

## Report on recent US international tax developments - 16 August 2019

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The United States (US) Treasury and Internal Revenue Service (IRS) on 9 August 2019 released Proposed Regulation Section 1.861-19 ([REG-130700-14](#)) addressing cloud-based and other digital transactions involving digital content, such as gaming and social media. The Government also proposed regulations that would amend current Reg. Section 1.861-18, which provides rules governing transactions involving computer programs. These proposed rules represent Treasury's first significant attempt to grapple with cloud computing and related digital tax issues.

The proposed regulations apply for purposes of determining the treatment of software and cloud transactions under certain provisions enacted as part of the *Tax Cuts and Jobs Act* (TCJA) (e.g., Internal Revenue Code<sup>1</sup> Sections 59A, 245A, 250 and 267A). Application of the proposed regulations to certain TCJA provisions would depend, in part, on the determination of a cloud transaction as a service or lease of property.

The proposed regulations reflect an incremental approach to create a flexible and coherent framework to resolve a host of complex and dynamic tax issues raised by cloud computing transactions and the digital economy. The proposed regulations identify several critical gating issues regarding the classification of cloud computing and other digital transactions, such as characterizing cloud transactions as either a service or a lease.

The proposed regulations would modernize and expand the software regulations under Reg. Section 1.861-18 to cover “digital content,” as well as clarify certain open questions such as the source of income for transactions involving sales of copyrighted articles. However, the proposed regulations also reserve on other important issues, principally, the source of income generated by cloud computing transactions and other digital activities.

Prop. Reg. Section 1.861-19 would apply to cloud transactions entered into in tax years beginning on or after the date of publication of final regulations. Similarly, Prop. Reg. Section 1.861-18 would be effective for transactions entered into in tax years beginning on or after the date of publication of the regulations as final.

The IRS this week released a revised version of Publication 5188 on reporting FATCA (*Foreign Account Tax Compliance Act*) data. The International Data Exchange Services (IDES) user guide provides information for financial institutions,

direct reporting non-financial foreign entities, sponsoring entities, non-global intermediary identification number filers, and Host Country Tax Authorities who transmit data through the IDES.

The Organisation for Economic Co-operation and Development on 13 August 2019 released the first batch of Stage 2 peer review reports on implementation of the Base Erosion and Profit Shifting minimum standard on dispute resolution (Action 14) by Belgium, Canada, the Netherlands, Switzerland, the United Kingdom and the United States. According to the report, all of the jurisdictions reviewed in this group met the Action 14 minimum standard with respect to the prevention of disputes, and when disputes occur, they provide access to mutual agreement procedures (MAP) in all eligible cases. In regard to the US, the report concluded that although US tax treaties contain a provision relating to MAP, not all of the treaties are consistent with the requirements of the Action 14 minimum standard.

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## Endnote

1. All “Section” references are to the Internal Revenue Code of 1986, and the regulations promulgated thereunder.

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