

Classification of Transactions Involving Digital Content (FKA: Computer Programs)

Reg. Sec. 1.861-18 (and Proposed)

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Note: The chart is based upon general interpretation of the regulations. Each specific fact pattern should be reviewed before taking any action.

Categories of Transactions	Description of Category	Transfer	Source of Income	New Examples # in Regs
Transfer of copyright right in the digital content	In addition to a copy of the digital content, acquires any one or more of the following rights:	All substantial rights: Sale or Exchange	Residence of transferor	
	1. The right to make copies for distribution to the public by sale or other transfer of ownership, or by rental, lease or lending.	Not all substantial rights: License generating royalty income	Based upon location of use of copyright (IP)	19
	2. The right to prepare derivative digital content based upon the copyrighted (original) digital content.			
	3. The right to make a public performance of the digital content (other than for purposes of advertising for the sale the digital content displayed).			
	4. The right to publicly display the digital content (other than for purposes of advertising for sale the digital content).			
Transfer of a copy in the digital content (a copyright article)	Restrictions on use of computer program (however transferred). See rights above.	Burden and benefit ownership have been transferred: Sale or Exchange	The right to publicly perform or display digital content for purposes of advertising the sale of the digital content is not a sale of a copyright article.	19 & 21
	Limited use of program with return of computer program (or requirement to destroy it at point in time).		Insufficient burden and benefit have been transferred: Lease generating rental income	New: Location of download or installation onto end user's device.
	Provision of services for development or modification of the digital content	Based upon intent of the parties as to which party is to own the copyright rights and how the risks of loss are allocated between the parties.		Based upon where services are performed
Provision of know-how relating to development of digital content	Based upon:			
	1. Information relating to the development of digital content;		Based upon where know-how is used.	
	2. Furnished under conditions preventing unauthorized disclosure; and			
	3. Considered property subject to trade secret protection.			

Classification of Cloud Transactions

Prop. Reg. Sec. 1.861-19

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Categories of Transactions	Description of Category	Transfer	Source of Income	New Examples
	Factors demonstrating Provision of Services Classification (not all equally weighed):		Sourcing is not specifically addressed in Proposed Regulations	
Provision of Services	Customer not in physical possession of property.		Normally, provision of services is based upon where the services are performed, but there may be an issue when services are used that might be located in various locations and from digital content that was developed in various locations (but owned by a single location).	9
	Customer does not control property.			
	Provider has the right to determine the specific property used in the cloud transaction and replace it.			
	Property is a component of an integrated operation in which provider has other responsibilities, including ensuring property is maintained and updated.			
Lease of Property	Customer does not have a significant economic interest in property.		Normally, lease of physical property in location of the tangible property being leased. Again, not often a "physical" asset involved in this case (or located outside the country of use).	
	Provider bears any risk of substantially diminished receipts or increased expenditures if there is nonperformance under the contract.			
	Provider used the property concurrently to provide significant services to other customers.			
	Provider's fee is primarily based on a measure of work performed or the level of customer's use rather than passage of time.			
	Total contract price substantially exceeds the rental value of the property for the contract period.			

For further information contact Moore Stephens Doeren Mayhew at 248.244.3060 or info@moorestephensdm.com. Thank you.