchange market.

Expenses that are fully deductible (and not subject to the 15 per cent limit) include: (a) payments subject to WHT; (b) short-term foreign loans for the imports of goods and bank overdrafts; (c) foreign loans to finance or pre-finance exports; (d) payments made to brokers located outside Colombia for the purchase of goods or raw material up to a certain amount; (e) interest paid on short-term loans acquired to finance the import or export of goods if certain requirements are met; (f) payments that are not of domestic source; (g) expenses related to the repair and maintenance of equipment abroad; (h) the training of personnel services provided abroad to public entities; (i) payments for the purchase of tangible goods; (j) costs and expenses capitalized for future amortization; and (k) costs and expenses related to the compliance of legal obligations such as services of customs certification. For a full overview, see articles 121, 122 and 25 ITA. Non-deductible expenses include dividends, expenses not having a causal relationship with the production of income, income tax, VAT, net worth tax, registration tax, stamp tax and vehicle tax.

As soon as the government publishes its list of tax havens, payments to such jurisdictions will also no longer be deductible, unless subject to a 33 per cent WHT. However, for more than three years the government has failed to issue the list.[6]

1.2. Income classification issues

1.2.1. Definition of "services"

The ITA does not define the term services. According to the State Council (SC, the highest Court dealing with administrative matters, including taxation), contracts for the supply of services have the following features: (a) the performance of an activity in which the exercise of intellect prevails; (b) the activity is acknowledged by the state; (c) lack of subordination; (d) payment as compensation for the activity.[7] In the absence of a legal definition, the SC referred to the dictionary of the Royal Academy of the Spanish Language and "traditional concepts". Unfortunately, the Court did not clarify which traditional concepts.

According to the Constitutional Court, contracts for services involve an activity performed independently without subordination or dependence of orders for the

4 Art. 122 ITA.
5 SC judgment of Hugo Fernando Bastidas, 29 April 2010, filing number (fn.) 16886.
6 ITA, arts. 25, 122, 260, 6.
7 SC judgment of Libardo Rodríguez, 16 May 1991, fn. 1323.

execution of the service agreed.[8] Commercial, civil or administrative law govern contracts for services depending on the assignment, or the contracting parties. Administrative law governs services contracted with a governmental agency. According to the SC tax chamber, the definitions of such contracts provided by administrative law are not applicable to the ITA if one or both of the contracting parties are not governed by administrative law.[9] Instead, the DIAN considers that the definition of consulting services provided by the law governing contracts performed by the state is applicable to all kinds of consulting service contracts for the purposes of applying the WHT established by the ITA.[10]

The approach taken by the DIAN in its rulings is frequently mentioned. This is due to (a) the general character attributed to them even though the taxpayers request them on an individual basis, and (b) that they are legally binding on the DIAN.[11] Hence, they are able to produce effects for all taxpayers.[12] As such, in the reporters' view those concepts have the persuasive character of soft law, at least at the domestic level.[13] According to the DIAN, the definition of services for tax purposes includes: (a) all kinds of activity, labor or work performed by an individual, legal person and other legal entities; (b) the lack of an employment relationship between the contracting parties; (c) the obligation of the SP to do something of either a material or intellectual character; and (d) a consideration in money or in kind irrespective of the name or form.[14]

In practice, the concept of services is cumbersome and tricky. This is, in part, caused by the different WHT percentages and the complexities associated with the taxation of services and royalties. The dividing line with royalties is sometimes difficult to draw, as the current understanding of technical assistance proves (see sections 1.2.2, 2.2.1 and 2.3 below). The applicable regime is different for fees, services, technical services, technical assistance, consulting services and royalty income.

According to the DIAN, fees are different from services. Income from fees is related to payments in cash or in kind for the development of intellectual work executed without subordination. Examples of fees are the provision of professional and technical services, subject to a 10 per cent WHT.[15] In the DIAN's view, technical services require the use and application of special knowledge to implement methods and procedures, to allow follow-up, to evaluate or to issue advisory opinions or conclusions about a situation or a process.[16]

8 Constitutional Court, judgment by Hernando Herrera, 19 March 1997, fn. C-154/97.

9 As stated by the Court of Appeals in a case brought before the SC. SC judgment of Hugo Fernando Bastidas, 31 March 2011, fn. 17150.

10 DIAN, ruling of 1 June 1995, fn. 10695.

11 Law 223/1995, art. 264, Decree 2117/1992 and Decree 1265/1999, art. 57.

12 Before the 1990s SC judgments did not accept any binding character of a non-administrative act or decision. SC judgment of Julio Enrique Correa, 5 September 1997, fn. 8309. SC judgment of Delio Gómez, 18 April 1997, fn. 8208.

13 The Constitutional Court has referred to the self-regulatory activity produced by the DIAN rulings and considered them as administrative regulations of lower character than those issued by the President of the country. Judgment by Humberto Antonio Sierra, 24 May 2005, fn. C-542/05.

14 DIAN, ruling of 9 July 2002, fn. 042388.

15 DIAN, ruling of 17 July 2006, fn. 059443. The decision is based on art. 392 ITA, and Decree 3110/2004 (art. 1), and Decree 4715/2005.

16 DIAN, ruling of 10 March 1998, fn. 015454.

As stated by the DIAN, other examples of fees include payments to repair and maintain high-tension transformers. In the DIAN's opinion such activities require specific knowledge, training, expertise and skills to handle such complex equipment. As such, for fees the main characteristic is the special knowledge and the intellectual activity required for the control of the processes involved.[17] Income derived from the provision of services is not related to a prevailing intellectual activity and the WHT is 4 per cent. Examples of the latter case would be measuring, weighing, placing and removing materials.[18]

In addition to the above-mentioned, income from services has to be distinguished from income derived from sales. In cases involving the printing of advertising material, the DIAN considers advertising and printing as different activities leading to different income characterization. In a case submitted to the DIAN for a ruling, one of the contracting parties made a creative design while the other printed it and provided the raw materials such as ink, paper, etc. In the DIAN's view, according to article 2053 of the Civil Code, the contract is of sale if the person performing the work provides the main materials. A contract is of services if the person ordering the service provides the materials required to perform the work. Therefore, income characterization depends on who provides the raw materials.[19]

Examples of services include radio broadcasting. Income from radio broadcasting services is exempt under the ITA. Therefore, the WHT does not apply.[20] The exemption only applies to the means to establish communication as opposed to its contents (the message).[21] The WHT applies neither to the purchase nor to the lease of space/capacity for radio broadcasting.[22] The exemption covers neither advertising,[23] nor the services of a journalist while advertising.[24] According to the DIAN, WHT does not apply to payments made by a Colombian company to another Colombian company for the lease of advertising space in a foreign channel since domestic companies are taxed on their worldwide income. Hence, the proceeds are taxed under the ITA.[25]

The DIAN considers advertising performed through a web page to be services of a technical nature that require specialized knowledge. In its view, given the prevailing intellectual character required to provide the services, the WHT established for fees applies.[26] As to the DIAN, web pages are documents whose purpose is to provide information through a specific means. Hosting services are also characterized as fees subject to WHT. Hosting services are designed to provide virtual space on a server from which the services (commercial activities) of a web page are provided. The DIAN considers this is a technical service of a "virtual intangible character". In both cases the WHT varies (10 per cent or 11 per cent) depending on whether some thresholds are met.[27]

17 DIAN, fn. 059443, note 15 above.
18 *Ibid.*
19 DIAN, ruling of 9 February 2009, fn. 011792.
20 DIAN, ruling of 18 July 1989, fn. 016701.
21 DIAN, ruling of 1989, fn. 21237.
22 DIAN, ruling of 15 January 1993, fn. 01735.
23 DIAN, ruling of 1 June 1999, fn. 051170. DIAN, letter (*oficio*) of 25 January 2007, fn. 005469.
24 DIAN, ruling of 2 February 2007, fn. 007920.
25 DIAN, ruling of 26 February 2010, fn. 014191.
26 DIAN, ruling of 14 March 2002, fn. 16579.
27 DIAN, ruling of 28 November 2002, fn. 076974.

Table 1. Withholding regarding royalties and alienation of intangibles			
Income derived from		**Rates for payments or credits to the account**	
Exploitation of material and intangible goods	Within Colombia	Royalties or exploitation of industrial property or knowhow Profits or royalties derived from literary, artistic or scientific work	33% of the nominal value of the payment/CA
		Exploitation of cinematographic films	33% on 60% of the payment/CA
		Exploitation of computer software	33% on 80% of the payment/CA
Licensing services or right to use software	Inbound payments to Colombian taxpayers subject to IT in Colombia	Licensing services or right to use software	3.5% of the payment/CA
Alienations of material or intangible goods	Located within the country by the time of its alienation	Residual rate (art. 415 ITA)	14% on the gross value of the payment/CA
		Rate for profits or exploitation of industrial or intellectual property (art. 408 ITA)	33% of the nominal value of the payment/CA

1.2.2. Services v. royalties

Income derived from the temporary or permanent "exploitation" of intangibles within the country, as well as proceeds from the temporary or permanent rendering of services within the territory, are subject to income tax irrespective of the existence of an establishment.[28] Although both cases lead to source taxation, the borderline between royalties and services has to be drawn under domestic law and DTCs. Royalties and payments for services to non-residents are subject to a final WHT.

The applicable WHT rates vary depending on whether intangibles or services are involved. Tables 1 (above) and 2 (below, in section 1.3) illustrate the different cases and rates. Except for income derived from the exploitation of computer software and cinematographic films, a 33 per cent WHT of the nominal value of the payment or credit to the account (payment/CA) applies to intangibles. Surprisingly enough, a

[28] Art. 24 ITA.

33 per cent rate also applies to any payments made to individuals and companies located in tax havens. Hence, from a policy perspective, the taxation of royalties is as high as the punitive WHT rate applicable to payments remitted to tax havens. A 10 per cent WHT flat rate applies to consultancy services, technical services and technical assistance rendered by non-residents, as income tax and remittances tax, irrespective of whether the service is rendered in Colombia or from abroad.

The substantial difference in WHT rates on royalties and services unavoidably results in high taxation associated with the former, possibly leading to shifts in profit potential or asset value from one enterprise to another as the result of a transfer of intangible assets embedded in contracts for the provision of services. Therefore, issues of characterization are crucial. Legal scholars have also pointed out that the high taxation associated with royalties results, *de facto*, in the economic transfer of the tax to the Colombian company in the contract by agreeing on a gross-up provision which is non-deductible by the domestic company.[29]

1.2.2.1. Extent to which income from the provision of services may be covered by the tax concept of royalties in Colombia

While AC law and Colombian DTCs include tax concepts of royalties, the ITA does not define them. Although the scope of royalties under AC law does not cover services, some DTCs include them (see section 2.2). For AC law purposes, royalties are defined as payments for technological intangible contributions that are not capital contributions.[30] The definition includes "any benefit, value or amount of money paid for the use or right to use intangible goods, such as marks, patents, copyrights and related rights, rights of the holder of new varieties of plants, licenses, non-patented technical knowledge or similar knowledge in the territory of any of the Member States".[31]

AC law influences the domestic law of all AC member countries. Hence, the AC royalty definition also applies in Colombia. Under the ITA, benefits or royalties of any kind derived from the exploitation of industrial property, knowhow and technical assistance are taxed at source, irrespective of whether they are provided from within the country or from abroad. The same applies to benefits or royalties derived from literary, artistic or scientific property exploited in Colombia, and to payments for technical services, irrespective of the country from which they are rendered.[32]

Issues of characterization of royalties and services arise because some kinds of services are related to the transfer of an intangible by case law. This is the case of technical assistance which according to case law involves the transfer of knowledge (see section 2.3). Apart from the confusion between knowhow and technical assistance, this may create confusion for the understanding of knowhow under DTCs (see sections 2.2.1 and 2.3). Most Colombian DTCs include some types of

29 Catalina Hoyos, "Tax treatment of cross border transactions regarding intangible assets", *Tax Policy Reflections for Latin America*, SERCI Congress, Cartagena de Indias, 2010. Paper available at: www.serci.org/2010/hoyos.pdf.

30 Decision 291, Common regime for foreign capital, trademarks, patents, licenses and royalties, art. 15, available at: http://www.comunidadandina.org/normativa/dec/D291.htm.

31 Decision 578, Regime to avoid double taxation and to prevent tax evasion, 2004, art. 2, I, available at: http://www.comunidadandina.org/normativa/dec/D578.htm.

32 ITA, art. 24(7-8).

services under the royalty definition. The issue is important since the ITA distinguishes between services, technical services and technical assistance e.g. for the source provisions, the relevant WHT (see sections 1.3 and Tables 1 and 2), as well as the possibility of deducting costs.

1.2.2.2. Disaggregations of payments related to contracts involving both the transfer of intangible property and the provision of services

Domestic tax law does not include a specific provision dealing with this subject. However, the ITA attributes different consequences to income derived from services as opposed to income derived from the exploitation of intangibles. Given the high taxation of royalties, taxpayers may prefer contracts for services. Furthermore, the position taken by the DIAN for both the ITA and DTCs regarding the characterization of income derived from franchise contracts may tempt taxpayers to argue their characterization as contracts for services.

Franchises involve elements of different contracts such as the supply of goods, licenses and grants of intellectual property, knowhow and services. According to the DIAN, the full amount of the payment made to a foreign company for a franchise implemented in Colombia is subject to the WHT established for the exploitation of intangible property (articles 24 and 26 ITA). A 35 per cent WHT applied on the payment/CA if the payments were in favor of a non-resident (according to the rates in force in 2002, article 408 ITA).[33] The same would apply for DTC purposes.[34]

According to the DIAN, if an invoice involves several different items, each item is subject to the relevant WHT rate, unless the performance of different kinds of services is involved. In the latter case, it is necessary to establish whether the different items are identifiable or not. In the former case, separate WHT rates should be applied to each item. If they are not identifiable, it is necessary to establish which element dominates and to consider only one base for WHT. As a result, the different WHT rates apply depending on the item. If there is no special rate, the 3.5 per cent general one applies.[35]

In 1992, the SC concluded that payments derived from a contract for the use of a trademark that also includes clauses for technical advice and assistance for the manufacture and marketing of garments are to be characterized according to the main object of the contract. The Court considered the services ancillary to the enjoyment of the right. It was argued that the only purpose was to ensure that the products of the licensee met the production's technical conditions of the licensor and in this way made a proper use of the trademark.[36] The Court based its decision on the AC law in force at that time[37] as well as on case law of the Supreme Court of Justice (the highest court in civil law matters).[38]

33 DIAN, ruling of 6 May 2002, fn. 26737.
34 DIAN, ruling of 15 September 2009, fn. 75126.
35 DIAN, ruling of 12 February 2003, fn. 006349.
36 SC judgment of Guillermo Chahín, 30 April 1992, fn. 3887.
37 Decision 84, Basis for a subregional technological policy, art. 82, available at: http://intranet.comunidadandina.org/IDocumentos/c_Newdocs.asp?GruDoc=07.
38 Supreme Court, Civil Cassation Chamber, decisions of 15 March 1965, CXI and CXII, p. 71, and 15 June 1972, CXLII, p. 218, regarding the interpretation of contracts.

1.2.3. Embedded intangibles

Intangibles embedded in service arrangements are quite a sensitive issue. Cases of knowhow or trade secrets through the provision of "services" or by secondment of highly skilled employees to the offshore affiliate have been the subject of study for the acknowledgment of expenses. For instance, while applying domestic law, the SC concluded that payments for a long-term contract of technical assistance for a manufacturing process could not be considered as a deferred asset subject to amortization. Instead, the Court concluded that such payments corresponded to a necessary expense for the correct achievement of the enterprise's goals. The payments were made by a Colombian subsidiary to the foreign headquarters for assistance given through the application of technical knowledge and the training of workers. Such activities were related to the plaintiff's production.[39]

1.3. Source and nexus of income

Under the ITA, non-residents and branches of foreign companies are taxed on their income from domestic source. Income derived from the temporary or permanent performance of services within Colombia is subject to tax, irrespective of the existence of an establishment.[40] According to the ITA, some payments related to the supply of services are deemed to be from domestic source, i.e. (a) payments made by the state for personal services irrespective of the place of performance;[41] (b) the provision of services within Colombian territory except for technical services, technical assistance and consulting services, which are considered of domestic source when the benefits are enjoyed in Colombia, even though the service is rendered abroad; (c) income derived from technical assistance services supplied from anywhere;[42] (d) payments for the performance of technical services supplied from anywhere.[43] The income is not considered of domestic source: (a) if it is related to technical services rendered abroad in order to repair and maintain equipment; (b) if it is derived from training services rendered abroad to public entities.[44]

In addition, the ITA considers of domestic source: (a) income derived from the exploitation of tangible and intangible assets (including knowhow and intellectual property) within the country; (b) income derived from the alienation of tangible or intangible assets located in the country at the time of the alienation; (c) income derived from landed property or movable property located in the country; (d) interest generated by loans held in the country or economically tied to it, except for interest derived from loans originating in the import of goods and on overdrafts or bank overdrafts; (e) labor income such as salaries, commission, fees, allowances for cultural, artistic, sports and similar activities; (f) compensation for personal services paid by Colombia, regardless of where they have been provided; (g) dividends derived from Colombian companies; (h) dividends of Colombian residents

39 SC judgment of Juan Ángel Palacio, 2008, ref. 15707.
40 Art. 24 ITA.
41 Art. 24,6 ITA.
42 Art. 24,7 ITA.
43 Art. 24,7 ITA.
44 Art. 25,5b ITA.

derived from foreign companies or entities that directly or indirectly have businesses or investments in Colombia; (i) profits from the exploitation of farms, mines, shells and natural forests, located within the Colombian territory; (j) profits from the manufacturing or processing of goods or raw materials within the country, whatever the place of sale or disposal; (k) income obtained from commercial activities within the country; (l) payments for turnkey contracts and other contracts for the construction of buildings.

The source rules are subject to compliance with certain requirements. The applicable WHT rates and their requirements are explained in Table 2. According to article 406 ITA, the WHT applies to anyone who makes a payment/CA income taxable in Colombia in favor of foreign recipients. The WHT only applies if the income is subject to tax in Colombia, i.e. if it is of domestic source (articles 12 and 24 ITA).

According to the Constitutional Court, the source taxation established by law for technical services and technical assistance fees expresses the country's tax sovereignty. In the Court's view, Congress did not exceed its taxing powers because the effect of the technical services and technical assistance rendered from abroad takes place in Colombia. In the Court's opinion, on the one hand, the beneficiaries of the services referred to by the law are individuals or legal entities residing or established in Colombia and, on the other, the payment/CA is carried out or from Colombia. Hence, in these cases, source taxation is in accordance with the Constitution.[45]

The acknowledgment of foreign expenses is also related to the scope of "income from domestic source". According to the SC, foreign expenses for obtaining income of domestic source are fully deductible if: (a) the WHT is mandatory and it was applied (article 121 ITA); (b) the WHT is not mandatory for: (i) payments abroad to foreign commission agents for the purchase or sale of goods, commodities or other form of property, provided they do not exceed the percentage of the value of the transaction determined by the Ministry of Finance, and (ii) interest paid on short-term credits derived from the import or export of goods, overdrafts or bank overdrafts (article 121a-b ITA); (c) cases covered by article 122c-f ITA. Other foreign expenses are only deductible up to 15 per cent of the taxpayer's net income as long as they are made to obtain income of domestic source. If the latter is not the case, the deduction cannot be acknowledged.[46]

In practice the application of the source rules is quite complex. Cases related to international television broadcasting using satellites show that the use of a satellite breaks the chain leading to source taxation. A case dealing with telecommunications services to access and work – in Colombia – on an automated database located abroad and owned by a foreign company demonstrates that in a non-treaty case, the source rules apply, irrespective of whether the foreign recipient is the beneficial owner.

Case 1: based on AC decision 40, the SC concluded that payments derived from satellite broadcasting into Colombia were not of domestic source and therefore not subject to WHT in Colombia. The SC argued that payments made by the

[45] Constitutional Court, Decision C-527/03, case D-4367, declaring art. 24(8) of the Decree Law 624/1989 in compliance with the Constitution.

[46] SC, fn. 16886, note 5 above.

Table 2. Income of Colombian source, withholding taxes and rates on services			
Income derived from	**Requirements**	**Rates and bases for payments or credits to the account**	
Services	Within Colombia Temporary or permanent With or without establishment	Technical services or assistance	33% of the nominal value of the payment/CA
		Consultancy, technical services and technical assistance rendered by non-residents	10% (flat rate), as income tax and remittances tax, disregarding whether the service is rendered in Colombia or from abroad
Turnkey contracts	If the contractors are corporations or other foreign companies not domiciled in Colombia, Non-resident individuals in Colombia Illiquid successions of foreigners non-resident in Colombia		1% of the contract's value
Leasing contracts	Who makes the payment/CA		14% of the payment/CA
Leasing of equipment for construction, maintenance, or repair of public works	Carried out by Colombian builders developing contracts submitted to international public tender		2%
Cases not expressly mentioned			14% on the gross value of the payment/CA
Any other income for the beneficiary	If the beneficiary is resident or is located or work in countries classified as tax havens by the Colombian government		35%

Colombian operator to a foreign company were for a service related to the connection or access to the satellite located outside the national geostationary orbit. Therefore, the income belonged to the country of domicile of the foreign broadcaster originating and sending the signal to the satellite. Given the fact that such a process took place abroad it could not be subject to WHT in Colombia.[47]

In 2007, the SC addressed the issue of whether payments made to a foreign company for international television broadcasting services into Colombia were subject to tax in Colombia. The SC did not uphold the characterization as royalties argued by the DIAN and stated that payments for services were not subject to Colombian WHT. In the SC's view, the foreign broadcaster company and its local customer had different functions. The foreign company broadcast and rebroadcast the signal to a satellite. The local company connected to the satellite to get the signal in order to render the television service within Colombia.

According to the SC, payments to the foreign company were for access to the satellite and not for rendering broadcasting services within Colombia. The fact that the footprint of the beam touched Colombia and the user of the signal was also located in Colombia was insufficient to sustain that the service was rendered in Colombia.[48] As a consequence, and in application of articles 406, 12 and 24 ITA, the income was not considered of domestic source and it was not subject to WHT.[49]

Case 2: a Colombian company (X) made payments to companies in Spain (S) and Uruguay (U) for telecommunication services required for performing its own business activity of making tourist reservations. The services allowed X to access and work on an automated database owned by a German company. However, the two foreign companies had outsourced the supply of the telecom service to another Colombian company (TC) and hence were contractually required to instantly forward the payment received from X to TC. X did not apply WHT in Colombia, arguing that another Colombian company (TC) was the ultimate beneficiary of the payment, and hence no WHT was due. X claimed the payment could not be considered income in the hands of either S or U because it did not accrue to them.

The SC resolved the issue by stating that the failure to apply the WHT when required made the payment non-deductible. According to the Court: (a) the income was of domestic source and subject to WHT; (b) the payments were made to the foreign companies (S and U) as a consideration for the telecom service to enable the customers of the plaintiff (X) in Colombia to connect to the German database; (c) as such, the service is supplied within Colombia according to article 24 ITA; and (d) the beneficial ownership concept, or a possible reimbursement, argued by X was considered irrelevant for the application of the WHT.[50]

AC law also relies on the source principle as the criterion to establish which country has the right to tax the income. Decision 578, article 3, states that all kinds of income are taxable by the member state in which the income was generated (*fuente productora*), with the only exceptions stated by the decision. Other member coun-

47 SC judgment of Maria Inés Vargas, 12 July 2007, fn. 15440.

48 SC judgments of Maria Inés Ortiz, 14 June 2007, fn. 15686; 10 October 2007, fn. 15616, 15865, 15909, 15912.

49 SC judgments of Hector Romero, 2 August 2007, refs. 15635, 15688, 15903, and 2 February 2008, ref. 16444; SC judgments of Juan Angel Palacio, 3 October 2007, ref. 15689. SC judgments of Maria Inés Ortiz, 10 October 2007, refs. 15687, 15795, 15909.

50 SC judgment of Ligia López, 11 December 2008, ref. 15968.

tries are expected to apply the exemption method. Expenses made to obtain such exempt income are not deductible according to the ITA. The *fuente productora* is not necessarily related to the place of payment, nor to the performance taking place from a specific country. Instead, the decision refers to: (a) the place where the activity takes place if business profits are involved; (b) the place where an intangible is used or the place where the right to use an intangible is enjoyed; (c) the place where a service is performed when dealing with personal services; (d) income derived by enterprises of professional services, technical services, technical assistance and consulting services is taxable only by the member country in whose territory the benefit of such services occurs. Unless it is proven otherwise, the decision presumes that in the latter case the benefit takes place where the expense is imputed and recorded (the payer's country).

1.4. Gross v. net taxation

As already mentioned, income from services of domestic source is generally subject to WHT, levied on the gross amount. Therefore income from services is not subject to Colombian tax on a net basis but depends on the source and WHT, at the rates indicated in Table 2. DTCs include different allocation rules for services and by doing so limit the taxation of the source country (see section 2).

Although the ITA does not define the term PE, branches belonging to non-residents are treated (a) as separate entities of the parent company and (b) as resident companies. Hence, if they derive income in Colombia, they must file tax declarations based on self-assessment. It is possible to deduct expenses necessary to obtain taxable income if the requirements for deductibility are met. Net profits are subject to tax at a 33 per cent rate. The WHT at source is creditable against the final tax liability.

A foreign company without a permanent presence in Colombia which derives income from a domestic source is subject to WHT. A tax declaration is not necessary as long as the WHT was applied.[51] Article 406 ITA establishes the cases in which the WHT applies. Payments/CA are subject to the WHT if: (a) the income is subject to tax in Colombia, and (b) the payments/CA are made to non-resident individuals, illiquid successions of foreigners, foreign companies or other entities.

1.4.1. Fees for technical services

Fees for consulting, technical services and technical assistance performed by non-residents are subject to a 10 per cent WHT, irrespective of where the service is performed. Registration of the contract is required for the deductions to be acknowledged, not for the WHT[52] (see section 1.5). Unfortunately the ITA does not give any definitions of the different types of services.

[51] AC law makes this more evident because income derived from all types of services is taxable only by the member country in whose territory the benefit of producing such services arises, i.e. the country in which the expense is charged or registered, unless it is proven otherwise. Decision 578, art. 14.

[52] Art. 408 ITA. DIAN, ruling of 22 March 2005, fn. 016676. Followed by the DIAN in a ruling of 6 January 2006, fn. 2852.

According to the SC, while contracts of technical assistance involve the transfer of knowledge to third parties, technical services involve the direct application of a technique by an operator, without the transfer of any knowledge.[53] The difference was mentioned in order to clarify whether Decree 2579/1983 exceeded the regulating law (Law 9/1983). Hence, the controversy was on the legality of adding the expression "technical" in the decree, not mentioned by Law 9/1983 while referring to services.[54]

In 1984 the SC ordered the temporary suspension of the effect of the expression "technical".[55] The plaintiff argued that Law 9/1983 did not use the word "technical".[56] The Court based its decision on a 1984 DIAN ruling establishing the differences between technical services and technical assistance. The rationale behind the DIAN's ruling was "generally accepted common knowledge".[57]

From 1984, the DIAN assumed that the transfer of knowledge made the difference between technical assistance and technical services for income tax and VAT. To support that view, the DIAN made use of a definition introduced by Decree 2123/1975 establishing that technical assistance was advice given "in the frame of a contract to render immaterial services". The advice is for the use of technical knowledge applied through the exercise of an art or technique. This assistance also includes the training of people for the application of such knowledge.[58] Instead, technical services is the advice given for the use of technological knowledge to be applied in practice of an art or technique and "in the frame of a contract of immaterial services". As such, the DIAN argued that technical services were a kind of advisory service.[59]

In 2004 a new claim against the approach of the DIAN regarding technical assistance and technical services was submitted. The SC acknowledged the lack of legal definitions and by making use of the above-mentioned 1984 SC decision, and the natural and obvious meaning of the terms, concluded that while technical assistance involves the technological transfer of knowledge through active training and advice to the user or beneficiary, technical services only imply the provisional or permanent performance of intellectual or material work that: (a) ends with its execution, (b) is limited to the contracted object, (c) does not involve any kind of training from the SP to the beneficiary. Given the lack of a transfer of knowledge, the SC concluded that technical services were not a kind of advisory service.[60]

In 2011, the SC established the following based on legal scholars: (a) technical assistance implies the supply of advice, help or support by specialized workers in order to transfer technological knowledge through the exercise of an art or technique; (b) knowledge can also be transferred without technical assistance; (c) a contract to perform exclusively and confidentially scientific and technological research to improve a certain technique is a consulting services agreement because

53 SC, Judicial writ of 26 July 1984, fn. 0154, judge: Bernardo Ortiz.
54 Technical services were initially introduced by Decree 2579/1983, art. 2,1c.
55 *Ibid.*
56 SC, fn. 0154, note 53 above.
57 DIAN, ruling of 2 April 1984, fn. 7285.
58 Criteria followed by the DIAN, letter of 15 July 2004 (*Oficio tributario*), fn. 39256, among others.
59 DIAN, ruling of 12 July 2002, fn. 0003.
60 SC judgment of Juan Ángel Palacio, 12 February 2004, fn. 13623.

it does not imply advice or support. While contracts of technical assistance need to be registered with the Ministry of Commerce, Industry and Tourism as a requirement to acknowledge the costs incurred by the company, other contracts for services are not subject to this obligation.[61]

Examples of technical assistance are found in cases involving the acknowledgment of a deduction within a specific taxable year. As such the SC upheld the deductibility of payments for contracts of technical assistance consisting of the transfer of professional expertise and knowledge (re consulting services and auditing) to a big four firm by a related company. The expense was considered necessary and related to the purpose of the firm producing the income.[62] According to the DIAN, examples of technical services include the preparation of advertisements given the application of an art or technique.[63]

As to the DIAN's rulings, the following are examples of income derived from technical services: services for water treatment,[64] all activities related to advertising,[65] advertising prepared abroad,[66] and payments for data processing through software.[67] Furthermore, the DIAN argues that services of an "intangible virtual character" such as the "hosting" or the rent of space in websites are technical services.[68]

Up to the 2011 decision mentioned above, the following issues were not raised: (a) whether, for the purposes of defining technical assistance, the "transfer" regarded the use or the alienation; (b) the features of the knowledge. Therefore, the differences between income related to such proceeds and income derived from the exploitation of knowhow or showhow has often not been clear. The 2011 SC decision may help to open the door to a better understanding of services, their use, and the alienation of intangibles.

1.5. Compliance and administration

A non-resident SP is taxable in Colombia if the income is considered of domestic source. If that is the case, WHT applies. Under domestic law, the non-resident WHT is a final tax. Provided that the WHT is mandatory, the situation is as follows: (a) if the WHT was applied, the SP does not have the obligation to present a tax declaration in Colombia[69] and (b) if the WHT was not applied, the SP is required to file a tax declaration under the terms and conditions set forth for tax residents in Colombia, irrespective of the amount involved. If this is the case, the SP has to comply with a number of obligations before the DIAN, such as tax registration, and has to obtain a tax ID number.

If income paid to a non-domiciled SP is subject to tax in Colombia, the ITA requires any person who makes such payments to withhold tax.[70] The ITA also

61 SC, fn. 17150, note 9 above.
62 SC judgment of Carmen Teresa Ortiz, 28 July 2011, fn. 18324.
63 DIAN, consultation of 13 October 2005, fn. 84504.
64 DIAN, ruling of 2001, fn. 60574.
65 DIAN, fn. 42388, note 14 above.
66 DIAN, ruling of 2000, fn. 63071.
67 DIAN, ruling of 2000, fn. 54967.
68 DIAN, fn. 076974, note 27 above.
69 Art. 592 ITA.
70 Art. 406 ITA.

requests the withholding agent to file a statement regarding the WHT applied. In the absence of a WHT statement the invoice paid can be used provided that the following information appears in it: taxable year, place wherein the WHT was applied, full name, tax ID number and address of the withholding agent, full name and tax ID number of the person to whom the withholding was applied, amount and reason for the payment subject to a withholding, the signature of the payer or the withholding agent.

It is important to note that the person who makes the payment abroad is obliged to act as withholding agent, even if he is not the recipient of the services. The withholding agent is entitled to recover the amounts paid from the taxpayer/the recipient of the service. However, penalties and fines imposed on the agent for breach of his duties are his sole responsibility.[71]

The same requirements apply where the recipient of the services is a non-resident with a permanent presence in Colombia, to which the services are provided. In addition, there are no special rules for non-resident SPs that do not have a permanent presence in Colombia or where the services do not relate to that permanent presence.

The Commercial Code requires foreign companies conducting regular business in Colombia to set up a local branch,[72] but this does not affect the non-resident status of the foreign company. Permanent activities for the purposes of incorporating a branch under commercial law include: (a) having commercial establishments or business offices in Colombia, irrespective of their technical or advisory nature; (b) acting as a contractor in the execution of construction works or the performance of services; (c) participating in activities that imply the handling, usage or investing of private savings funds; (d) being involved in the natural resources extraction industry; (e) contracting with the Colombian government; and (f) the functioning of assemblies, boards of directors, management, or administration of a foreign company in Colombia.

If the SP has an establishment in Colombia, the establishment is required to fulfil all tax obligations imposed on residents, including a tax declaration. If a non-resident SP performs services in Colombia for the benefit of a non-resident without a permanent presence in Colombia, the SP is obliged to file a tax declaration for income earned in Colombia for such services.[73]

In addition to the above, it is worth mentioning that payments arising in Colombia regarding services rendered abroad by Colombian nationals resident abroad are not subject to a WHT as long as the payment is channelled through the foreign exchange market.[74]

There is a controversy regarding the records to be kept by either the SP or the person receiving or paying for the services. The controversy regards the application of Decree 187/1975 and its possible tacit repeal by AC law. Article 66 of the decree establishes that royalties for the use or exploitation of intangibles or profits paid for technical assistance are deductible as long as the taxpayer complies with the general requirements mentioned above, and provides together with its tax declaration a

71 Art. 370 ITA.
72 Art. 471 ITA.
73 Art. 592,2 ITA.
74 Art. 366 ITA.

notary deed of the contract regarding the use of intangibles or the performance of technical assistance services. Article 67 states that if the deduction regards royalties or profits related to technology imported into Colombia governmental authorization of the contract is required. In both cases, for the deduction to proceed, it is necessary to provide an authentic copy of the accounts entry of the payment/CA, duly authenticated by the auditor or public accountant registered, as appropriate (article 68).

The authorization required by article 67 was expressly linked to the AC common regime for foreign capital, trademarks, patents, royalties and licenses in force by that time.[75] Later AC provisions (Decisions 220 of 1987 and 291 of 1991) request the registration of contracts regarding the license of technology, technical assistance, basic engineering and other technological contracts,[76] but not the authorization mentioned by article 67 of Decree 187/1975. The entity granting the authorizations (INCOMEX) does not exist any more and the authorization functions were not transferred to another agency. Notwithstanding the fact that the law refers to an authorization, the DIAN considers the registration mandatory for deductions to be acknowledged if contracts of technical assistance, technical services, basic engineering and other contracts involving technology or industrial property are invoked.[77] It seems that although the law changed due to the direct effect of AC Decision 220, the practice remains by the assimilation of "authorization" with "registration" of the contract and the DIAN has not accepted otherwise.

2. Treaty issues

2.1. Income from services under article 7

DTCs in force (Spain, Chile and Switzerland) create some chaos in the taxation of income from services.[78] In general, DTCs follow the rules of article 7 OECD model but there are some important deviations that more closely resemble the UN model. The PE force of attraction rule also applies to a fixed base through which services can be supplied.[79] Furthermore, under the DTC with Chile, the taxation of independent services is covered by article 14 and the income is shared by the residence state and the source state. In addition, services are covered under the PE definition if a certain time threshold is met.

Although the use of inconsistent terminology might look like a minor issue, it may lead to issues of characterization. For example, while article 7 of the majority of the Colombian DTCs applies to income from services – of independent

75 Decision 24, Common regime for foreign capital, trademarks, patents, licenses and royalties, art. 18 *et seq.*, available at: http://intranet.comunidadandina.org/IDocumentos/c_Newdocs.asp?GruDoc=07.

76 Decision 291, art. 12, note 30 above.

77 Art. 408 ITA. DIAN, fn. 016676, followed by the DIAN in fn. 2852, note 52 above.

78 Also pointed out by Brian Arnold, "The taxation of income from services under tax treaties: cleaning up the mess – Expanded version", *Bulletin for International Taxation*, 2011, vol. 65, no. 2.

79 DTC Chile, arts. 10, 11, 12, 13, 14.

character – the DTC with Canada refers to "professional services".[80] This might not be important if DTCs do not introduce other types of services. Unfortunately that is not the case. The royalty article applies to income derived from technical assistance, technical services and consulting in all DTCs in force, as well as in other treaties, e.g. the DTC with Canada. Other articles, like income from employment, artistes and sportspersons, directors and government service are also to be considered. Hence, issues of characterization are to be expected.

Given the issues identified at the domestic level regarding the tax regime for the different types of services it is unfortunate that no Colombian DTCs define services for treaty purposes. The definition would also be important especially in those cases where the treaty deviates from the OECD model. The DTC with Canada, for example, establishes that "the term 'business' includes the performance of professional services and of other activities of an independent character".[81] However, the PE provision also includes the furnishing of services, including consulting services, by an enterprise of a contracting state through employees or other individuals engaged by the enterprise for such purposes in the other contracting state, but only where such activities continue within that state for a period or periods aggregating more than 183 days within any 12-month period.[82]

Under the Colombian-Swiss DTC the term "business" includes the performance of professional services and of other activities of an independent character.[83] Therefore, in principle, income from services is dealt with under article 7. However, the scope of the royalty article also includes payments received as consideration for the furnishing of technical assistance, technical services and consulting services. Therefore, the understanding of the latter services is important for the classification of the income and the application of the DTC due to the special character of royalty income (see section 2.2). The DTCs with Spain and Chile also include the types of services mentioned under the royalty definition and although the income is allocated to the country of residence, the treaty also allows limited source taxation.

The thin line dividing services and a PE under the Colombian-Chilean DTC is not free of controversy. As pointed out by Reimer, since 2000 the OECD's Committee on Fiscal Affairs has reconsidered "a broadening of the PE concept in the interest of service-importing countries".[84] The current version of the OECD commentaries on PEs conditioned to the performance of services made this situation evident as well by introducing cases in which the performance of services may determine the existence of a PE.[85] Traditionally both concepts were dealt with independently, allocating income derived from services to the state of residence, while the PE would be taxed by the state of source on the income attributable to it. The issue of nexus becomes important in this framework especially for substantial businesses that do not require a fixed base to achieve their objective. This involves mainly services.

80 DTC Canada, art. 3,1k.
81 Art. 3,1k.
82 Art. 5,3b.
83 DTC Switzerland, art. 3,1k.
84 Reimer Ekkehart (ed.), *Permanent Establishments: A domestic taxation, bilateral tax treaty and OECD perspective*, Wolters Kluwer, Netherlands, 2011.
85 Art. 5 (42.11 to 42.48), OECD commentaries.

Similar to the non-traditional elements included under the PE definition of the current OECD model, the PE definition provided by the Colombia–Chile DTC covers the supply of services for an enterprise, including consulting services, through employees or other individuals requested by the enterprise for that purpose, for activities not exceeding periods or a period of 183 days within a 12-month period.[86] It also includes a work or a construction project, installation or assembly and supervisory activities in connection with them, as long as they last more than 6 months. This DTC as well as the OECD and UN approach show that controversies on this subject are not yet over and that a necessary balance for the conflict between residence and source has to be found.[87]

Finally, it is worth mentioning that according to the Colombian-Chilean DTC, insurance companies resident in a contracting state are deemed to have a PE in the other contracting state if the company collects premiums from policies in the territory of that other state or if it insures risks within a territory through a representative not being an independent agent. This provision does not apply to reinsurance.[88]

2.1.1. Other activities

DTCs include provisions dealing with services not only in the business profits and PE articles. In fact, the DTCs with Chile, Switzerland and Spain include the former article 14 OECD model. Article 14 regards income from independent personal services and includes the rule of the force of attraction by a fixed base. The fixed base is also mentioned in the dividends, interest, royalties, capital gains and capital articles wherever related services are provided.[89] The meaning of professional services is clarified in the Colombian-Chilean DTC, to include all independent activities of scientific, literary, artistic, educational or pedagogic character, as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Other special rules are as follows. The most favored nation (MFN) clause applies to some services. The DTCs with Chile and Canada apply it to technical services, technical assistance and consulting services.[90]

The Colombian–Chilean DTC includes income derived from property used for the supply of independent personal services under the scope of the article dealing with income from immovable property.[91]

DTCs with Chile and Switzerland provide that, for the purposes of paragraph 3 of article XXII (consultation) of the General Agreement on Trade in Services, the contracting states agree that, notwithstanding that paragraph, any dispute between them as to whether a measure falls within the scope of the convention may be brought before the Council for Trade in Services, as provided by that paragraph, only with the consent of both contracting states. Any doubt as to the interpretation

86 Art. 5(3).
87 In the same vein by Arnold, *op cit.*
88 Art. 5,6.
89 DTC with Chile, arts. 10, 11, 12, 13, 14, 22.
90 DTC Chile, protocol, ad art. 12. DTC Canada, protocol.
91 Art. 6,4.

of this paragraph shall be resolved under paragraph 4 of article 24 or, failing agreement under that procedure, pursuant to any other procedure agreed to by both contracting states.

The Colombian-Canadian DTC provides that contributions in a year in respect of services rendered in that year, paid by, or on behalf of, an individual who is a resident of a contracting state or who is temporarily present in that state to a pension plan that is recognized for tax purposes in the other contracting state shall, during a period not exceeding in the aggregate 60 months, be treated in the same way for tax purposes in the first-mentioned state as a contribution paid to a pension plan that is recognized for tax purposes in that first-mentioned state.

2.2. Income from services treated as royalties

Under all Colombian DTCs the characterization of services is not simple given the different rules applicable to services, professional services and other types of services such as technical assistance, technical services and consulting services (see section 2.1). The royalty article of the DTCs with Canada, Chile, Spain and Switzerland covers compensation of any kind paid for services such as technical assistance, technical services and consulting services. Other DTCs, not yet in force, also include similar provision, e.g. the Colombian-Mexican DTC. In the majority of cases those types of services are not defined, except for the Colombian-Spanish DTC which defines technical assistance (see section 2.2.3). The fact that under the ITA technical assistance involves the transfer of knowledge may not cause characterization issues since basically all DTCs in force include payments related to it under the royalty article.

So far there are no judgments dealing with the application of DTCs. Instead there are some rulings of the DIAN. While applying the Colombian-Spanish DTC, the DIAN argued that payments related to consulting and engineering services performed by a Colombian company to a Spanish company had the following treatment. Under domestic law a Colombian corporation is subject to tax on income and gains of both Colombian and foreign source (articles 12 and 254 ITA). For DTC purposes, the income is considered under the scope of the royalty article. As a consequence, Spain can impose a 10 per cent WHT on the gross payment, and the Colombian company is entitled to a credit in Colombia according to article 22 of the treaty.[92]

2.2.1. Supply of knowhow

The supply of knowhow is not explicitly mentioned by Colombian DTCs. Similar to the OECD model, Colombian DTCs include under the scope of royalties the consideration of any kind derived from information regarding industrial, commercial or scientific experience. It is not yet known whether both concepts are to be assimilated. Under domestic law, knowhow is defined as experience that meet the following requirements: (a) are secret, (b) are accumulated in an art or technique, (c) are susceptible of being granted to third persons in order to be applied

[92] DIAN, ruling of 1 December 2008, fn. 87286.

efficiently in the same field.[93] In practice it is not easy to establish whether a contract involves knowhow or not.

In 2009, the SC drew the line between goodwill and knowhow for domestic purposes. The Court stated that knowhow concerned all kinds of knowledge, specialized knowledge, and experience poured into the procedure and the technical manufacture of a product. In the Court's view, the definition mentioned in the plan of accounts (*plan único de cuentas*) is also applicable. According to this regulation, knowhow is an intangible, with money value, related to practical knowledge about the easy and efficient way to do or to achieve something by maximizing the efforts and experiences of an art or technique.[94]

2.2.2. Secondment of employees

Employment income earned by a resident of a contracting state shall be taxable only in that state unless the employment is performed in the other contracting state. In the latter case the remuneration may be taxed in that other state. The state of residence has exclusive right to tax the income if: (a) the recipient is present in the other state for no more than 183 days within a 12-month period commencing or ending in the fiscal year, (b) the remuneration is paid by or on behalf of an employer who is not resident in the other state, and (c) the remuneration does not belong to a PE or fixed base owned by the employer in the other state.

Notwithstanding the foregoing, according to the DTCs with Canada and with Chile, the remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic by an enterprise of a contracting state shall be taxable only in that state unless a resident of the other contracting state derives the remuneration.[95] Instead, the treaties with Spain and Switzerland allocate the taxing rights to the contracting state where the effective seat of direction is located.[96]

The above-mentioned rules are included in the Colombian DTCs in force. According to the AC Decision 578, article 13 applies to income from personal services, determining decisively the place of services for the allocation of the power to tax. For the crews of ships, aircraft, buses and other vehicles, the decision provides that such income shall be taxable only by the member country where the employee has its domicile.

2.3. Fees for technical and other services

As already mentioned, all Colombian DTCs mention different kinds of services including professional services, technical services, technical assistance and consulting. Definitions of these types of services are missing with the exception of the term "technical assistance" which is defined in the Colombian-Spanish DTC. According to this treaty, technical assistance is the advice given for the use of

93 Decree 2123/1975, art. 1.
94 SC, sentence of 26 January 2009, fn. 16274, judge: Martha Teresa Briceño.
95 DTC Canada, art. 14(3). DTC Chile, art. 15(3).
96 In both DTCs art. 14(3).

technological knowledge through the exercise of an art or technique in the frame of a contract of intangible services.[97]

While applying the Spanish–Colombian DTC, the DIAN considered that payments for online services are services, irrespective of the technological means used to provide them. As a consequence, payments for online services made to a Spanish headquarters from its Colombian subsidiary are of domestic source and subject to the ITA (articles 12, 2 and 24).[98] The DIAN based its ruling on the domestic definition of technical assistance provided by Decree 2123/1975 and its understanding of technical services in the 1984 SC case law. Unfortunately, in the rulings of the DIAN, domestic law overly influences the application of DTCs.

2.4. Independent personal services

The 2007 DTC between Colombia and Chile follows the UN model on this subject. This treaty provides that income derived by an individual resident of a contracting state for professional services or other activities of independent character is taxed in that state. However, the income can also be taxed by the source country, if: (a) the individual has a fixed base in that other state and the income is attributable to it or (b) when the person stays in the source country for a period or periods amounting to or exceeding 183 days within a year. In the latter case, source taxation is limited to income derived from activities performed in that other state. The provision only applies to individuals. The DTC does not define fixed base.

Under the Colombian-Chilean DTC, the term "personal services" covers especially independent activities of scientific, literary, artistic, educational or teaching character as well as independent activities of physicians, lawyers, engineers, architects, dentists and accountants. The definition excludes activities of industrial or commercial character as well as services within an employment relationship. Income derived by artistes and athletes is covered by article 17. Income from technical services, technical assistance and consulting services is under the scope of royalties (see section 2.2).

97 Protocol, art. VIII, ad art. 12.

98 DIAN, ruling of 11 June 2009, fn. 47861, 21451.