Taxation of Software Payments: Multi-Jurisdictional Case Law Analysis

This article considers the taxation of software payments with specific reference to tax treaties, and analyses the tax and case law of three divergent jurisdictions, i.e. Argentina, Australia and India.

1. Introduction

In this article, the author aims to analyse whether income derived from cross-border sales of software, without transferring full rights to the program, or licences to use software should be characterized as falling under the equivalent of article 12 (Royalties) or article 7 (Business profits) of the OECD Model and the UN Model, which determine how the taxing rights of residence and source countries are allocated. To this end, case law from the following jurisdictions is examined:

- Australia, which is an OECD member country;
- India, a non-OECD member country, but a member of the United Nations, which has a long and erratic litigation history regarding the characterization of software payments; and
- Argentina, a non-OECD member country, but also a member of the United Nations, where the case law dealing with this subject matter is emerging.

2. Different Types of Software

2.1. Analysis of the concept of “software” and types of software

The concept of “software” is defined in the Commentary on Article 12 of the OECD Model and a distinction is made between standardized software, also referred to as “shrink-wrapped” software, and customized software, also called “tailor-made” software. The distinction between the types of software is highly relevant for source countries, such as Argentina, as the characterization of the software payments as royalties or as business income is based primarily on the type of software (see section 4.3.1).

In the author’s opinion, different tax treatment based on the type of software can be based on the greater degree of protection required in the source state regarding customized software for the following reasons:

- more effort and time are involved on the part of the developer to customize the software;
- the users may create or increase the value of customized software by entering data;
- exploitation rights are usually transferred in the case of customized software (for example, modification rights) and not for shrink-wrapped software; and
- customized software entails the provision of services or technical assistance, usually on an ongoing basis, which falls within the definition of “royalties” in some tax treaties, but in contrast, with regard to standardized software, technical assistance is not provided by the software supplier to the customer.

For these reasons, a source state may decide to tax customized software as royalties and not tax standardized software, or it may tax both, but customized software at a higher rate. Section 2.2. discusses some judicial decisions that adopt divergent views regarding the tax treatment applicable to shrink-wrapped software and the characterization of software under the different categories of intellectual property (IP), i.e. not necessarily falling under “copyright”.

2.2. Analysis of the rights granted regarding software

The OECD and the United Nations provide guidance regarding the characterization issue arising from software-related payments, holding the same view in respect of the tax treatment applying to a transfer of copyright itself, but opposing views regarding the tax treatment of a transfer of a “copyrighted article”.

Examples of shrink-wrapped software are Microsoft Office, Windows 10 and Linux, while a typical case of customized software would be the software made for a particular company to enable it to sell its products online or for the management and issuance of invoices.

See A. Garcia Heredia, Software Royalties in Tax Treaties: Should Copyright Rights Be Reconsidered in the OECD Commentary on Article 12? 39 Bull. Intl. Fiscal Docn. 6, sec. 5.1.1. (2005), Journals IBFD.

The transfer of a “copyright” itself occurs when a person acquires, in the computer software, any of the rights that constitute “copyright” provided for by the domestic copyright law. In contrast, a transfer of a
The OECD’s view on the nature of software payments is as follows:
- in the case of the granting of use rights without any other right to alter, modify or exploit the program in any other form (e.g. the transfer of a copyrighted article), article 7 of the OECD Model applies; and
- in the case of the granting of exploitation rights (for example, rights to reproduce, distribute or modify the software) that constitute a transfer of the copyright itself, article 12 of the OECD Model is applicable.8

The position of the United Nations deviates from the OECD’s position with the adoption of a broader approach with regard to the scope of the term “royalties”. Accordingly, even payments for the strict use of a program for personal or business use or enjoyment of the customer may constitute royalties; therefore, article 12 of the UN Model may apply.

These different interpretations are based on the diverse purposes and intentions of article 12 of the OECD and UN Models. The purpose and intention of article 12 of the OECD Model is to eliminate source taxation, while the purpose and intention of article 12 of the UN Model is to grant shared taxing rights to the source state.5

With regard to the United Nations’ view, some changes to the Commentary on Article 12 of the UN Model in respect of the nature of software-related payments are expected.10

Accordingly, it is recommended that the reports of the UN Committee of Experts on International Cooperation in Tax Matters are monitored so as to be able to follow the progress of the amendments, as it is likely that the United Nations’ position will move towards that of the OECD.11

In the author’s view, the OECD’s narrow interpretation of royalties should be followed, unless copyright protection in the source state is required to ensure that the economic value of the software is not diluted in the source state, which is not the case for software for personal or business use, because the value of the software in these cases is not undermined. The author also considers that a licence to use a software program by way of an intangible medium (such as the Internet) and the acquisition of software via a tangible medium should have the same tax treatment, regardless of the means of supply.12

3. Income Tax and Income Categories from an International Tax Perspective

If the income derived from software payments falls under article 12 (Royalties), it is generally taxed at source, either because the relevant tax treaties deviate from article 12 of the OECD Model or they follow the UN Model, as is the situation with regard to the tax treaties concluded by Argentina, Australia and India. If the software payments fall under article 7 (Business profits),13 the residence state should have exclusive jurisdiction to tax, based on the assumption that there is no permanent establishment (PE) in the other state.

Income may fall within the meaning of article 12 if the software in question falls under the following categories of royalties:
- copyright;
- secret formulae or processes;
- scientific equipment, included only in the definition in the UN Model, when the software is embedded in the hardware;
- information concerning industrial, commercial or scientific experience, typically referred to as “know-how”, in relation to which numerous tax treaties, such as those concluded by Argentina, include the term “technical assistance”; and
- “computer software”, when such software is expressly covered in the definition.

Even though the term “royalties” is defined autonomously in the tax treaties, the scope of the different types of IP is not provided for, and its meaning should be defined by domestic IP law.14

8. OECD Model: Commentary on Article 12 (2017) paras. 17.3 and 17.4 (21 Nov. 2017), Models IBFD.
9. According to UN Model: Double Taxation Convention between Developed and Developing Countries: Commentary on Article 12 para. 12 (1 Jan. 2017), Models IBFD. “[s]ome members of the Committee of Experts are of the view that the payments referred to in paragraphs 14.1, 14.2, 14.4, 15, 16, 17.2 and 17.3 of the OECD Commentary extracted above may constitute royalties”. These payments refer to (i) general end-user licences, regardless of the method of transfer; (ii) site, enterprise and/or network licences; (iii) distribution intermediaries; (iv) transfer of full ownership of the copyright of the software; (v) transfer of rights that constitute a distinct and specific property, i.e. geographically limited and time-limited rights; (vi) user copyright limited to backup or operation purposes; and (vii) user copyright limited to download for own use or enjoyment.
10. Unfortunately, the possible amendments were not planned to be incorporated into the new version of the UN Model which was published on 18 May 2018. The Committee of Experts on International Cooperation in Tax Matters, the Economic and Social Council’s subsidiary body, formed a subgroup within the subcommittee for the next update of the UN Model to deal specifically with the tax treatment of software-related payments, whose work is expected to finish no later than 2020.
11. The notes by the Coordinator of the Committee, Ms Pragya Saksena, state the following: “44 [...] A substantial majority of the Committee took the firm view that the narrower interpretation was correct. They felt that paragraph 1 of the Commentary on Article 12 which describes royalties in principle as ‘income to the recipient from a letting’ made the position clear. As the outright acquisition of a product (e.g. a computer programme) for simple use by the purchaser could not represent any form of letting it clearly could not give rise to a royalty within the meaning of Article 12.” See UN, Committee of Experts on International Cooperation in Tax Matters, Twelfth Session (11-14 October 2016), Possible Amendments to the Commentary on Article 12 (Royalties): Note by the Coordinator, Ms. Pragya Saksena, E/C.18/2016/CRP.8, p. 14 (UN 2016).
12. As suggested in para. 14.1 OECD Model: Commentary on Article 12 (2017). Consequently, if reproduction rights are granted to end users when the software is supplied via a tangible medium, they should be disregarded so that the situation would be equivalent to software accessible through the Internet, where the making of a copy of the software or downloading it may not be required.
13. When software payments do not qualify as royalties under art. 12 (Royalties) OECD Model (2017) and UN Model (2017), the subsequent analysis of art. 7 (Business income) applies, i.e. art. 7(4) OECD Model (2017) and art. 7(6) UN Model (2017). In this regard, there is no autonomous definition of “business” in the tax treaties, and therefore, the term should have the meaning established in the domestic law. If the business definition is not satisfied, income would fall under art. 21 (Other income).
14. In AU: Copyright Amendment Act 1984, which amended AU: Copyright Act 1968, Australia included “computer programs” within the

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members of the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which provides copyright protection for computer software.\textsuperscript{15}

Software payments would be covered in the definition of royalties as "copyright", while in other tax treaties, the term "software" would be included expressly in the definition, either as a clarification by means of the expression "copyright of literary, artistic or scientific work (including computer software)" or as an autonomous category. The latter may be useful if the copyright use is limited to the necessary operation and is therefore a disregarded ancillary element, as suggested by Valta.\textsuperscript{16}

**4. Country-Specific Case Law**

4.1. **Taxation in Australia: An OECD member country**

4.1.1. **Taxation under domestic law and overview of tax treaties**

In spite of being an OECD member country, the tax treaties concluded by Australia incorporate article 12(1) and (2) of the UN Model in place of article 12(1) of the OECD Model. In this respect, Australia has opted to tax royalties at source, thereby deviating from the OECD Model. Australia also reserves the right to amend the definition of royalties under the tax treaties to include payments or credits that are treated as royalties under its domestic law. In this context, Australia could eventually adopt a broad interpretation of the term "royalties" to extend its taxing rights.

Currently, the tax treatment for "copyright" and a "copyrighted article" is aligned with the OECD’s approach. In other words, a payment for copyright qualifies as a royalty under section 3(a) of Taxation Ruling (TR) 93/12, and a payment for a "copyrighted article" generally does not qualify as a royalty under section 4(b) of TR 93/12.

Despite the divergence with the OECD Model, it is expected that Australia should follow the recommendations in the Commentaries on the OECD Model, as it is an OECD member country. Indeed, TR 93/12 includes the distinguishing criterion between a transfer of "copyright" and a "copyrighted article",\textsuperscript{17} even though this criterion may not be necessarily followed in practice by Australian courts.\textsuperscript{18}

4.1.2. **Case law in Australia: Task Technology (2014)\textsuperscript{19}**

In Task Technology, the Court of First Instance held in favour of the tax authorities,\textsuperscript{20} characterizing the payments as royalties and holding that the exception of article 12(7) of the Australia-Canada Income Tax Treaty (1980)\textsuperscript{21} could not apply, as the rights granted exceeded the effective use or operation of the software. The Commentary on Article 12 of the OECD Model (2000) were referred in this judgment, even though the case presented some particularities, namely that (i) the provision under analysis was article 12(7) of the Australia-Canada Income Tax Treaty (1980), which is a tailor-made provision, and therefore not included in the OECD Model;\textsuperscript{22} and (ii) article 12(1) of the OECD Model was not incorporated into this tax treaty, as royalties were taxed at source.

The Federal Court of Australia (FCA) also decided in favour of the tax authorities, but on different grounds. According to the FCA, article 12(7) of the Australia-Canada Income Tax Treaty (1980) did not apply, as there was no explicit reference in the distribution agreement to "source code", whether as a supply of or as a right to use source code in the distribution agreement to "source code", whether as a supply of or as a right to use source code in a computer software program, provided that the right to use the source code is limited to such use as is necessary to enable effective operation of the program by the user." This provision was aligned with the OECD Model Tax Convention on Income and Capital Article 12(9) (Amended 2000). Models-BIRD [hereinafter OECD Model: Commentary on Article 12 (2000)] at that time and was inserted into the tax treaty to create an exception to Canadian practice. In accordance with Canadian tax practice regarding computer software, Canada made an observation on the OECD Model: Commentary on Article 12 (2000), which was in effect at the time that Australia and Canada signed the Protocol amending the Convention between Australia and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (23 Jan. 2002), Treaties IBFD [hereinafter Austrl.-Can. Income Tax Treaty (1980)] (as amended through 2002) did not apply.

21. Article 12(7) Austrl.-Can. Income Tax Treaty (1980) (as amended through 2002): "[T]he term ‘royalties’ as used in this Article shall not include payments or credits made as consideration for the supply of, or the right to use, source code in a computer software program, provided that the right to use the source code is limited to such use as is necessary to enable effective operation of the program by the user.” This provision was aligned with the OECD Model Tax Convention on Income and Capital Article 12 (29 Apr. 2000). Models IBFD [hereinafter OECD Model: Commentary on Article 12 (2000)] at that time and was inserted into the tax treaty to create an exception to Canadian practice. In accordance with Canadian tax practice regarding computer software, Canada made an observation on the OECD Model: Commentary on Article 12 (2000), which was in effect at the time that Australia and Canada signed the Protocol amending the Convention between Australia and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (23 Jan. 2002), Treaties IBFD [hereinafter Austrl.-Can. Protocol (2002)], despite the fact that the observations were not made in the context of the FCA’s decision, which established that “[i]n Canada, payments by a user of computer software pursuant to a contract that requires that the source code or program be kept confidential, are payments for the use of a secret formula or process and thus are royalties within the meaning… of the Article”.

According to Vann, supra n. 18, at p. 11, the reference to the OECD Model: Commentary on Article 12 (2000) was correct, as the bespoke provision, i.e. art 12(7), “was clearly rooted in the OECD Commentary on Article 12, including the Canadian Observation, and so there was more international context for excluding a literal approach.” The roots of the OECD Model: Commentary on Article 12 (2000) can be seen in the last part of art 12(7) Austrl.-Can. Income Tax Treaty (1980) (as amended through 2002), which reads: “provided that the right to use the source code is limited to such use as is necessary to enable effective operation of the program by the user.”
code. In addition, payments were solely made as consideration for other rights described in the agreement.\textsuperscript{23}

In order to exemplify the cases in which article 12(7) of the Australia-Canada Income Tax Treaty (1980) should apply, the FCA referred to the “unusual case” in which the right to use source code is transferred, i.e. when there is a “supply of information about the ideas and principles underlying the program, such as logic, algorithms or programming languages or techniques”.\textsuperscript{24} The FCA also asserted that “[w]e are in the ordinary case, not the unusual case”, and quoted the following from the Commentary on Article 12 of the OECD Model:

> In these cases, the payments may be characterized as royalties to the extent that they represent consideration for the use of, or the right to use, secret formulas or for information concerning industrial, commercial or scientific experience which cannot be separately copyrighted. This contrasts with the ordinary case in which a program copy is acquired for operation by the end user.\textsuperscript{25}

The last part of the quotation is unexpected, as it appears that the FCA was saying that the case in question was an ordinary case “in which a program copy is acquired for operation by the end user,” which implies that the nature of the transaction was an “acquisition of software by the end user” and the nature of the rights granted was “operation or use rights”.

However, the facts in Task Technology were different, as a result of the following considerations:

\begin{itemize}
  \item the transaction consisted of the supply of the licensed software to market and distribute it to end users\textsuperscript{26} and the right to develop and supply application templates to end users under licence.\textsuperscript{27} Accordingly, the transaction should qualify as a case of a distribution intermediary and not as the “acquisition of software by the end user”; and
  \item not only were operation rights granted (i.e. the rights necessary to enable effective operation of the software by the user) for the user’s “own” use, but also reproduction and distribution rights (i.e. rights to copy and supply).
\end{itemize}

As a result, the framing by the FCA as an “ordinary case” is not clear and is not explained in the recitals to the judgment. Nevertheless, the key issue is to assess how relevant this was in reaching the FCA’s conclusion that the payments were royalties.

4.1.3. Analysis of Australian case law

According to Vann, the FCA adopted a literal approach regarding the treaty provisions and the distribution agreement. Vann also sustained that the FCA “would be rejecting the basic distinction made by the OECD” if it disagreed with the grounds of the Court of First Instance to hold that payments for “own use” of software constitute royalties.\textsuperscript{28}

In the author’s opinion, it is overly complex to infer that this was the FCA’s position, as the FCA distinguished the “unusual case” from the “ordinary case” solely for the purpose of analysing when article 12(7) of the Australia-Canada Income Tax Treaty (1980) would apply. However, the FCA did not precisely analyse (i) the qualification of the payments under article 12(3) of the Australia-Canada Income Tax Treaty (1980);\textsuperscript{29} (ii) whether the rights granted exceeded the rights necessary to enable the effective operation of the software; or (iii) the type of software, i.e. shrink-wrapped software or customized software, which would have been consistent with the OECD’s approach and the provisions of TR 93/12. The FCA emphasized that the scope of the use right was not relevant for analysis, as there was no supply of or right to use the source code (i.e. the first limb of the provision in article 12(7) of the Australia-Canada Income Tax Treaty (1980) was not met), and therefore, the payments amounted to royalties.

While the Court of First Instance adopted the OECD’s narrow interpretation of the term “royalties”, it is doubtful as to which interpretation the FCA is following. As a matter of fact, the case would not be decisive, in the author’s view, in order to determine its position, as, in substance, this was a clear case of the transfer of exploitation rights (i.e. the right to reproduce and distribute the software) in respect of which the OECD Model and the UN Model reach consensus on the tax treatment as royalties.

4.2. Taxation in India: A non-OECD member country

4.2.1. Taxation under domestic law and overview of tax treaties

The tax treaties concluded by India incorporate article 12(1) and (2) of the UN Model, the purpose and intention of which are to grant shared taxing rights to the source state. In this respect, India has opted to tax royalties at source and, therefore, as would be expected, has adopted a broad interpretation of the term “royalties”.

With regard to India’s position in respect of the OECD Model,\textsuperscript{30} India considers as royalties the payments for general end-user licences and for user copyright limited to downloads for own use or enjoyment, among others. India also amended the Income Tax Act (ITA) 1961\textsuperscript{31} by way of the Finance Act (FA) 2012\textsuperscript{32} to extend the domestic definition of “royalties” with retroactive effect, even though

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\textsuperscript{23} In the description of the rights granted under the distribution agreement, there is no explicit reference to “source code”, but there is a reference, in clause 8 of the obligation of Task Technology, to protect confidential information, including, by definition, source code and executables. The licensee was not allowed to “reverse engineer, reverse compile or disassemble Licensed Programs” without prior consent of the licensor.

\textsuperscript{24} Task Technology, supra n. 19, at Recital No. 35.

\textsuperscript{25} Para. 143 OECD Model: Commentary on Article 12 (2000).

\textsuperscript{26} Clauses 2.2.2 and 2.2.3 of the software distribution agreement.

\textsuperscript{27} Id., at clauses 2.2.6 and 2.2.7.

\textsuperscript{28} Vann, supra n. 18, at p. 12.

\textsuperscript{29} It is not clear under which category of royalties the software payments fell, that is, under “copyright”, or under a “secret formula or process” as observed by Canada at the time that the Australia-Canada Protocol (2002) was signed. It could be inferred that the classification under “secret formula or process” or “know-how” was inappropriate, as there was no supply of source code or reverse engineering.

\textsuperscript{30} See Reimer et al., supra n. 16, at p. 975.

\textsuperscript{31} IN: Income Tax Act (ITA) 1961.

\textsuperscript{32} IN: Finance Act (FA) 2012, Act No. 23 of 2012.
the tax treaties restrict the domestic definition (see Nokia Networks (2012),33 which is covered in section 4.2.3.2.).

With regard to the meaning of “copyright”, the following rights belonging to “copyright” under section 14 of the Copyright Act (CA) 195734 must be highlighted, namely:

– the right to make copies, i.e. “reproduction rights”, which is included in article 14(a)(i) of the CA 1957 and applies to computer programs as provided for in article 14(b)(i);
– “distribution rights”, provided for in article 14(a)(ii) of the CA 1957, which consist of the right to issue copies to the public to the extent that the copies are not in circulation, i.e. the copies are not sold even one time,35 and the distribution right applies to computer programs as provided for in article 14(b)(i); and
– the “sale right” (which would reasonably cover the “resell right”)36 and “rental right” in respect of software, both of which are provided for in article 14(b)(ii) of the CA 1957.

Even though the act of issuing copies is part of the copyright with regard to computer programs, section 52 of the CA 1957 provides for certain exceptions in respect of infringement of the copyright.37

In sections 4.2.2. and 4.2.3., examples of case law of the High Courts (HCs) of India as of 2011 are analysed. At the time of writing this article, one case was pending before the Supreme Court (SC) (see Samsung Electronics (2011))38 against a decision of the HC Karnataka, under which payments for shrink-wrapped software had been held to constitute “royalties” under the ITA 1961, as well as the relevant tax treaties. It is also essential to consider Tata Consultancy Services (2004),39 in which the SC analysed the characterization of software payments for shrink-wrapped software (even though the case was related to sales tax) and held that the sale of computer software was clearly a sale of goods for the purposes of sales tax.40 If it were to be treated as a sale of goods for income tax purposes, the equivalent of article 7 of the OECD Model or UN Model in tax treaties would apply.41

4.2.2. Case law characterizing software payments as royalties (in favour of the tax authorities)

4.2.2.1. CGI Information Systems (2014)42

CGI Group Inc (CGI-Canada) developed a facility and granted to CGI India, the end user, the right to use the facility by way of the intranet. The sale right and rental right were excluded.

The HC Karnataka held that the income qualified as royalties even though it derived from a licence to use the computer software, i.e. a right to a copyrighted article, and not a copyright. In arriving at its decision, the HC Karnataka referred to its decision in M/S Synopsis International Old Limited (2010).43

4.2.2.2. Rational Software Corp. India (2011)44 and Samsung Electronics (2011)45

In Rational Software Corp. India (2011), the HC Karnataka referred to its earlier decision in Samsung Electronics, the resolution of which, at the time of writing this article, was still pending before the SC. In Samsung Electronics, which involved shrink-wrapped software, the HC Karnataka held that a licence to use the software amounted to “copyright”46 and would have constituted infringement in the absence of the licence granted.47 As a licence was granted, there would be a lawful possessor of the copy, i.e. the licensee, to the extent that the purpose of a copy would be to use or operate the software as intended. Unfortunately, the term “lawful possessor” is not defined in the CA 1957, and this lack of definition can result in a significant amount of controversy.49

34. IN: Copyright Act (CA) 1957.
36. Id.
37. Sec. 52 CA 1957 sets out exceptions to the infringement of copyright, namely: “(a) the making of copies or adaptation of a computer programme by the lawful possessor of a copy of such computer programme, from such copy – (i) in order to utilize the computer programme for the purpose for which it was supplied; or (ii) to make back-up copies purely as a temporary protection against loss, destruction or damage in order only to utilize the computer programme for the purpose for which it was supplied.”
40. Id. at recital 86 concluded that “a transaction sale of computer software is clearly a sale of goods within the meaning of the term as defined in the said Act. The term ‘all materials, articles and commodities’ includes both tangible and intangible incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed etc. The software programmes have all these attributes’ (emphasis added).
41. The tax authorities could consider that the income in question derives from the use of or the right to use “scientific equipment”, for example, if the software is embedded with tangible property, under the equivalent of art. 12 UN Model (2017) in the tax treaties concluded by India. In the author’s opinion, even when software is delivered via a tangible medium, the primary nature of what is being transferred, i.e. the software, is intangible property, and hence, this qualification would not be accurate.
42. IN: HC Karnataka, 9 June 2014. CGI Information Systems & Management Consultants Pvt. Ltd. v. CIT, Tax Treaty Case Law IBFD.
43. Id. at Recital No. 12. See also IN: HC Karnataka, 3 Aug. 2010. The Commissioner of Income Tax v. M/S Synopsis International Old Limited.
45. Samsung Electronics, supra n. 38.
46. Sec. 14 CA 1957.
47. Id. at secs. 51 and 52.
48. Samsung Electronics, supra n. 38. at Recital No. 24.
49. Rajgopalan, supra n. 35, criticized Samsung Electronics, supra n. 38 and drew attention to a different meaning of the term “lawful possessor” based on another decision by the Income Tax Appellate Tribunal of Mumbai (ITAT Mum) in IN: ITAT Mum, 29 Feb. 2016, Capgemini Business Services (India) Ltd. v. ACIT, 46 CCH 223 (Mum.). According to this view, in order to become a lawful possessor, a licence to use the software is not required, as it is only necessary to be the purchaser of the copy to become a lawful possessor, who then would be entitled to make copies as allowed by the CA 1957 and art. 9(2) of the Berne Convention for the Protection of Literary and Artistic Works 1886, as amended.
Subsequently, the HC Karnataka added that "payment made in that regard would constitute 'royalty' for imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill as per clause (iv) of explanation 2 to Section 9(1)(vi) of the Act".50

In this respect, it would appear that the HC Karnataka also qualified the payments as being another type of IP within the catalogue of the definition of royalties, despite not having analysed this classification in the previous recitals of the judgment. It is not clear whether the classification under "copyright" prevails or, even if such a classification were not possible, whether payments would nonetheless qualify as royalties to the extent that there was a transfer of know-how.

Finally, the HC Karnataka did not distinguish between transactions with end users and those with distributors. This situation applied even though HC Karnataka did distinguish the rights granted in each of the cases,51 and with regard to the rights granted to distributors, the payments were likely to qualify as royalties, as either distribution or sale rights were transferred.

4.2.2.3. Wipro (2011)52

In Wipro, the HC Karnataka held that payments made by end users for access to and use of a technical database through the Internet consisted of royalties, as decided in identical cases and connected cases regarding payments made for the use of shrink-wrapped software or off-the-shelf software. In the opinion of the HC Karnataka, it did not make any difference whether the transfer was of a "right to access to the database", i.e. a licence to use the database, or the "use of shrink wrapped software". The equivalence between both of these transactions would be justified by the fact that both transactions fall under the definition of "copyright" according to section 2(o) of the CA 1957.53

4.2.3. Case law characterizing software payments as business profits (in favour of the taxpayer)

4.2.3.1. M. Tech India (2016)54

M. Tech India P. Ltd. (Indian Co.) was a value-added reseller (VAR) of software that purchased software from Australia for marketing and resale to end users in India.

In some cases, Indian Co. was entitled to customize the software at the request of the end users without acquiring the IP rights or the source code. The HC Delhi considered there was a transfer of a copyrighted article instead of a transfer of copyright or the right to use a copyright. Consequently, the payments qualified as "business income" for the vendor under article 7 of the Australia-India Income Tax Treaty (1991).55 The considerations of the HC Delhi illustrate the voluminous and conflicting case law existing in India with the different outcomes regarding the taxation of software payments.56

In the author's opinion, the judgment can be criticized, as the HC Delhi did not analyse the use of the software and source codes made by the VAR, even when the use was limited, as the VAR could customize the software at the request of end users. In the case in question, the Indian Co. was a VAR and not a simple reseller or distribution intermediary, which entitled that value was created or added to the software product.57 As a result, the customization of the software could constitute an infringement of IP rights in the absence of permission from the vendor to use and customize the software (i.e. modification rights) and therefore could result in the recharacterization of the payments as royalties due to the acquisition of a right to use a copyright. Similarly, taking into account the fact that the VAR was a reseller, the payments would have been recharacterized as royalties had the HC Delhi analysed the transfer of "distribution rights" or the transfer of "sales rights" under section 14(a)(iii) or (b)(ii) of the CA 1957, respectively.


In Nokia Networks, the HC Delhi concluded that payment for a "supply of equipment and licensing of software integral thereto" (i.e. the software was embedded in the hardware, being GSM (global system for mobile communication) equipment, and could not be used independently)60 was not a royalty "because the same was for a copyrighted article and not for a copyright".61 Consequently, the payments made as a consideration for a copyrighted article

50. Samsung Electronics, supra n. 38, at Recital No. 25.
51. The end users acquired the following rights regarding the effective use of the software: (i) to make copies, (ii) to download the software and (iii) to make copies for the backup. Without having any right for making any alteration or reverse engineering or creating subclones. With regard to distributors, they acquired a licence to use and distribute copies of the software, without the right to rent, lease, loan or sell. Reverse engineering and the right to modify the source code were excluded.
53. According to sec. 2(o) CA 1957, "literary works" include computer programs, such as shrink-wrapped software, tables and compilations including computer databases (as with the database considered in Wipro, id.).
56. The HC Delhi relied on the decisions in Tata Consultancy Services, supra n. 39. IN: HC Delhi, 22 Nov. 2013, Director of Income Tax v. Infosys Ltd., IITA 1034/2009 and IN: HC Delhi, CIT v. Dynamic Vertical Software India P. Ltd., (2011) 332 FTR 222 (Del) when ratifying its disagreement with the decision in Samsung Electronics, supra n. 38.
57. Indian Co. (a value-added reseller) was not a simple and typical "distribution intermediary", and the installation was not intended to customize the software, but to fulfil the requests of end users. For this reason, para. 14.4, final part of OECD Model: Commentary on Article 12 (2017) did not apply.
58. Nokia Networks, supra n. 33.
60. Nokia Networks, supra n. 33, at Recital No. 25.
61. Id., at Recital No. 5(6).
qualified as business profits under the Finland-India Income and Capital Tax Treaty (1983). In addition, the HC Delhi asserted that the amendments incorporated into section 9 of the ITA 1961 by the FA 2012 were not enforceable, as the definition of "royalties" in the tax treaty prevailed over the definition in Indian tax law. Accordingly, the tax treaty restricted the definition of royalties to payments "for the use of, or the right to use, copyright of a literary work" in article 13(3) of the tax treaty, by which "a copyrighted article does not fall within the purview of Royalty".

4.2.4. Analysis of Indian case law

On the one hand, the HC Delhi, in its decisions, followed the rationale of the OECD’s narrow interpretation of "royalties". Here, it should be noted that the Indian HCs are not compelled to follow the United Nations’ approach, according to paragraph 12 of the introduction of the UN Model (2017). On the other hand, the HC Karnataka adopted a broader interpretation of the term "royalties", similar to the United Nations’ approach, under which software payments made as consideration for a copyrighted article should be construed as royalties and taxed accordingly.

At the time of writing this article, Samsung Electronics was under review by the SC. Hopefully, the SC’s judgment will settle the dispute and set the criteria to characterize software payments and tax them accordingly. As a result, a converging interpretation of the article on royalties in tax treaties could be expected from the Indian HCs, primarily the HC Delhi and HC Karnataka.

4.3. Taxation in Argentina: A non-OECD member country

4.3.1. Taxation under domestic law and overview of tax treaties

As the case law from Argentina relating to the taxation of software payments primarily analyses the source of the income, it is relevant to provide some background for Argentina’s income tax system, under which non-residents are subject to Argentine income tax only on Argentine-source income.

In order to assess the source of the income, it is necessary to consider whether the element that generates income for the non-resident payee is related to goods or services, following which the source is determined as follows:

- for transactions qualifying as the provision of goods:
  - Argentine-source income: computer software or a right to the software that is located, placed or economically used in Argentina, where the expression "economically used" is not defined in the Ley de Impuesto a las Ganancias (Income Tax Law, LIG) and the related regulations; and
  - foreign-source income: computer software that is not economically used in Argentina; and

- for transactions qualifying as the provision of services:
  - Argentine-source income: services provided in Argentina, or services provided from abroad but qualifying as technical assistance; and
  - foreign-source income: services that are wholly provided abroad and do not qualify as technical assistance.

With regard to international tax law, the tax treaties concluded by Argentina include articles 12(1) and 12(2) of the UN Model, the purpose and intention of which are to grant to the source state shared taxing rights. In this regard, Argentina has opted to tax royalties at source, and therefore, a broad interpretation of the term "royalties" is to be expected.

In line with such an expectation, Argentina included “technical assistance” as one of the forms of royalties subject to taxation. This term is interpreted widely in Argentina, irrespective of whether the term is defined or undefined in the tax treaties concluded. The definition in the protocol to the Argentina-Chile Income and Capital Tax Treaty (2015) reflects Argentina’s broad interpretation to include, in the author’s view, any kind of services applicable to software payments.

62. Convention between the Republic of Finland and the Republic of India for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital (10 June 1983), Treaties IBFD.

63. Nokia Networks, supra n. 33, at para. 23 stated: “It is categorically held in CIT Vs. Siemens Aktiengesellschaft, 310 ITR 320 (Bom) that the amendments cannot be read into the treaty.”

64. Id., at para. 23.

65. Para. 12, introduction UN Model (2017) states that “the provisions of the Model Convention are not themselves enforceable. Its provisions are not binding and should not be construed as formal recommendations of the United Nations. Rather, the United Nations Model Convention is intended to facilitate the negotiation, interpretation and practical application of bilateral tax treaties based upon its provisions.”

66. AR. Ley de Impuesto a las Ganancias (Income Tax Law, LIG), Ley (Law) 20,628 of 31 December 1973, art. 5, as amended, and AR. Decreto Reglamentario (Regulatory Decree) 1344/1998 of 25 November 1998, art. 9(b) and (d). The provision refers to “assets located, placed or economically used in Argentina”. The lack of distinction between material or immaterial assets is noted and emphasized by M.S. Screpante, La importación de software frente al impuesto a las ganancias, Consultor Tributario, Errepar, p. 43 (October 2011). According to Screpante, the test of “economic use” also applies to immaterial assets.

67. Art. 12 LIG.

68. Under AR. Resolución (Instituto Nacional de la Propiedad Industrial) (Resolution, INPI) P-328/2005, art. 5, “technical assistance” is defined as “those provisions in the form of provisions of work or services, to the extent they imply technical knowledge applied to the productive activity of the local contractor and the transmission to the latter or to its personnel of said knowledge, either totally or part of it, through training, recommendations, guidelines, reports or similar, provided that the consideration is paid proportionally to the works which must be previously determined” (emphasis added).

69. Argentina holds the view that software payments fall within the scope of art. 12, where less than the full rights to software are transferred, either if the payments are in consideration for the right to use a copyright on software for commercial exploitation or if they relate to software acquired for the personal or business use of the purchaser”. (See Reimer et al., supra n. 16, at p. 975)

70. According to art. 3.2 of both the OECD Model (2017) and the UN Model (2017), an undefined term in the tax treaty or protocol should have the meaning provided under the domestic law of the states applying the tax treaty.

in the definition of “technical assistance”. With regard to the tax treaties in which the term is not defined, the United Nations’ position is to restrict recourse to the domestic law.

Recently, Argentina concluded the Argentina-Chile Income and Capital Tax Treaty (2015) and the Argentina-Mexico Income and Capital Tax Treaty (2015), both of which, in their protocols, contain a relevant provision that characterizes the income derived from computer software as royalties or as business income, depending on the type of software, as follows:

  – royalties (article 12): payments for the use of or right to use computer programs if, in the absence of a licence, copyright laws would be violated; and
  – business income (article 7): standardized software, to the extent that the rights transferred are limited to those necessary to enable the user to operate the program; and

4.3.2. Case law in Argentina

4.3.2.1. In general

The relevant Argentine case law consists of three cases with the same facts and circumstances relating to airline reservation systems (see sections 4.3.2.2–4.3.2.4). Argentine airlines had a licence to access and use airline software and professional services, such as the provision of technical support, maintenance of the software and training in the use of the software. There was no consideration for access to the database. The obligation to pay arose when a booking in respect of an airline’s products was processed.

The software permitted the management of reservations and issuance of tickets. The features were as follows:

– the system processed the data that Argentine airlines entered from terminals in Argentina connected via the Internet;
– the servers and the information, i.e. the databases, were located outside Argentina and the data was processed abroad;
– the airline companies could not modify or alter in any way the information of the databases, as they were only allowed to make bookings; and
– the software was operated, possessed and controlled by the software suppliers.

Aerolíneas Argentinas and Austral – the taxpayers that acted as plaintiff in two of the cases – had a binding ruling from the tax authorities under which the remuneration paid for the use of computer software to access the provisions of Amadeus Marketing S.A. qualified as the “use of, or right to use, computer software” under article 12(2)(c) of the Argentina-Spain Income and Capital Tax Treaty (1992) and article 4(d) of the protocol to that tax treaty. With regard to the other software suppliers, such as Sabre Group and Galileo International, which were US companies, these companies could not benefit from a reduced tax rate, as there was – and still is – no tax treaty between Argentina and the United States.

72. Art. 13(b) of the protocol to the Arg-Chile Income and Capital Tax Treaty (2015) establishes that “[i]t is understood that ‘technical assistance’ means the provision of independent services that involve the application by the service provider of specialized knowledge, being not patentable skills or experience for a customer.”

73. Under para. 66 UN Model Commentary on Article 12A (2017) (on fees for technical services), “[t]he definition of ‘fees for technical services’ does not include a reference to the domestic law of a Contracting State. The lack of any reference to domestic law is justified because: a) the definition generally covers most types of services that are regarded as technical services under the domestic law of the countries that tax such services; b) such a reference would introduce a large element of uncertainty; c) future changes in a country’s domestic law with respect to the taxation of fees for technical services could otherwise have an effect on the Convention; and d) in the United Nations Model Convention, reference to domestic laws should be avoided as far as possible”. According to para. 64 UN Model Commentary on Article 12A (2017), “the ordinary meaning of the term ‘technical’ involves the application of specialized knowledge, skill or expertise with respect to a particular art, science, profession or occupation.”


75. Art. 12(b) Arg-Chile Income and Capital Tax Treaty (2015) reads as follows: “It is understood that payments for the use of, or right to use, computer programs fall within the scope of subparagraph (b) of paragraph 2 of Article 12. It is also understood that when payments are intended to acquire partially a copyright of a computer program (without the author or transferor alienating his intellectual property) and the payment is made for the right to use (including partially) such program, such payments constitute a royalty if the absence of such license acquired would result in violation of copyright laws. However, if the rights acquired in relation to a standardized computer program (the so-called shrink-wrapped software) are limited to those necessary to enable the user to operate the program, the payments received in connection with the transfer of these rights shall be treated as business profits to which Article 7 applies.”

76. Art. 12(3) (on the definition of royalties) Arg.-Mex. Income and Capital Tax Treaty (2015) states: “It is understood that payments for software applications fall within the scope of this Article where only part of the rights on the program is transferred, whether the payments are in consideration for the use of a copyright on a software application for commercial use or relate to a software application acquired for business or professional use by the purchaser, when, in the latter case, the software applications are not totally standardized but somehow adapted for the purchaser.” (Emphasis added.)

77. This service could qualify as technical assistance, as there is a “transmission of technical knowledge.”


80. The Arg.-Spain Income and Capital Tax Treaty (1992) applied with regard to the payments made to Amadeus Marketing S.A., a Spanish company, which was the beneficial owner of the receipts, and the withholding tax rate was 10%.
4.3.2.2. Aerolíneas Argentinas S.A.\textsuperscript{81} – The AA case

In AA, Room I of the National Chamber of Appeals and the Tax Court of Appeals decided in favour of the tax authorities. The National Chamber considered whether the service provided abroad was economically used in Argentina, i.e. if the service was profitable based on the economic activity of the plaintiff in Argentina, and held that the income was from an Argentine source, subject to Argentine income tax.\textsuperscript{82}

4.3.2.3. Austral Líneas Aéreas (Cielos del Sur SA)\textsuperscript{83} – The Austral case

In Austral, the Tax Court of Appeals held in favour of the taxpayer in considering that Amadeus provided a service from abroad that did not qualify as technical assistance, as there was no transmission of scientific or empirical knowledge but only the transmission of data for the purpose of being processed abroad. Consequently, as foreign-source income, the income was not subject to Argentine income withholding tax.

The National Chamber of Appeals reversed the judgment of the Tax Court of Appeals and decided in favour of the tax authorities that there was a provision of technical assistance instead of a mere provision of services. The National Chamber quoted the AA case (see section 4.3.2.2.) to conclude that the taxpayer economically used a service in Argentina, i.e. technical assistance, as the taxpayer used the assistance provided to realize profits derived from the sale of its products through the system, i.e. the income was Argentine-source income subject to Argentine income tax.

4.3.2.4. Líneas Aéreas Privadas Argentinas SA\textsuperscript{84} – The LAPA case

The same considerations made in Austral (see section 4.3.2.3.) applied to LAPA. The framework set out by the National Chamber of Appeals has been unanimously criticized by scholars, as the Chamber, in order to assess the source of the income, referred to the concept of "economic use" in respect of the provision of services. The LIG clearly establishes that the principle of "economic use in the country" is irrelevant in the case of services rendered abroad.\textsuperscript{85}

4.3.3. Analysis of Argentine case law

Even though the case law refers to the existence of "technical assistance", which would have been sufficient to constitute Argentine-source income, the qualification is not clearly delineated. Notwithstanding this situation, the judgments described in sections 4.3.2.2.–4.3.2.4. reflect the position of three rooms of the National Chamber of Appeals, which confirmed the assessments of the tax authorities. It would have been interesting to know the position of the Argentine Corte Suprema de Justicia de la Nación (Supreme Court of Justice, CSJN) had the cases been appealed. However, none of these cases were appealed, given the nationalization of the airline companies by the Argentine government.\textsuperscript{86}

The fact that Argentina had to include a provision in the protocols to the Argentina-Chile Income and Capital Tax Treaty (2015) and the Argentina-Mexico Income and Capital Tax Treaty (2015) demonstrates that there is a controversy surrounding the tax treatment applicable to the software payments and that the articles of the tax treaties are insufficient to achieve the same result in the absence of this specific provision.

By way of this provision, the parties could have intended to (i) ensure that customized software is treated as royalties for tax purposes, while standardized software may qualify as business income or royalties, depending on the rights granted; and (ii) provide a tax policy guideline on how to tax software payments, which could apply in other bilateral situations. In other words, the author wonders if this could be the policy that Argentina would adopt to characterize payments in respect of customized software under any tax treaty without affecting the relative effect of the tax treaties. In doing so, Argentina would be following the United Nations' approach in respect of customized software, which would be taxable under the equivalent of article 12 of the UN Model, irrespective of whether the purpose of the software is for personal or business use, or commercial exploitation.

With regard to fully standardized software, such software may qualify as business income or royalties, depending on the nature of the rights granted. In this case, Argentina would be following the OECD's narrow approach according to its position in the protocols to the Argentina-Chile Income and Capital Tax Treaty (2015) and the Argentina-Mexico Income and Capital Tax Treaty (2015).

Consequently, it would be reasonable to conclude that Argentina's position in respect of taxing software payments depends primarily on the type of software. In other words, (i) if it is customized software, Argentina follows the United Nations' broad approach; and (ii) if it is fully standardized software, Argentina follows the OECD's...
narrow approach. However, Argentine case law indicates that the type of software may not always be analysed when the software contracts are mixed contracts. In such cases, the characterization of the software transaction as a provision of services cannot be ruled out, particularly as "technical assistance", considering the broad scope of this concept.

In the judgments reviewed, there was no discussion of the scope of the rights granted, as the payments did not qualify as copyright, most likely because the access to the database was through the Internet, i.e. the software was not reproduced. In other situations, making copies and downloading software may constitute an infringement of copyright. To this end, it should be noted that Argentine copyright law does not include a "fair use" doctrine, even though article 36 of Ley (Law) 11.723 provides some exceptions to copyright.

The framework in relation to "computer software" was also not analysed, although Aerolíneas Argentinas and Austral had binding rulings from the tax authorities, which qualified the payments under this category. It is the author’s understanding that, because computer software was not included as an autonomous category of royalties in the Argentina–Spain Income and Capital Tax Treaty (1992), which was in force at that time, the position was not analysed as such, but as a category included under copyright.

The analysis focused on technical assistance, thereby ruling out the tax treatment applicable to the use of the database, i.e. the software that processed the bookings. It is not possible to foresee how the National Chamber of Appeals would have decided if the provisions were broken down, and the National Chamber had to decide on the tax treatment applicable to the use of the software based on the rights granted. Even though Argentine courts analysed the "economic use" of the service by the airline companies and their agents, such an analysis was made to determine the source of the income – even when the domestic source rules were applied inaccurately – instead of assessing the nature of the software payments.

According to the OECD, classification as "technical assistance" is unsuitable based on the examples provided in its report entitled “Tax Treaty Characterization Issues Arising from E-commerce” under the headings “Category 13: Data warehousing” and “Category 15: Data retrieval”, in which the OECD concluded that the payments should qualify as “business profits”. In the particular case of "Data retrieval", this situation arises either because a service is provided (i.e. the service of making the database available to search and extract data) or only the right to use is granted.

As noted by Valtas, Argentine domestic law has a wide understanding of technical assistance, in fact covering all assistance without regard to the word “technical” [...] The Argentinean interpretation violates the context if it renders the word “technical” obsolete and thus has to be restricted for [double tax convention] purposes to assistance with relation to technical issues.

Not only is the word “technical” disregarded, but also the application of the knowledge to the productive activity as provided for by the domestic law. With regard to airline companies, in the author’s opinion, technical assistance would arise in the case of the transmission of technical knowledge in respect of software of which the functionality is related to a productive activity, i.e. the transportation of passengers and cargo by plane. Using software of which the functionality is related to the booking of tickets could qualify as a commercial activity, i.e. as sales performed primarily by travel agents, rather than as a productive activity. Analysis in this respect was not undertaken in either Austral (see section 4.3.2.3) or LAPA (see section 4.3.2.4).

Having said that, as the software was customized software, i.e. made and adapted at the request of the airline industry, the result of the cases analysed would have been the same had Argentina’s policy been to follow the provision of the protocols to the Argentina-Chile Income and Capital Tax Treaty (2015) and the Argentina-Mexico Income and Capital Tax Treaty (2015). In any event, the payments would have qualified as royalties, regardless of the category of royalties applicable.

According to Screpante, customized software should be considered to fall under technical assistance, which leads to the same result as the judgments examined in this article, but technically in another way, as in the judgments.
the transactions qualified as the “provision of services” and not the provision of customized software.

5. Conclusions and Recommendations

5.1. In general

The author believes that there is no clear position held by each of the countries analysed regarding the taxation of software payments. One issue identified by the research is that software can be included in different categories of IP within the definition of royalties in the tax treaties, which may give rise to uncertainty, as the analysis for each category is different and, usually, each item is subject to different limitations with regard to tax rates in respect of source-state taxation. The appendix of this article sets out the possible classifications in respect of the different types of software and the case law relating to the various classifications.

5.2. “Copyright” or “computer software”

Software has been traditionally analysed as falling under the category of “copyright”, as most countries are members of the TRIPS Agreement, which provides copyright protection with regard to software. Some tax treaties expressly include the phrase “use of, or the right to use, computer software” as an autonomous category, apart from copyright, which is not provided for in either the OECD Model or the UN Model. In these cases, the category of “computer software” would be more specific than “copyright”. Consequently, it could be argued that an analysis distinguishing between “copyrighted article” and “copyright” would no longer be relevant.

If the tax treaty only includes the expression “use of, or the right to use, copyright”, under the OECD’s approach, a transfer of a copyrighted article would not fall under the royalties article.

If the tax treaty refers to the “use of, or the right to use, computer software”, the payment would qualify as a royalty, regardless of the type of software or the rights granted in respect of the software. In this case, the author would recommend incorporating a provision in the tax treaty or the related protocol as in the protocols to the Argentina-Chile Income and Capital Tax Treaty (2015) and the Argentina-Mexico Income and Capital Tax Treaty (2015). If such a provision is added, the type of software must be distinguished, and, depending on the type (for example, standardized software), an analysis of the rights granted in respect of the software, equivalent to the analysis that would have applied under the category of “copyright”, could be performed to determine the tax treatment.

As a result, special attention should be paid to the inclusion of the autonomous category of “computer software” within the definition of “royalties” in the tax treaties in question, as the scope of “royalties” is extended to cover, in principle, any type of software, irrespective of there being a copyrighted article.

5.3. The debate on the classification under copyright

Unfortunately, if the scope of the term “copyright” is not defined in a tax treaty, recourse to domestic law is necessary in order to understand whether a right to use the software qualifies as a right belonging to copyright. The issue is that domestic law may have some uncertainties and undefined terms, such as “lawful possessor” in the Indian legislation. In addition, it is vital to determine if the domestic law follows a “fair use” or “fair dealing” doctrine.

These particularities regarding domestic IP law may be a drawback for qualification purposes under copyright, as domestic law is not constant. For instance, countries may amend their domestic laws to increase their taxing powers. In such circumstances, one solution that would contribute towards a resolution of the debate would be to define the scope of “copyright” in the tax treaties.

The provision for states that adopt the OECD’s approach could be drafted along the following lines:

Royalties shall not include payments made as consideration for the supply of, or the right to use, a computer software program, provided that the right to use the computer software program is limited to such use as is necessary to enable effective operation of the program by the user.

In this case, reproduction rights would be excluded from the scope of the term “copyright”, which would be circumcribed to exploitation rights, regardless of the domestic copyright legislation.

The different approaches of the OECD Model and the UN Model could be settled if the anticipated amendments to the Commentary on Article 12 of the UN Model are approved, as it is likely that the United Nations’ viewpoint would move towards the OECD’s narrow viewpoint. However, even if these amendments were approved, the dispute would not be resolved, as the Commentaries on the UN Model are not binding and only have persuasive force or influence for UN member countries. This is why the debate will continue until the issue is settled by a SC decision (such as that pending in India with regard to Samsung Electronics) or tax treaties are drafted or renegotiated with additional provisions.

5.4. Technical assistance and its role in mixed contracts

Further to the proposal of delineating the scope of the different types of royalties so that recourse to domestic law is avoided, “technical assistance” should be defined as an autonomous category, apart from copyright, which is not provided for in either the OECD Model or the UN Model.

96. For instance, in the tax treaties concluded by Argentina with Belgium, Mexico, the Netherlands, Russia, Spain, Switzerland and the United Arab Emirates (at the time of writing this article, the tax treaty with the United Arab Emirates was not yet in force).
in a tax treaty or the related protocol. The author is critical of the wide definitions incorporated into the protocols to the Argentina-Chile Income and Capital Tax Treaty (2015) and to the Argentina-Brazil Income and Capital Tax Treaty (1980), as amended. In both cases, the definitions are unhelpful, as it appears to be difficult to delineate the boundary between the provision of services, which would fall under article 7, and the provision of technical assistance, which would fall under article 12. Consequently, the author recommends, in both cases, to replace the words “provision of services” with “transmission of knowledge”.

Alternatively, the examples of Australia and India could be followed, under which “technical assistance is only covered if it is connected to IP within the catalogue of Article 12 OECD and UN Model”. This “connection requirement” would be reasonable for the purpose of article 12, which deals with IP, but in some tax treaties, this article introduces other unrelated items, such as tangible property, when the “use of industrial, commercial or scientific equipment” is covered. Following Indian case law, which is not dealt with in this article, article 12 includes services such as “technical services rendered in connection with installation, testing and training in relation to the supply of software... provided that the supply of software is considered to constitute royalties”. In this case, technical services would depend on the treatment of the software in question as royalties. In contrast, “processing and reporting of the data acquired” would not be services included in this category.

With regard to mixed contracts, the author suggests breaking down the amounts payable in order to assign the relevant tax treatment to the provision of software, especially when classification under “copyright” applies and there is a transfer of a copyrighted article, to which article 7 applies under the OECD’s approach. However, if the approach based on the type of software is followed, such a breakdown would not be useful, as payments in respect of customized software would fall within the scope of the royalties article.

5.5. “Secret formula or process” or “know-how”

In the context of Task Technology, Canadian tax practice was to consider that, if there was a requirement to keep the source code or the program confidential, the payments could be qualified as a secret formula or process, which resulted in royalties. Regardless of whether the characterization is a “secret formula or process” or “know-how” – the distinction of which could be blurred – the analysis based on the rights granted, as required under the category of “copyright”, is irrelevant, unless there is a provision such as article 12(7) of the Australia-Canada Income Tax Treaty (1980).

Overall, qualification as a “secret formula or process” or “know-how” is exceptional and constitutes specific categories that prevail over the category of “copyright”. These categories would be appropriate if there were a supply of source code (i.e. logic, algorithms or programming languages or techniques) or reverse engineering.

5.6. The way forward

The author is of the opinion that, under the rights-based approach, the OECD’s narrow interpretation of royalties should be followed. The source states should not be entitled to tax software payments when the protection of “copyright” in the source states is not required, i.e. when the software is used for personal or business reasons.

Without prejudice against the approach followed by countries, the author believes that provisions, such as those included in the protocols to the tax treaties recently concluded by Argentina, as well as the other provisions suggested in this article, would be a good approach that would provide greater certainty for both taxpayers and tax authorities, which would eventually result in a reduction in judicial disputes.

Finally, the taxation of digital transactions is a topic currently under intense review, and therefore, the author cannot rule out that some software-related transactions may be covered by the tax measures proposals for the digital economy that would grant more taxing rights to source states. For the time being, and considering that the proposed taxes may not be covered by tax treaties, this analysis is outside the scope of this article.
### Appendix

Possible classifications for the different types of software and the case law related to the respective classification

<table>
<thead>
<tr>
<th>Type of software</th>
<th>Characterization for tax purposes</th>
<th>Case law analysed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standardized software</td>
<td>Sale of goods, i.e. business profits/ copyrighted article, as no relevant copyrights are granted (following the OECD’s approach)</td>
<td>Tata Consultancy Services and Nokia Networks (software embedded within hardware); it should be noted that Tata Consultancy Services concerned sales tax</td>
</tr>
<tr>
<td></td>
<td>Copyright, i.e. the rights granted amount to copyright</td>
<td>Samsung Electronics and Wipro</td>
</tr>
<tr>
<td>Customized software</td>
<td>Technical assistance and/or know-how</td>
<td>AA, Austral and LAPA</td>
</tr>
<tr>
<td></td>
<td>It should be noted that in these cases, the transactions were related to the provision of services instead of the provision of goods</td>
<td></td>
</tr>
<tr>
<td>Software as know-how</td>
<td>Know-how or secret formula or process if there is a supply of unrevealed source code (i.e. logic, algorithms or programming languages or techniques) or reverse engineering</td>
<td>Task Technology</td>
</tr>
</tbody>
</table>