A Cloudy Forecast for SaaS Companies Claiming Foreign Tax Credits

By J. Michael Cornett and William Hooker

On January 4, 2022, the Internal Revenue Service ("IRS") and the U.S. Treasury Department issued final regulations (Regulations) that provided significant guidance on the determination of whether a foreign tax is eligible for the foreign tax credit ("FTC").[1] These Regulations substantially modified prior regulations issued under Code Sec. 901-905.[2] The Regulations can preclude certain foreign withholding taxes and other taxes that have historically been considered creditable from being claimed as an FTC. These Regulations apply to foreign taxes paid in tax years beginning on or after December 28, 2021.

The complexity of the Regulations will require all taxpayers, but in particular, small-to-mid-size taxpayers, to spend additional time and resources to determine if an FTC is available for the foreign taxes they paid. This article will provide an overview of the U.S. federal tax characterization of technology-based transactions, followed by an overview of the Regulations. The article will provide simple examples showing the interactions of these two sets of regulations and possible ways to mitigate the impact of the Regulations.

I. Overview of Taxation of Technology Industry

The revenue streams from which businesses in the technology industry derive income are wide and varied. Some of the more commonly used terms to describe their offerings include computer programs, computer software, digital content, apps, digital services, on-demand network access, streaming services, streaming digital content (music, video), online gaming, cloud computing, cloud storage, cloud services, infrastructure-as-a-service ("IaaS"), platform-as-a-service ("PaaS"), and software as-a-service (SaaS). Companies continue to innovate and add more terms to the lexicon of the technology industry. From a tax perspective, it is challenging for the tax authorities in the United States and other countries to keep pace with the innovation in this industry. Consequently, it can be a challenge for businesses (and their tax advisors) in the United States and abroad to determine the ultimate global tax costs of their cross-border transactions.

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The terms used by the parties to the transactions and the classification of the transaction under copyright law (or, presumably, other bodies of law outside of the Code) are not determinative of the transaction's classification as a sale, royalty, service, and/or lease for tax purposes.[3] The tax classification of a transaction is not determined by its form but instead by its substance (based on all facts and circumstances) in light of the applicable tax rules. Code Sec. 7701(e) provides factors that indicate whether a transaction should be treated as a service or as a lease transaction. Treasury and the IRS issued regulations in October of 1998 to provide some guidance at it related to computer programs.[4] However, Treasury and the IRS did not issue further guidance until proposed regulations were issued in August of 2019 that address the classification of "digital content" and "cloud transactions."[5]

A. Code Sec. 7701(e)

Under this Code Section, a "contract which purports to be a service contract shall be treated as a lease of property if such contract is properly treated as a lease of property based on the relevant factors including whether or not:

1. The service recipient is in physical possession of the property,
2. The service recipient controls the property,
3. The service recipient has a significant economic or possessory interest in the property,
4. The service provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract,
5. The service provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient, and
6. The total contract price does not substantially exceed the rental value of the property for the contract period."

B. Reg. §1.861-18

This regulation provides rules for classifying transactions relating to a computer program, which is defined as a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result.[6] This regulation addressed how transactions would be classified depending on whether the transaction involved the transfer of a computer program or the provision of services or know-how related to a computer program. The regulation provides that a transfer of a "copyright right"[7] would be classified as a sale/exchange transaction or a licensing transaction. Under the regulation, the transfer of a "copyrighted article" is either a sale/exchange transaction or a leasing transaction generating rental income.

C. Proposed Reg. §1.861-18

This proposed regulation addresses transactions involving "digital content." This proposed regulation replaces "computer program" with "digital content,"[8] thus expanding the reach of the regulation to cover not just computer programs but also other forms of digital content such as books, movies, and music in digital format. If finalized, the proposed regulations would apply to the transfer of digital content or the provision of services or know-how in connection with digital content. The proposed regulation also provide specific sourcing rules for copyrighted articles and make clear that digital content sold and transferred through an electronic medium is sourced to the location of the download or installation on the user's device if known or the location of the customer.

D. Proposed Reg. §1.861-19

Proposed Reg. §1.861-19 addresses transactions referred to as "cloud transactions". A cloud transaction is defined as a transaction through which a person obtains on-demand network access to computer hardware, digital content (as defined in Proposed Reg. §1.861-18(a)(3)), or other similar resources, other than on-demand network access that is *de minimis* taking into account the overall arrangement and the surrounding facts and circumstances.[9] Under the proposed regulation, a cloud transaction would be classified either as a lease of computer hardware/digital content or a service, taking into account all relevant factors. Factors that demonstrate that a cloud transaction is classified as the provision of services rather than a lease of property include the following:

1. The customer is not in physical possession of the property[10];
2. The customer does not control the property, beyond the customer's network access and use of the property;
3. The provider[11] has the right to determine the specific property used in the cloud transaction and replace such property with comparable property;
4. The property is a component of an integrated operation in which the provider has other responsibilities, including ensuring the property is maintained and updated;

5. The customer does not have a significant economic or possessory interest in the property;
6. The provider bears any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract;
7. The provider uses the property concurrently to provide significant services to entities unrelated to the customer;
8. The provider's fee is primarily based on a measure of work performed or the level of the customer's use rather than the mere passage of time; and
9. The total contract price substantially exceeds the rental value of the property for the contract period.

If the cloud transaction is treated as a provision of services, income would be sourced to location where services are performed. If the transaction is classified as a lease transaction, then income is sourced to the place where the property is used. Unfortunately, the regulation does not provide any further guidance as to the location of where cloud computing services are performed. The nature of cloud computing means the facilities, equipment, and personnel can be in multiple locations. Thus, the key question will be where the service is performed. Is it performed at the location of the physical infrastructure (*i.e.*, servers, computers), where the people who are involved in the service (*e.g.*, programmers, network maintenance) are located, or where the customers are located?[12]

II. Overview of the FTC Provisions and Regulations

In general, an FTC is allowed for income, war profits, and excess profits taxes (Levy) paid during the tax year to any foreign country.[13] The determination of whether a Levy is a foreign income tax is determined independently for each separate Levy.[14] Reg. §1.901-2(a)(1)(ii) provides that a Levy is a foreign income tax only if it is a foreign tax and is either a net income tax or an in lieu of an income tax.

A. Code Sec. 901 Tax—Net Income Tax

A foreign tax is a net income tax only if the foreign tax meets the net gain requirement in Reg. §1.901-2(b).[15] The preamble to the Regulations describes the net gain requirement as prescribing the elements of gross receipts and costs that must comprise the foreign tax base. Reg. §1.901-2(b)(1) generally provides that a foreign tax satisfies the net gain requirement only if the tax satisfies the following requirements:

1. Realization Requirement,
2. Gross Receipts Requirement,
3. Cost Recovery Requirement (previously referred to as the net income requirement), and
4. Attribution Requirement.

These requirements are applied to a foreign tax solely by reference to the foreign tax law governing calculation of the foreign tax base, unless otherwise provided, and without any consideration of the tax rate.[16]

1. Realization Requirement

A foreign tax satisfies the Realization Requirement if the tax is imposed on one or more of the events described in Reg. §1.901-2(b)(2)(i). The types of events that meet the realization requirement are:

a. Realization events (*i.e.*, foreign tax is imposed on or after the occurrence of events that result in the realization of income under U.S. tax law);
b. Pre-realization events (*i.e.*, foreign tax is imposed upon the occurrence of an event before a realization event that results in recapture of a tax deduction, tax credit, or other tax allowance previously accorded to the taxpayer);[17] or
c. Pre-realization timing difference event (*i.e.*, when the foreign tax is imposed upon the occurrence of a pre-realization event other than a recapture event, but only if the foreign country does not, upon the occurrence of a later event, impose a second tax or separate levy on the same taxpayer (treating a disregarded entity as a taxpayer separate from its owner) on the income on which the first tax was imposed by reason of the pre-realization event).

2. Gross Receipts Requirement

A foreign tax satisfies the Gross Receipts Requirement if the tax is imposed on one or more of the amounts described in Reg. §1.901-2(b)(3)(i)(A)–(D). The types of amounts that meet the Gross Receipts Requirement are:

a. Actual gross receipts;
b. Deemed gross receipts (applies in case of an insignificant nonrealization event or a realization event under U.S. law that does not result in actual gross receipts provided it is imposed on deemed gross receipts that are reasonably calculated to produce an amount not greater than the fair market value ("FMV") of actual gross receipts or property);
c. Deemed gross receipts (in the amount of a tax deduction that is recaptured by a pre- realization recapture event); or

d. Deemed gross receipts (in the amount arising from a pre-realization event).

3. Cost Recovery Requirement

A foreign tax satisfies the Cost Recovery Requirement if the tax base is computed by reducing gross receipts to permit recovery of significant costs and expenses (including capital expenditures) attributable to those gross receipts. A foreign tax need not permit recovery of significant costs and expenses that are not attributable to gross receipts included in the foreign tax base.[18] Principles used in foreign law to attribute costs and expenses to gross receipts may be reasonable even if they differ from principles that apply under U.S. law (for example, principles that apply under Code Sec. 265, 465, or 861(b)). Reg. §1.901-2(b)(5) contains additional requirements that address foreign tax law rules for attributing costs and expenses to gross receipts.

Whether a cost or expense is significant is determined based on whether, for all taxpayers in the aggregate to which the foreign tax applies, the item of cost or expense constitutes a significant portion of the taxpayers' total costs and expenses. Costs and expenses (as characterized under foreign law) related to capital expenditures, interest, rents, royalties, wages or other payments for services, and research and experimentation are always treated as significant costs or expenses. Foreign tax law is considered to permit recovery of significant costs and expenses even if recovery of all or a portion of some costs or expenses is disallowed provided the disallowance is consistent with the principles underlying disallowances required under U.S. tax law, including disallowances intended to limit base erosion or profit shifting. For example, a foreign tax is considered to permit recovery of significant costs and expenses if:

a. It limits interest deductions to 10 percent of taxable income (determined either before or after depreciation and amortization) based on principles similar to those underlying Code Sec. 163(j);
b. disallows interest and royalty deductions in connection with hybrid transactions based on principles similar to those underlying Code Sec. 267A;
c. disallows deductions attributable to gross receipts that, in whole or in part, are excluded, exempt, or eliminated from taxable income; or
d. disallows some expenses based on public policy considerations similar to the disallowances in Code Sec. 162.

A foreign tax law permits recovery of significant costs and expenses even if the costs and expenses are recovered earlier or later under foreign law than under U.S. law, unless the time of recovery is so much later (for example, after the property becomes worthless or is disposed of) as to constitute an effective denial of recovery. The amount of costs and expenses recovered under foreign tax law is neither discounted nor augmented by taking into account the time value of money attributable to any acceleration or deferral of a tax benefit resulting from foreign law cost recovery relative to when tax would be paid under U.S. law. Therefore, a foreign tax satisfies the cost recovery requirement if items deductible under U.S. law are capitalized under foreign law and recovered either immediately, on a recurring basis over time, upon the occurrence of some future event, or if recovery of items capitalized under U.S. law occurs more or less rapidly than under foreign law.

4. Attribution Requirement

This is a new requirement that did not previously exist. This requirement has been controversial. The rules vary depending on whether the taxpayer is nonresident or resident in the foreign country imposing the tax. A foreign tax satisfies the Attribution Requirement if the gross receipts and costs included in the foreign tax base are determined in accordance with Reg. §1.901-2(b)(5)(i) for nonresidents and Reg. §1.901-2(b)(5)(ii) for residents.

a) Attribution Requirement for resident taxpayers

For residents of a country, the Attribution Requirement requires that allocation of income among related parties must be determined under arm's length principles. The arm's length principles cannot take into account location of customers, users, or any other destination-based criteria.

b) Attribution Requirement for nonresident taxpayers

The gross receipts and costs attributable to each nonresident's income item included in the foreign tax base must be based on one of the three following requirements that are (1) activities, (2) source, or (3) situs of property:

i. Attribution based on activities—must be limited to the gross receipts and costs that are attributable "under reasonable principles" to the nonresident's activities within the foreign country imposing the tax. Reasonable principles include attribution based on nonresident's functions, assets, and risk located in the country similar to determining effectively connected income (ECI) under Code Sec. 864(c). Specifically excluded are location of customers, users, or similar destination-based criteria or the location of a supplier.

ii. Attribution based on source—must be limited to gross income arising from sources within the foreign country. Under this requirement, the sourcing rules must be reasonably similar to the source rules of the Code. To make this determination, the character of the gross income is generally determined using foreign law. For example, if the transaction is sourced as a service for U.S. tax purposes, but sourced as a royalty for foreign tax purposes, the transaction will be sourced as royalties.[19] For services, the payment source must be determined based on where services are performed. Place of performance does not include determining the place of performance based on location of the service recipient. For royalties, it must be determined based on the place of use or the right to use, not residency of person making the payment.

iii. Attribution based on situs—applies only in cases where U.S. federal tax law would tax a nonresident's capital gains. For a tax imposed on property other than real property, the base may only include gross receipts attributable to property forming part of the business property of a taxable presence under rules similar to Code Sec. 864(c) or ECI. For sales of a copyrighted article, it must be treated as a sale of tangible property under foreign law, and not a license payment.

B. Code Sec. 903—In Lieu of Taxes

Code Sec. 903 provides that the term "income, war profits, and excess profits taxes" in Code Sec. 901 includes a tax paid "in lieu of" a tax on income, war profits, or excess profits otherwise generally imposed by a foreign country. Reg. §1.903-1(b)(2)(i)-(ii) provides that a foreign levy is a tax in lieu of an income tax only if it is a foreign tax and it satisfies the Substitution Requirement or the Covered Withholding Tax Requirement.

1. Substitution Requirement

A foreign levy satisfies the Substitution Requirement if, based on foreign tax law, a tested foreign tax satisfies either (1) the general requirements in paragraphs (c)(1)(i) through (iv) of Reg. §1.903-1, or (2) the Covered Withholding Tax Requirements described in paragraph (c)(2).[20] The general Substitution Requirement in Reg. §1.903-1(c)(1) is met if:

a. There exists a generally imposed net income tax as described in Reg. §1.901-2(a)(3);
b. Non-duplication of net income tax exists if excluded income is subject to the tested foreign tax but not the generally imposed net income tax;
c. Close connection to excluded income (a close connection must be established with proof that the foreign country made a cognizant and deliberate choice to impose the tested foreign tax instead of the generally imposed net income tax. The proof must be based on foreign tax law or the legislative history of either the tested foreign tax or the generally imposed net income tax. The proof must describe the provisions excluding taxpayers subject to the tested foreign tax from the generally imposed net income tax).
d. Jurisdiction to tax excluded income meets one of the attribution requirements described in Reg. §1.901-2(b)(5).[21]

2. Covered Withholding Tax

If the general Substitution Requirements for a substitution tax are not met, then the Covered Withholding Tax Requirement may apply. Reg. §1.903-1(c)(2) provides that withholding taxes are treated as a creditable in lieu of tax if, based on foreign law, the tested foreign tax meets:

1. The generally imposed net income tax as described in Reg. §1.901-2(a)(3);
2. The tax is imposed on gross income of nonresidents;
3. Non-duplication exists (*i.e.*, this tax is not in addition to any net income tax imposed by the foreign country); and
4. The income subject to tax satisfies the source-based attribution requirement previously discussed in Reg. §1.901-2(b)(5) *supra* (this requires the foreign law sourcing rules to be reasonable similar to those in the United States).

III. Interaction of FTC Regulations and Technology Characterization Rules

To determine if a particular foreign tax will be a creditable FTC, a taxpayer will have to:

1. Determine the character of the transaction (*i.e.*, income from the sale of property, royalty income, rental income, or service income) under the Code;
2. Determine the source of the income (*i.e.*, United States or foreign) under the Code;
3. Determine the character of the transaction under foreign law; and
4. Determine if the tax is a creditable under Code Sec. 901 or 903 by applying the tests described under each section.

To illustrate this interaction and the complexity that can result, the following examples based on a SaaS transaction will be used.

A. Company A, a U.S. Corporation, Provides SaaS to a Customer in Country X

1. SaaS Treated as a Service Transaction in Country X

All employees and servers of Company A are located in the United States. There is no tax treaty with Country X.[22] Country X imposes a withholding tax on payments made by customer for such services. Under U.S. tax principles, the key question for this type of service is the location at which the service is performed. Is the service performed at the location of the physical infrastructure (*i.e.*, servers, computers), where the people involved in the service (*e.g.*, programmers, network maintenance) are located, or where the customers are located? Location of the customers is not an acceptable basis for determining the location of services under U.S. tax principles. Neither the proposed regulation on cloud computing nor the FTC Regulations provide guidance on the place of performance for a cloud transaction.

Thus, the FTC Regulations not only increase the complexity of FTCs in general but also the cost and time to determine if a foreign tax is creditable.

As all employees and servers of Company A are located in the United States, the service is performed in the United States and the services income would be U.S. source. Would the Country X withholding tax be creditable for U.S. tax purposes?

Under the FTC Regulations, Country X's rules are used to characterize the transaction. Assume Country X characterizes the transaction as a service performed in Country X on the basis that the customer is in Country X. The tax would not be creditable as the Attribution Requirement would not be met as Country X relied on the location of the customer to establish the basis for taxation.

To address the non-creditability of the tax, Company A may consider inserting a gross up provision for the foreign tax in the contract with the customer. Alternatively, the U.S. company could decide to locate a server in Country X that is used in the SaaS transaction. Under U.S. tax principles, all or a portion of the income could be treated as foreign source. If Country X treats this as a service performed at the location of the server under its law and not the location of the customer, then the tax should be creditable assuming the other requirements of the FTC regulations are met.

Alternatively, Company A could also establish a subsidiary in Country X to provide the service. If that is the case, then instead of a withholding tax, the subsidiary would be subject to direct taxation in Country X. This would require the rules under Code Sec. 901 to be met. In addition to the Attribution Requirement, the Subsidiary would be subject to the Cost Recovery Requirement, which could add an additional layer of complexity depending on the tax structure of Country X.

2. SaaS Transaction Treated as a Licensing Transaction in Country X, but as a Service Transaction in the United States

Same facts as the example above, but Country X treats the transaction as a licensing arrangement instead of a service transaction and under their rules characterizes the payment for use of property in Country X. Under Country X law, the payment should meet the Attribution Requirement if Country X's rules are viewed as "similar to" the U.S. rules. No guidance is provided on what is meant by "similar to." Assuming Country X sources royalty payments based on place of use, the withholding tax may be considered a creditable foreign tax if it meets the other requirements of the FTC regulations. An issue with this fact pattern is that you may have a creditable foreign tax but the income to which it relates is U.S. source income as all services are performed in the United States. Thus, no FTC would be available unless Company A has other foreign source income in the same basket to which the tax is creditable.[23]

IV. Conclusion

The Regulations created new requirements to determine if a foreign tax is creditable. Further, the Regulations now require you to have knowledge of foreign law on

how a transaction should be characterized and how income is sourced from that transaction. It also requires the taxpayer to make a subjective analysis of whether the foreign rules are "similar to" or whether the foreign law "is reasonable." Thus, the Regulations not only increase the complexity of FTCs in general but also the cost and time to determine if a foreign tax is creditable. As a result, it is possible that many smaller taxpayers either will forego the credit or take their chance that the IRS will not challenge the taxpayer's position on the creditability of the tax.

However, help may be on the way. At an event at the Tax Policy Institute on May 20, 2022, a Treasury spokesperson indicated that Treasury is "pretty serious" about issuing some guidance that would offer some relief from the Attribution Requirement under the Regulations and possibly create a safe harbor for some taxpayers with royalty withholding taxes.[24] The same spokesperson also indicated that some clarification regarding the Cost Recovery Requirement may be issued.

Until such clarifications are provided, taxpayers should consult with their tax advisor to determine whether a tax is credible and whether altering their business operations to increase the likelihood a foreign tax is creditable or at a minimum, to make themselves whole if an FTC cannot be claimed.

ENDNOTES

1 T.D. 9959, 87 FR 276 (Jan. 4, 2022).

2 All section references are to the Internal Revenue Code, as amended (the "Code"), or related Treasury regulations, unless otherwise indicated.

3 Reg. §1.861-18(g)(1).

4 Reg. §1.861-18.

5 Proposed Reg. §1.861-18 and Proposed Reg. §1.861-19.

6 Reg. §1.861-18(a).

7 A copyright right is defined as (1) the right to make copies of the computer program for purposes of distribution to the public by sale or other transfer of ownership, or by rental, lease, or lending; (2) the right to prepare derivative computer programs based on the copyrighted computer program; (3) the right to make a public performance of the computer program; or (4) the right to publicly display the computer program.

8 Subsection (a)(3) defines digital content as "a computer program or any other content in digital format that is either protected by copyright law or no longer protected by copyright law solely due to the passage of time."

9 A cloud transaction does *not* include network access to *download* digital content for *storage and use* on a person's computer or other electronic device.

10 Subsection (c)(1) provides that computer hardware, digital content, or other similar resources are referred to as "the property."

11 Subsection (c)(1) provides that the party to the transaction making such property available to customers for use is referred to as "the provider."

12 The Regulations suggest that location of the customer will not be a relevant factor.

13 Reg. §1.901-2(a)(1)(i).

14 A Levy is a tax if it requires a compulsory payment by virtue of a foreign country's authority to levy taxes. A penalty, fine, interest, or similar obligation is not a tax, nor is a customs duty. Whether a Levy requires a compulsory payment is determined by principles of U.S. law and not foreign law. Therefore, the assertion by a foreign country that a levy is imposed under its authority to levy taxes is not determinative. Reg. §1.901-2(a)(2)(i).

15 Reg. §1.901-2(a)(3) defines net income tax.

16 Reg. §1.901-2(b)(2)-(6).

17 For example, the recapture of an incentive tax credit if required investments are not completed within a specified period.

18 A foreign tax having a gross receipts base with no reduction for costs and expenses satisfies the Cost Recovery Requirement only if there are no significant costs and expenses attributable to the gross receipts included in the foreign tax base that must be recovered. Reg. §1.901-2(b)(4)(i)(C)(1) (*see* Example 1).

19 Examples. Reg. §1.901-2(b)(5)(iii) provides two examples that illustrate the nonresident attribution requirements of Reg. §1.901-2(b)(5)(i). Example 1 assumes Country X imposes a separate levy on nonresident companies that furnish, from an extraterritorial location, electronically supplied services to users in Country X. The tax base is computed by taking the nonresident company's overall net income from electronically supplied services and deeming a portion to be attributable to a deemed PE of the nonresident company in Country X. The amount of the nonresident company's net income attributable to the deemed PE is determined *via* a formula based on the percentage of the nonresident company's total users located in Country X. The tax base is not computed on a nonresident company's activities located in Country X, but instead takes into account the location of the nonresident company's users. Therefore, the tax does not meet the attribution requirement in Reg. §1.901-2(b)(5)(i)(A).The tax on electronically supplied services also does not meet the requirement in Reg. §1.901-2(b)(5)(i)(B) because it is not imposed on the basis of source. It does not meet the requirement in Reg. §1.901-2(b)(5)(i)(C) because it is not imposed on the sale or other disposition of property.

Example 2 assumes the same facts as in Example 1 except that instead of imposing the tax by deeming nonresident companies to have a PE in Country X, it treats gross income from electronically supplied services provided to users located in Country X as sourced there. The gross income sourced to Country X is reduced by costs that are reasonably attributed to gross income to arrive at the tax base. The amount of the nonresident's gross income and costs that are sourced to Country X is determined by multiplying the nonresident's total gross income and costs by the percentage of its total users that are located in Country X. The Country X tax law rule for sourcing electronically supplied services is based not on where the services are performed, but rather the location of the service recipient. Therefore, the tax, which is imposed on the basis of source, does not meet the requirement in Reg. §1.901-2(b)(5)(i)(B). The tax also does not meet the requirement in Reg. §1.901-2(b)(5)(i)(A) because it is not imposed because of a nonresident's activities located in Country X. The tax does not meet the requirement in Reg. §1.901-2(b)(5)(i)(C) because it is not imposed on the sale or other disposition of property.

20 Under Reg. §1.903-1(c)(1).

21 Discussed *supra*.

22 If there was an income tax treaty between Country X and the United States and the treaty provided that this tax is creditable, then the treaty would control. Company A would need to analyze the resourcing provision of the treaty to determine if the income could be resourced as a foreign source.

23 *Id*.

24 *Treasury Likely to Issue FTC Regs Royalty Withholding Carveout*, Tax Notes Int'l (May 23, 2022).