Cloud taxation issues and impacts

2015 edition
Cloud taxation issues and impacts
“This is a pivotal moment in global technology taxation, amid intense policy analysis of business model innovation in the cloud. Companies need to consider how new, digital-era tax policy will change their risk profiles, operational efficiency and profitability.”

Channing Flynn
International Tax Partner and
EY Global Technology Tax Services Leader
Partner, Ernst & Young LLP

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Overview
Technology companies are at the forefront of multinationals operating in a developing new global tax environment. Their ever-evolving and increasingly borderless cloud-based business models have set off a scramble among companies and governments around the world to grasp cloud taxation issues and impacts.

As a linchpin of the global digital economy, cloud computing is now pervading business across all industries. But it is the technology companies that have not only created this transformational technology but also, in turn, pioneered its use to transform their own businesses. As both cloud service providers and cloud users, technology companies are already achieving unprecedented global operational efficiencies and tapping new revenue streams worldwide.

Being the first to conduct big business in the cloud, technology companies have also been the first to run into some of the thorniest tax issues yet confronted in the global digital economy. Governments are reacting to technology companies’ race to the cloud, engaging in wide-ranging global, regional and local initiatives to overhaul the rules on the books. Important new multilateral tax guidelines are due for completion in 2015, driven in large part by digital economy concerns. But some major countries are also forging ahead unilaterally, while others try to make do in the interim by modifying existing electronic service tax rules.

As a result, the global tax landscape is riddled with gaps, inconsistencies and impending change, as described in EY’s Worldwide Cloud Computing Tax Guide (see page 14). And for technology companies, this means that cloud tax issues and impacts are plentiful, complex and significant.
But nothing is quite that simple in these early evolutionary days of cloud taxation. There are no familiar, cookie-cutter business models that tax authorities can readily understand. The existing tax laws governing technology transactions are often perceived as outdated and inconsistent. The technology and business arrangements are such that even identifying the taxable location of either cloud service providers (CSPs) or their customers can be challenging.

“There are no roadmaps in this environment, and the tax risks can be as significant for users of cloud services as for cloud service providers,” says Channing Flynn, International Tax Partner at Ernst & Young LLP and EY Global Technology Tax Services Leader.

From profit margins to partnership arrangements to compliance burdens to brand reputation – all these and more business aspects of global operations today can face surprising and changing tax risks. “Often, the best a company can do is ask the right questions,” says Flynn. “But that’s critical in the practice of tax advisory services because there’s no way to get the right answer until you’ve asked the right question.”

Importance of location
Where to locate the assets and people associated with delivering global cloud content and services is a defining tax consideration – in terms of both direct corporate tax rates and indirect sales taxes, such as value added tax (VAT). “Understanding of the relative importance and location of people functions and technology functions can fundamentally change the overall tax analysis, whether on transfer pricing, indirect tax or taxable presence,” says Joe Bollard, Ernst & Young Ireland International Tax Practice, Partner, Ernst & Young Ireland.

“As a big factor is the attitude of local tax authorities – their willingness to have a dialogue and to work with business. Every country takes a slightly different approach in its behavior and treatment of taxpayers – let’s just say that there are some very complex jurisdictions to do business in.”

Anne Freden
Partner
Ernst & Young LLP
A recent change in EU tax law provides a textbook case of business disruption in the cloud — specifically for CSPs providing consumer services from a data center in the European Union (i.e., with human and technical resources in one EU country, even if headquartered outside of Europe). In the past, a CSP could apply VAT on electronic services at the rate of tax in the EU country in which it was situated. However, the EU reversed that requirement in 2015, so the same company instead had to begin applying VAT based on the location of its customers. Several multinational technology companies had to rethink their European operating models and make extensive reconfigurations in their enterprise resource planning systems (ERPs) to prepare for this new reality across the EU’s 28 Member States.

Another scenario shows risk in companies’ cross-border value chains. Tax alignment issues could emerge as intangibles and related business activities flow more readily through clouds. An example is intellectual property (IP), and a measure would be the actual control over IP ownership functions, including people controlling development, enhancement, maintenance, protection and exploitation. Is the IP-owning company in a particular country exercising such control? Or does it simply provide a license, with these functions adding value in a second country? Where is the tax then calculated?

**Risks for global customers and contracts**

Business customers in any given country can find themselves with added burdens for collecting and reverse-charging taxes to their global CSPs.

Similar issues can arise between CSPs and the contractors in their global supply chains. In both cases, the risk increases the possibility that tax obligations will go unmet. “How you legally construct your customer contracts, whether you’re going through intermediaries like distributors or channel partners – or whether you’re going to sell directly to end users – will have a fundamental impact on your tax analysis,” Bollard says.

Consider this scenario, in which a partner in Singapore, for example, is not collecting appropriate sales taxes for a CSP based abroad. The resulting costs can include unexpected tax bills, penalties and interest. On a more positive note, some CSPs have begun using cloud service design and tax compliance for competitive advantage — providing assurances on design models that help cloud users maintain compliance with all tax regulations in the jurisdictions in which they operate.

Cloud business models are still in the early stages of their evolution as business and technology innovation continues – both in the cloud and in the closely aligned technology megatrends of smart mobility, social networking and big data analytics.

Already, however, cloud computing is not only altering the technology industry landscape, but also beginning to improve business agility for technology companies’ customers across all industries, as it increases everyone’s access to computing, storage and communications power.

A dramatic example of public cloud-enabled transformation can be seen in the millions of mobile apps residing in the cloud, accessed by more than two billion smartphones and tablets worldwide. Enterprise users, meanwhile, are using both public clouds (serving multiple customers via the internet) and private clouds (serving a single organization via private network) to gain new operational flexibility and efficiencies – thus making major shifts from capital expenditures to operating expenditures.

Both the consumer and enterprise examples above share key attributes: wherever/whenever access to content or services, without requiring software downloads or heavy IT infrastructure to process them. Driving the mobile apps growth, for instance, is the fact that much of the software sold through smartphone app stores actually consists of just the display and user interface components of sophisticated applications that run mostly in cloud data centers.

Although there are a number of definitions for cloud computing, EY generally views cloud computing as borderless commercial transactions conducted over a virtual network (e.g., the internet) in which goods or services are provided to a user (related or unrelated) anywhere in the world with access to such network.
Impacts on profit margins and pricing strategies

“Some American companies have been very surprised by European VAT,” says Anne Freden, Ernst & Young LLP Tax Partner. With their main offices, servers and content creation all in Silicon Valley—and with customers in Europe who simply log on and access their offerings—these enterprises have found that upward of 20% of what they were posting as revenue was actually owed as tax. “For companies that have grown rapidly, what starts as a small exposure can get very large, very quickly,” she says. Adds Bollard: “Especially if you’re in the business-to-consumer space, it is critical that you correctly factor the impact of VAT into both price points in the market and underlying margin expectations.”

Reputational risks

Given the sums of money at stake, cloud taxation is not a non-controversial matter. “Understanding how you’re complying with the law and documenting it is of paramount importance today,” Flynn says. “The cloud industry for some two years now has been increasingly targeted by governments and other policymakers questioning whether technology companies are paying enough tax,” he says. Often, these controversies play out in national news headlines. Some companies are modifying their value chain structures to increase the certainty of tax treatment, even if it results in an increased tax liability over the status quo.

Consumers not immune

Tax surprises are even sprung on the cloud consumer. Homeowners putting rooms on a travel site for rental as a bed and breakfast, for instance, have sometimes found themselves subject to individual or business taxes and a mountain of additional paperwork—giving both the travel site and homeowner cause for rethinking their tax positions. “Technology companies need to understand how not to expose their customers to an unnecessary tax burden—even if it’s just a reporting burden,” Flynn says.

More specifically, new technology sector offerings range from software as a service (SaaS) to infrastructure as a service (IaaS) and platform as a service (PaaS). These, in turn, are being joined by hybrid and specialized services, such as business process-, data center-, database- and testing-and-development as a service. Cloud market size projections vary by definition, with the market for SaaS enterprise applications (customer relationship management, enterprise resource management, etc.) estimated to be growing from $22.6 billion worldwide in 2013 to $50.8 billion in 2018.²

Among the technology companies in the cloud today are the makers of cloud components and systems, with their own cloud-enabled global value and supply chains, and the developers of mobile applications, collaborating with peers worldwide on cloud-based development platforms to produce the apps hosted in the cloud.

They are the software companies that have lifted their worldwide distribution models into the cloud, giving birth to new SaaS offerings. They are the internet companies with their global consumers, the information technology services companies that are increasingly serving their multinational customers as cloud service providers and the data analytics companies measuring the flows of cloud activity across the world.

As these companies’ business models are evolving, so too is the technology—making tax uncertainty an ongoing concern.
Section II

Perspective on tax authorities

With cloud computing as a catalyst for the overhaul of companies’ global cost structures and profit centers – and with steadily increasing volumes of revenue moving through the cloud – governments have focused increasing attention on taxing cloud business.

This is primarily driven by one of two motivations: while some governments focus longer term on building local digital economies – even offering CSPs tax incentives to locate in their jurisdictions – others are under severe pressure to raise public revenue after years of economic downturn. In addition, some governments seek to protect their local markets, others to preserve local cultural norms or censor unwanted content.

Governments’ ability to keep up with the technology varies as well – often lagging behind the development of new business models. “Now, in the cloud, companies are doing things even more quickly, much more virtually. And that’s just going to increase,” says Flynn. “Governments have to become more technologically sophisticated to understand this.”

Global tax policy developments
At a global level, the focal point for potential change is the Organisation for Economic Co-operation and Development’s (OECD’s) action plan on base erosion and profit shifting (BEPS). This far-reaching rewrite of existing international tax guidelines reflects governments’ concerns about the possibility of double taxation and non-taxation, as well as their desire to develop a coordinated response. The work, which the OECD has said would be completed in 2015, has been endorsed by leaders of the Group of Eight (G8) and Group of 20 (G20) nations. (Work is under way with developing countries to achieve something closer to 100% as well.)

Perhaps the single biggest BEPS decision for the technology sector came during 2014, when the OECD declared that the global digital economy is the economy, and that it cannot be treated differently for tax purposes. The technology sector and its digital business models nevertheless remain a priority. As the OECD sees it: “It is important to examine closely how enterprises of the digital economy add value and make their profits.” As of early 2015, digital economy questions, reassigned across several BEPS working groups, were at various stages of resolution. Draft work provides an indication of thinking – and in many cases, significant detail – on transfer pricing of intangibles, permanent establishment, VAT and other tax matters relevant to new digital business models.

Changing regional and national tax rules
Change is also coming at the regional and national levels, sometimes creating tensions and additional uncertainty. For example, attempts to revise tax rules to “assure that transfer pricing outcomes are in line with value creation,” as the OECD puts it, have emerged at both the national and multilateral levels. Meanwhile, a government-affiliated think tank in an EU Member State is also advocating international negotiations to adapt nexus rules, such as the definition of permanent establishment, to the digital economy – as their report also raises issues surrounding the ownership, compensation and taxation of personal data. In these and other important areas, some countries have not been satisfied simply to wait until the BEPS process is completed and new guidelines are issued. Some in the vanguard have introduced national policy reforms that they say will coalesce with the OECD’s output. Only time will tell how coherent global tax policy will be in the end.
In countries (and even some states and provinces) around the world, tax authorities are also exploring how operating models (commissioned agent, commissionaire, buy-sell) now map to contractual terms (lease/rental/license, sale or service) and, in turn, to their national tax treatment (income characterization, withholding tax, permanent establishment, indirect tax). In practical terms, this can lead to uncertainties from jurisdiction to jurisdiction on such basic questions as whether a business offering is taxed as content, service, software or some bundle of the three; about whether sales taxes apply; or about whether more income tax is due.

In comparing detailed information on tax rulings across countries, EY’s Worldwide Cloud Computing Tax Guide has identified key international patterns, such as the lack of clarity regarding the VAT treatment of cloud computing services and the widespread (but not universal) adherence to evolving OECD guidance.

Among the patterns:

- **Taxable nexus** – certain countries surveyed report that the mere presence of a cloud server in-country would likely constitute a taxable presence, while other countries base their determination on the server functions.
- **VAT** – many countries have not defined or have only partially defined the VAT treatment of cloud computing services.
- **Withholding tax** – some regions of the world, such as Latin America, require more withholding taxes than others, such as Europe.

Resolving the myriad of tax questions will not be easy. Even multinationals involved in similar activities – say, digital marketing – may have dissimilar technology infrastructures and business models.

Map those to tax rules that differ from place to place. And consider that in global cloud networks (employing internationally distributed backup facilities), the exact location of a transaction at any time can be hard to place.
Then, there are the wild cards. For instance, while many smaller countries may be content to let global or regional initiatives guide their future rulings, some of the larger countries may take unilateral action that will increase the cost of doing business in those markets—and in other countries that choose to follow suit.

As they unfold, these tax developments are touching on all the key technology megatrends: mobile, social, cloud and big data analytics. For instance, one major European country has suggested taxing data collected on consumers for big data analytics and marketing.

**Improving government relations**

Companies face varying attitudes and behaviors on the part of local tax authorities toward their new ways of doing business in the cloud, at both the policy and administrative levels.

At the policy level, government-industry interaction over cloud taxation has ranged from contentious spectacle to evolved, forward-looking dialogue. The conversation is far from over. “Governments are only beginning to understand how this industry works today and consider the future,” Flynn says. In the meantime, few expect certainty on these issues any time soon, especially since any new OECD guidelines would actually need to be implemented into law in each individual nation.

At an administrative level, “A big factor increasing the complexity of today’s tax environment is the degree to which tax authorities differ in their attitude toward business and their willingness to have a dialogue with business,” Freden says. “In some jurisdictions, the good news is that companies can gain more certainty by engaging with tax authorities that are willing to give them advance clearances or rulings on certain tax matters,” Bollard says.
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Section III

Asking the right tax questions

From country to country, companies must ask the right tax questions about how they are structuring their cloud-based operations and how that will impact their margins, efficiency and competitive positioning. They must look at the entire picture – and do it as a matter of up-front planning.

For example, companies often focus on corporate tax when devising their international tax structures as part of their overall strategic business plan. “But they also need to consider their structure’s VAT implications. Thinking about this afterward – after you’ve already made some critical business decisions – will carry an absolute cost to business,” Freden says.

Chief information officers, chief digital officers and their tax colleagues should work together with business lines – not only on the design of the IT infrastructure to deliver the service, but also on the ERP system used for managing tax. “It’s quite possible that the tax efficiency in that structuring can materially assist in funding the budget for any new cloud buildout,” Bollard says.

Businesses need to conduct up-front and ongoing conversations that anticipate, mitigate or capitalize on such events as new cloud tax rulings or the integration of cloud technology into business operations. “It’s not just existing policy but the future policy direction that is impacting companies in their decision-making,” Bollard says.

The lack of planning can lead not only to tax surprises, but also to higher costs to support the administrative burden of complying with those taxes.
Considerations from different perspectives
With EY’s online *Worldwide Cloud Computing Tax Guide*, companies can get a high-level view of the tax conditions in more than 120 countries worldwide. As you refer to the guide and analyze your cloud plans, what patterns will emerge for your tax situation?

As a CSP:
- What might be the tax implications for your profit margin as you move to a cloud model and rebalance capital and operational expenditures from one country to the next?
- What level of independent assurance are you willing to offer customers?
- Are you aware of all potential domestic and global incentives to supplement CSP expansion plans (relevant, but not covered in the guide)?

As a cloud business user:
- Have you adequately considered tax nexus and the related compliance issues in the selection of your CSP and are they clearly documented in your agreement? Are the filing and tax responsibilities clearly identified among the parties?
- How will you monitor CSP adherence to agreed-upon compliance duties?
- How will the relationship with your CSP adapt to changing tax statutory and regulatory requirements?

As either a CSP or cloud user:
- Is your tax strategy aligned with your business model and flexible enough to change as required?
- Are you alert to indirect as well as direct tax considerations?
- Where do you have tax nexus?
- Have you reviewed all global contracts to manage local tax issues or expectations effectively?
- Where are your intermediaries and customers located? Are you/they applying the necessary VAT or other sales/use tax?
- What are the revenue characterization and sourcing rules for each jurisdiction in which you operate? Do you have tax risk with respect to these issues in your value chain?
- Is your ERP system built to manage global compliance?
- Which countries are looking to create job growth and attract investment in the digital economy, which are more focused on generating public revenue, and how is this changing their local tax environment?
- Are you engaging with local tax authorities to gain advance guidance?
- Are you doing up-front analysis of your tax position in line with all of your technology transitions? Are you in a position to reassess your tax position periodically?
Summary of the Situation

- The tax issues and impacts for cloud computing and the digital economy remain dynamic across worldwide jurisdictions and will continue to evolve.

- Global technology companies have been and will continue to be in the first wave of businesses to feel the impact of dramatically new and changing tax rules in the cloud.

- The ever-changing technology tax landscape creates business uncertainty and risk, on one hand, and opportunity, on the other, calling for up-front and ongoing conversations that anticipate, mitigate or capitalize on such events as new cloud tax rulings or the integration of cloud technology into business operations.

- Technology companies need to bring tax to the planning table early on and ask the right questions to avoid high-impact surprises — for themselves as CSPs, for their business customers and even for the consumer.

- Determining where and whether a CSP has a taxable presence is a necessary step in designing new business models or subscribing to a CSP offering.

- Analyzing the underlying substance of the CSP’s product offerings and customer contracts will assist in appropriate revenue characterization and avoid unmet tax obligations. All cross-border enterprise value chains merit similar analysis.

- Companies should work to improve relationships with tax authorities and seek advance certainty on business plans in the form of advance clearances or other rulings.

- CSPs should approach CSP design and tax compliance as a potential competitive advantage. One way to achieve this is through assurances on design models that help cloud users maintain compliance with all tax regulations in the jurisdictions in which they operate.

EY’s cloud taxation reference manual

- EY has dedicated time, talent and resources to providing technology companies with a reference manual that will allow them to identify jurisdictional information and to formulate the questions and answers needed to support their cloud strategy.

- The EY Worldwide Cloud Computing Tax Guide is there to help you. The guide demonstrates EY’s commitment and passion for the technology industry, as well as its depth of industry and technical tax knowledge and breadth of experience across jurisdictions around the world.

- A copy of the guide can be found at ey.com/cloudtaxguide.

Concluding thoughts

With insight and up-front planning, technology companies can rise above the uncertainty to realize the opportunities, efficiencies and growth inherent in cloud business models. Proceeding without sufficient knowledge can lead to significant issues impacting compliance, risk management, operational efficiency, profitability and, ultimately, missed opportunity.
We invite you to explore EY’s *Worldwide Cloud Computing Tax Guide* – a dynamic online tool that tracks national cloud-related tax changes across the world. The guide contains relevant tax information for more than 120 countries, making it the most comprehensive compilation of cloud tax rules available today. Going forward, EY will continue to expand and update the guide on a regular basis. This is a dynamic reference that draws on the knowledge and experience of EY’s Global Technology Sector and its worldwide teams of tax professionals, who together have been there from the beginning – helping companies navigate the complexities of cloud-based business, technologies and taxation.

The EY *Worldwide Cloud Computing Tax Guide* is itself cloud-enabled, culling thousands of hours of tax research involving EY member firm partners, practitioners and clients around the world. And as cloud tax policy evolves, the guide is keeping abreast of changes on a dedicated website including relevant linkages with such other online EY publications as the *Worldwide Corporate Tax Guide, Worldwide VAT, GST and Sales Tax Guide* and the groundbreaking *Cloud computing issues and impacts* report.

The guide provides a comprehensive mapping of operating models (commissioned agent, commissionaire, buy-sell) to contractual terms (lease/rental/license, sale or service) and their national tax treatment (income characterization, withholding tax, permanent establishment, indirect tax). Analyzing this national data at a global level, EY member firm tax professionals also identify key international patterns.

It also provides an overview for any company (technology or non-technology) looking to navigate this new global business setting. Access the guide at ey.com/cloudtaxguide and discuss your tax profile with us by contacting any of our global tax contacts listed on pages 18 through 20.
“The tax problems with unplanned international investments in the cloud can be quite significant: suboptimal investment decisions, unrecorded taxes and surprises affecting the pricing of your product – to name just three. And once your business is on a certain track, it can be very difficult to restructure the model later on.”

Joe Bollard
Ernst & Young Ireland International Tax Practice Leader
Partner, Ernst & Young Ireland
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Glossary of terms

Cloud terms

Cloud infrastructure as a service (IaaS)
The capability provided to the customer is to provision processing, storage, networks and other fundamental computing resources where the customer is able to deploy and run arbitrary software, which can include operating systems and applications. The customer does not manage or control the underlying cloud infrastructure but has control over the deployed applications and possibly limited control of select networking components (e.g., host firewalls).

Cloud platform as a service (PaaS)
The capability provided to the customer is to deploy onto the cloud infrastructure customer-created or acquired applications created using programming languages and tools supported by the provider. The customer does not manage or control the underlying cloud infrastructure, including network, servers, operating systems or storage, but has control over the deployed applications and possibly application hosting environment configurations.

Cloud software as a service (SaaS)
The capability provided to the customer is to use the provider's applications running on a cloud infrastructure. The applications are accessible from various client devices through a thin client interface, such as a web browser (e.g., web-based email). The customer does not manage or control the underlying cloud infrastructure, including network, servers, operating systems, storage or even individual application capabilities, with the possible exception of limited user-specific application configuration settings.

Electronic services
The European Commission applies the term electronic services broadly to the electronic processing and transmission of data for many diverse activities, including online delivery of digital content and services, among others.

Enterprise resource planning system (ERP)
A management information system that typically operates across major units and functions in an organization.

Private cloud
The cloud infrastructure is operated solely for an organization. It may be managed by the organization or a third party and may exist on-premise or off-premise.

Public cloud
The cloud infrastructure is made available to the general public or a large industry group and is owned by an organization selling cloud services.
Tax terms

Direct tax
Direct taxes are taxes imposed on income, capital gains, net worth, property tax and others (OECD).

Income characterization
For the purposes of this report, this term refers to the treatment of electronic transactions as either (i) income from the provision of services, sale of product, rental or license, (ii) other income from intangible property, such as royalties, or (iii) bundling of the above.

Indirect tax
Tax imposed on certain transactions, goods or events (OECD). Examples in this report include VAT, goods and services taxes (GST) and other sales taxes.

Jurisdiction
The power, right or authority to interpret and apply tax laws or decisions (OECD). In this report, jurisdictions include nations and states.

Permanent establishment
See taxable nexus.

Taxable nexus
Taxable nexus refers to the taxation of an entity in a country (other than its country of incorporation) due to the level of presence and activity within that country. This differs from a permanent establishment, which is the level of activity required to create a taxable nexus as agreed upon between two countries in an income tax treaty.

Transfer pricing
A transfer price is the price charged by a company for goods, services or intangible property to a subsidiary or other related company (OECD).

Value added tax (VAT)
See indirect tax.

Withholding tax
Tax on income imposed at source, i.e., a third party is charged with the task of deducting the tax from certain kinds of payments and remitting that amount to the government (OECD).

Sources

3 Cloud computing issues and impacts, EY, © 2011 EYGM Limited.
4 “SaaS remains most popular form of cloud computing for UK IT,” ComputerWeekly, 11 February 2013.
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Global tax contacts

The EY Worldwide Cloud Computing Tax Guide provides an overview for any company looking to navigate this new global business setting. Access the guide at ey.com/cloudtaxguide and discuss your tax profile with us by contacting any of our global tax professionals listed below.

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