GARRIGUES

Latin America

Software as a Service (SaaS): a challenge posed by highly complex tax rules in a digital and interconnected world

Software as a Service (SaaS): a challenge posed by highly complex tax rules in a digital and interconnected world

The tax treatment of SaaS is attracting an increasing amount of attention worldwide. Firstly because we live in a digital and interconnected world where businesses and individuals routinely use services of this type to carry on business activities with a high technology content. Although another reason is the definition of the payments for services of this type along with the resulting Income Tax and Value Added Tax (VAT) rules for them, which pose a highly complex technical challenge for tax authorities and taxpayer companies, involving the interaction of domestic laws and tax treaties.

The way in which each law resolves this has a high potential impact for businesses in today's world, because it can mean significant withholding tax at source, making the prices of these services more costly or less competitive, depending on which way you look at it.

In this article, the firm's tax experts give a graphic and simplified analysis of the tax treatment of SaaS in a number of Latin American countries.

In every case, it is assumed that the SaaS is provided outside the country concerned, without having a permanent establishment in that country. The conclusions are based, except for the elements specifically mentioned, on the domestic legislation in each country and may change if a tax treaty is applied.

Check the information of each country by clicking on the map

Argentina

SaaS

VAT

Taxable

21% (chargeable to the customer)

Capital gains tax

Does it involve a license of intangible property?

Yes

Withholding tax on payments to foreign beneficiary

31.5% WHT

No

Characterized as technical advice?

Yes

Withholding on payments to “foreign beneficiaries”

WHT: between 21% and 31,5%

No

Not taxable*

(*) Meaning that it simply involves bringing products into Argentina and/or services provided from another company which are not characterized as technical advice.

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More information

Argentina

In Argentina, the tax treatment of SaaS for capital gains tax depends first on whether the income has an Argentine or foreign source, because non residents are only taxable on their Argentine-source income. Capital gains are considered to have an Argentine source if they come from property located, placed or used economically in Argentina and from any income-generating transaction or activity or events that occurred within the country.

Transactions that simply involve bringing products into Argentina or services provided from outside the country are treated as foreign-source income and therefore not subject to withholding tax. This presumption does not apply to technical, financial or other types of advice provided from outside Argentina, which are treated as an Argentine-source gain and therefore subject to withholding tax.

Licenses of intangible property are subject to capital gains tax. Because the foreign provider would be characterized as a foreign beneficiary, the payer would have to withhold tax in one final payment. The applicable rate is 35% of 90% of the imputed income, meaning that the effective rate would be 31.5%.

If the transaction is not characterized as a license of intangible property, but instead as a technical advice service, it will be taxable for capital gains tax subject to the same conditions as those described above. The applicable rate would be 35%, although the imputed net base would be between 60% and 90%, depending on whether or not the registration and other requirements for the contract with the National Intellectual Property Institute (INPI) have been fulfilled. The effective rate would therefore be between 21% and 31.5%.

Obviously, these conclusions based on domestic law may change if a tax treaty is applied, and if so, it makes a difference whether the SaaS is characterized as a royalty or a business profit. In the first case, generally in the treaties signed by Argentina with other countries, the source country (Argentina in this case) can make withholdings, although they are limited, whereas if it is characterized as a business profit, in line with the most widely accepted international principles, the payment would not be subject to withholding tax in Argentina, as long as the service provider does not have a permanent establishment there. In any event, most tax treaties signed between Argentina and other countries include technical advice within “royalties”, and allow the source country to withhold capital gains tax, although with limitations.

Argentine VAT is chargeable on SaaS even in the type of cases we are looking at, due to being treated as a taxable importation of services. Moreover, the VAT Law expressly includes among taxable services “software services, including, among others, software services provided online (“software as a service” or “SaaS”) through cloud based downloads”.

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Chile

SaaS

Characterized as standard software?

Yes

Exempt from WHT

If WHT not chargeable, VAT exemption does not apply

Subject to VAT (19%)

Who pays and files VAT?

Is the beneficiary a VAT taxpayer?

Yes

The beneficiary must file and pay VAT, and issue a purchase invoice for the transaction

No

The foreign provider must:

- file and pay VAT
- register for the simplified scheme (on virtual platform)

No

Subject to WHT

No treaty (15% WHT)

If WHT is chargeable, VAT exemption applies

With a treaty (10%/15% WHT)

Not subject to VAT

Sub-license or subsequent sale to local customer

Subject to VAT (19%)

More information

Chile

There is no definition of SaaS in the law, although tax authorities treat them as a type of service model of “cloud computing”, which in turn are defined as programs that allow customers to use the provider’s applications by executing them on a cloud infrastructure, accessible from multiple devices and for which the consumer does not manage or control the underlying cloud infrastructure, including the network, servers, operating systems, storage or even the capabilities of individual applications, with the exception of setting up specific limited applications for the user (Chilean IRS – Ruling N° 42 of 2021).

With respect to the applicable “additional tax” to payments made to the foreign SaaS provider (i.e. single withholding tax on gross amounts, hereinafter “WHT”), article 59 of the Chilean Income Tax Law states as follows:

- A 15% WHT applies to the “use, enjoyment or exploitation of computer programs”, meaning the set of instructions to be used directly or indirectly on a computer or processor, to carry out or obtain a given process or result, contained on a physical or intangible medium, according to the definition or specifications set out in the Intellectual Property Law.
- Whereas the “use of standard computer programs” is exempt from WHT, meaning those computer programs in which only the rights needed for their use are transferred, not the rights to exploit them commercially, or to reproduce or alter them for any purpose other than to enable their use.

New article 8.n) of the VAT Law requires VAT to be charged on the provision of computer software, storage, platforms or IT infrastructure (i.e. SaaS) by providers domiciled or resident abroad.

Article 12.E.7 of the VAT Law harmonizes these provisions so that:

- If payments made to other countries are subject to VAT and to WHT under article 59 of the Income Tax Law, only the WHT needs to be paid.
- If services are provided or used in Chile and are exempt of WHT under Chilean laws or tax treaties, VAT must be charged on them.

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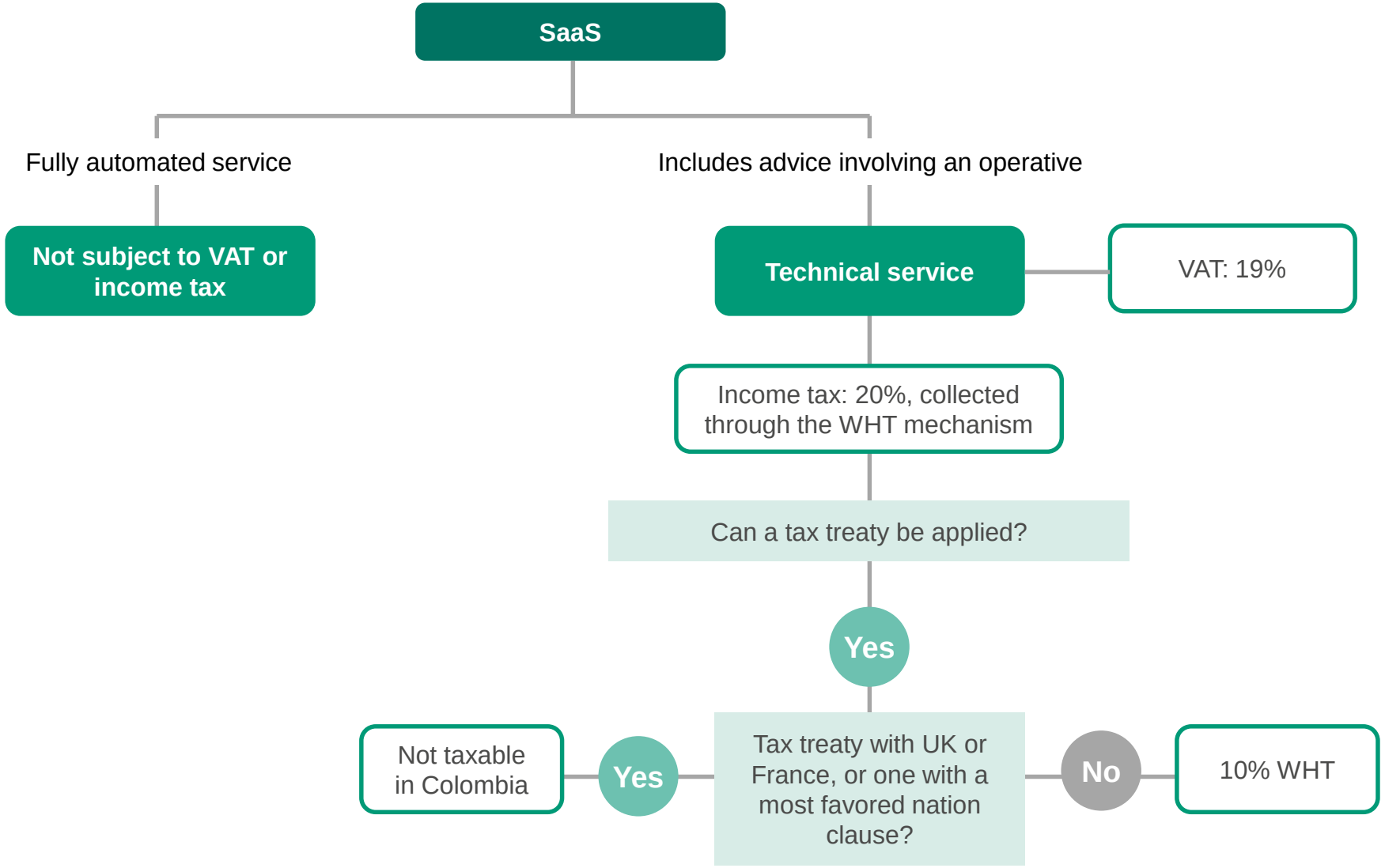
Colombia



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Colombia

There is no definition of SaaS in Colombian law, although the Colombian National Tax and Customs Directorate (DIAN) has adopted in its interpretations the same definition as that used by the Colombian Ministry of Information and Communications Technology: any software which “allows the client to use the cloud provider’s applications which are executed on cloud computing infrastructure and the applications are accessible on multiple client devices through a thin client interface”.

Broadly speaking, any payments received for the provision of services which are classed as “technical services” to clients in Colombia are treated as domestic-source income no matter whether they are provided in Colombia or from other countries, and are therefore subject to 20% withholding tax at source.

In its official interpretation, the DIAN has analyzed whether SaaS may be treated as a technical service. And it concluded that this is not always so with these services, because in some cases a few essential components of technical services are not identifiable, such as their nature as advice or the use of a skill or technique by an operator. All of this needs to be defined, because it determines whether the service, even if provided from another country, is taxable in Colombia.

When applying tax treaties, it is important to consider that generally the tax treaties signed by Colombia (except for those with France and the United Kingdom) include in the definition of royalties payments made in respect of technical services, technical assistance and consulting, which means 10% tax in Colombia. The treaties concluded with the United Kingdom and France do not include these payments in the article on royalties, which means they will be treated as “business profits” and therefore not be taxable in the country. This same treatment must be applied for treaties in which a most favored nation clause has been agreed, although the treaties with Spain, Chile and Switzerland have not enabled this clause.

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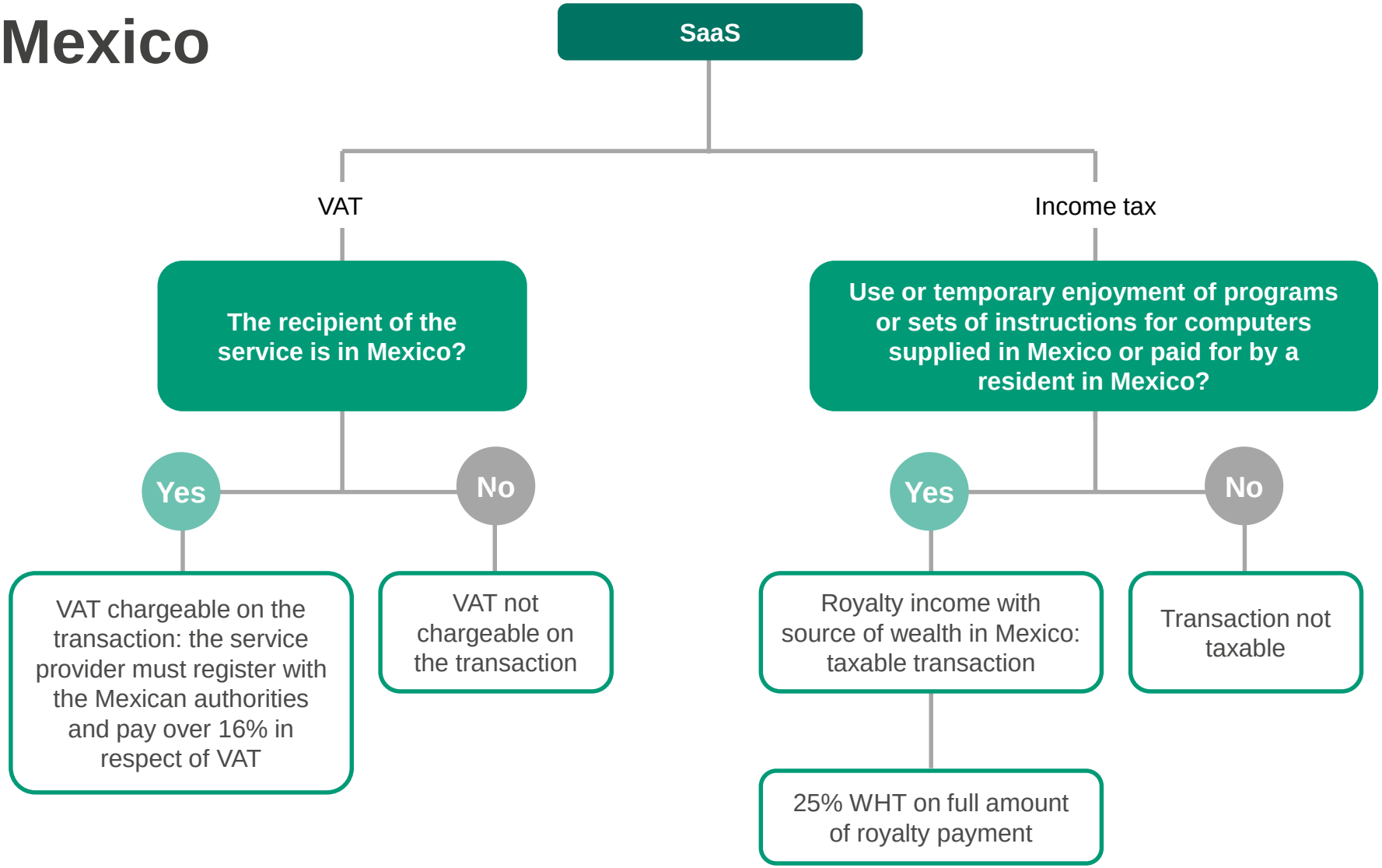
Mexico



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Mexico

In Mexico there are no specific rules on payments made in respect of SaaS, and their analysis must start out from the rules on royalties, and be guided by the most widely accepted opinions and practices on this subject.

The elements that the Income Tax Law treats as royalties include payments of any type for the use or enjoyment of programs or sets of instructions for computers. In relation to royalty income, it is considered that the source of wealth is in Mexico where the payment relates to property and rights that are used in Mexico and they are paid for by a resident in the country.

- The tax is calculated at 25%, without any deduction whatsoever, of the income obtained by the resident in another country.
- Anyone having to make payments in this respect must deduct WHT in the amount calculated as described.

To determine the final tax liability on the transaction a specific analysis is needed of the various tax treaties that Mexico has in force. It needs to be mentioned that both the network of treaties with Mexico and Mexico's observations in the OECD model tax treaty tend to tax all software-related activities as royalties.

The recipient of the service is considered to be in Mexico if any of the following tests are met: (i) the recipient must have stated to the service provider an address located in Mexico; (ii) the recipient of the service must make payment to the service provider through an intermediary located in Mexico; (iii) the IP addresses used by the electronic devices of the recipient of the service must fall within the range of addresses assigned to Mexico; and (iv) the recipient must have stated to the service provider a phone number with the country code for Mexico.

The VAT Law contains a number of requirements to be fulfilled by residents in other countries who provide digital services. If they are not suitably fulfilled, the Mexican authorities may issue an order to block the digital service, which is implemented through the concession holders belonging to the public telecommunications network in Mexico.

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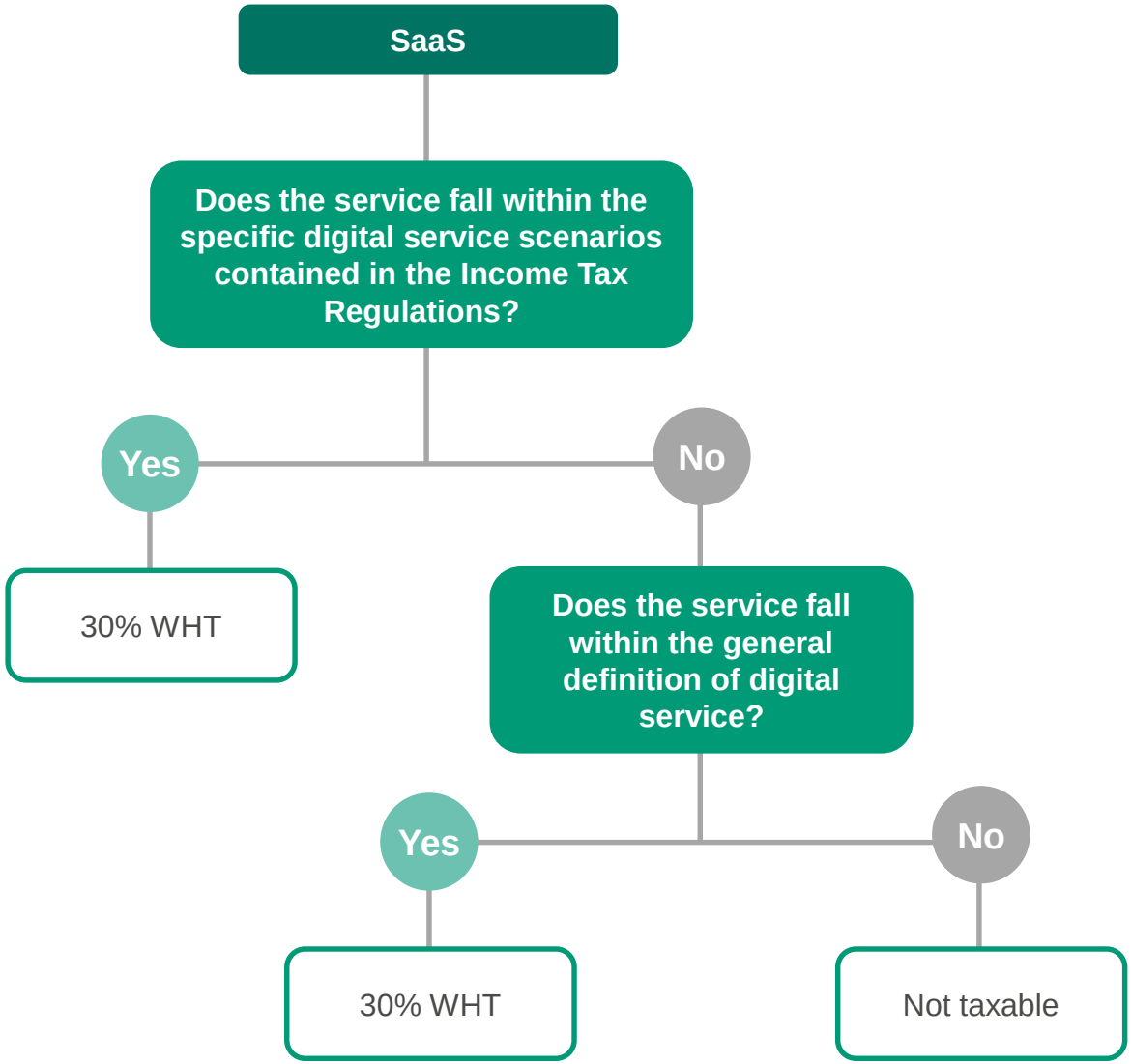
Peru



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Peru

In Peru, the tax treatment of SaaS is related to whether, according to their nature, they may be characterized as a digital service. Income is considered to have a Peruvian source if it is obtained in respect of digital services provided on the internet or any other network on which equivalent services are provided, where the service is used for economic purposes or is used or consumed in the country.

To ascertain whether the SaaS is characterized as a digital service it needs to be determined whether it falls within any of the following cases: (i) software maintenance; (ii) technical support to the customer on the network; (iii) information storage; (iv) application hosting; (v) provision of applications services; (vi) website storage; (vii) electronic access to consulting services; (viii) advertising; (ix) online auctions; (x) information distribution; (xi) access to an interactive website; (xii) interactive training; or, (xiii) online selling sites. If the supplied service falls within any of the alternatives mentioned, then it will be taxed in Peru at 30% via withholding tax.

If the service does not fall within any of the listed categories, it needs to be analyzed whether it meets the general definition of digital service; in other words, whether it: (i) is provided on the internet; (ii) is provided via online access; (iii) is essentially automatic; and, (iv) is dependent on information technology. If the service has all these characteristics, it is taxable at 30% via withholding; otherwise, the SaaS will not be treated as taxable in Peru (if it does not involve physical presence in the country).

It must be mentioned, however, that when applying tax treaties to transactions, it must be analyzed whether the SaaS is characterized as a royalty (which are taxable in the contracting state where they come from, without limitations) or as a case of business profits.

Lastly, in Peru a general sales tax is charged on the provision or use of services in the country. Therefore the provision of digital services or SaaS by a non-domiciled provider to a company domiciled in Peru is subject to 18% general sales tax (under the reverse charge mechanism).

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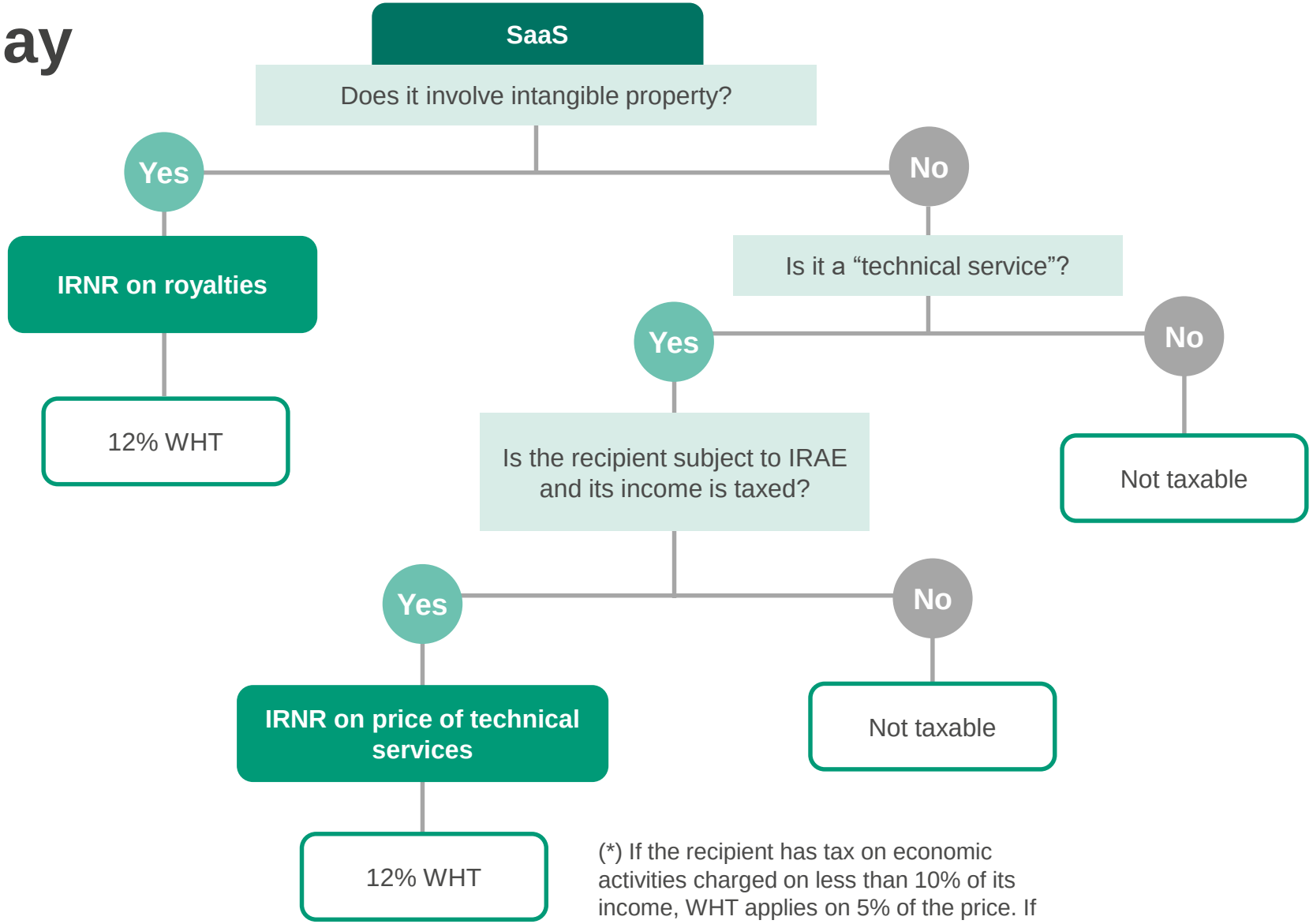
Uruguay



(*) If the recipient has tax on economic activities charged on less than 10% of its income, WHT applies on 5% of the price. If the recipient has no taxable income, WHT would not apply (foreign source)

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Uruguay

In Uruguay, the tax treatment of SaaS is determined first by defining whether that service involves an intangible property, because, if so, the income paid for that service would be characterized as a fee or royalty subject to 12% nonresident income tax on the payment for the non resident who owns the intangible property. This is if it is considered that the economic use or exploitation of that intangible asset is occurring in Uruguay and therefore the income arising has a Uruguayan source. This tax is paid via a WHT by the payer. If no intangible asset is involved, however, the payment derived from the SaaS would be subject to the same 12% Non Residents Income Tax (IRNR), although only if the Uruguayan person receiving the service characterized as a “technical” service is an entity subject to Uruguayan corporate income tax (IRAE) and if that service is included in an activity that is effectively taxed for the recipient entity. If the IRAE taxpayer receiving the services has less than 10% of its income effectively taxed, then the 12% WHT must be made on 5% of the payment derived from the SaaS. If the IRAE taxpayer receiving the service has no taxable income, then WHT would not apply.

Obviously, the application of a tax treaty may alter these conclusions based on domestic law. It makes a difference whether the SaaS is characterized as a royalty or as a service, because in the first case, generally in the treaties signed by Uruguay with other countries, the source country (Uruguay in this case) may make WHT, although they are often limited under article 12 of the tax treaties. If, however, it is characterized as a service, under the most widely accepted international principles, the payment would be characterized as a business profit, falling under article 5 and article 7 of the tax treaties, and not subject to WHT in Uruguay if the service provider does not have a permanent establishment in Uruguay. In their official interpretation, the tax authorities have argued in relation to a few services that they could be treated in the same way as royalties (Resolution 6114), although Uruguay has expressly stated that payments derived from software must be characterized as business profits in the Protocol to the tax treaty with Finland.

Because in the SaaS scenario we are analyzing the service takes place outside the country, it is not spatially included in the VAT chargeable event.

It needs to be mentioned lastly that in 2017 Uruguay introduced specific legislation to tax digital services defined in the regulations as digital services with audiovisual or streaming content, together with intermediation or mediation in the provision of those services. This legislation states that payments for these services are subject to IRNR (12%) and VAT (22%) if the customer is in Uruguay. In relation to mediation or intermediation, the legislation states that payments are subject to Uruguayan taxes on their full amounts if the supplier and the customer are located in Uruguay, whereas they are taxed on 50% of their amounts if the supplier and the customer are outside Uruguay. The regulations themselves contain specific rules for determining the location of the customer based on the invoice address and the IP address of the device. There is a rebuttable presumption that the customer is located in Uruguay where the service is paid for using electronic payment systems administered from Uruguay.

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