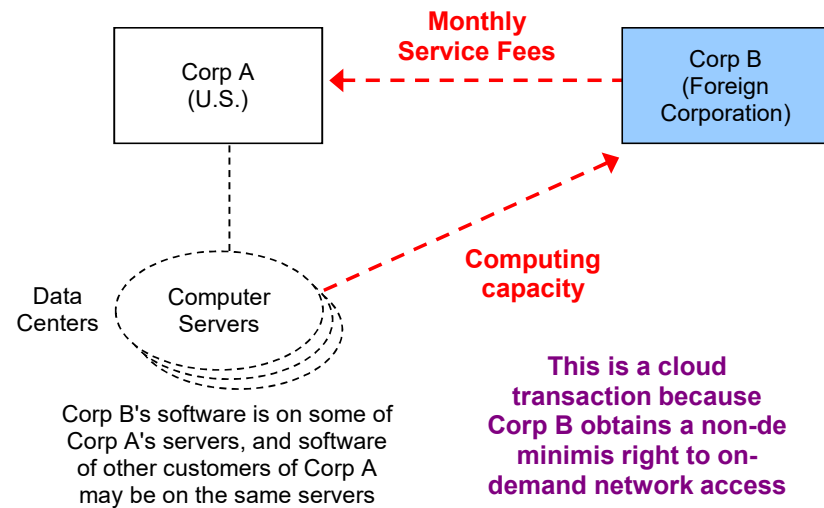


**Prop. Reg. 1.861-19(d),  
Example 1**

**Supplying Computing  
Capacity: Provision of Services**

Copyright © 2019 Andrew Mitchell LLC  
International Tax Services  
www.andrewmitchel.com

Corp A operates data centers on its premises in various locations. Corp A provides Corp B computing capacity on Corp A's servers in exchange for a monthly fee based on the amount of computing power made available to Corp B. Corp B provides its own software to run on Corp A's servers. Depending on utilization levels, the servers accessed by Corp B may also be used simultaneously by other customers. The computing capacity provided to Corp B can be sourced from a variety of servers in one or more of Corp A's data centers, and Corp A determines how its computing resources are allocated among customers. Corp A agrees to keep the servers operational, including by performing physical maintenance and repair, and may replace any server with another server of comparable functionality. Corp A agrees to provide Corp B with a payment credit for server downtime. Corp B has no ability to physically alter any server.



(A) The computing capacity transaction between Corp A and Corp B is a cloud transaction described in Reg. 1.861-19(b) because Corp B obtains a non-de minimis right to on-demand network access to computer hardware of Corp A.

(B) Corp B has neither physical possession of nor control of the servers, beyond Corp B's right to access and use the servers. Corp A may replace any server with a functionally comparable server. The servers are a component of an integrated operation in which Corp A has other responsibilities, including maintaining the servers. The transaction does not provide Corp B with a significant economic or possessory interest in the servers. The agreement provides that Corp A will provide Corp B with a payment credit for server downtime, such that Corp A bears risk of substantially diminished receipts in the event of contract nonperformance. The servers may, depending on utilization levels, be used by Corp A to provide significant computing capacity to entities unrelated to Corp B. Corp A is compensated according to the level of Corp B's use (that is, the amount of computing power made available) and not solely based on the passage of time. Taking into account all of the relevant factors, the transaction between Corp A and Corp B is classified as the provision of services under Reg. 1.861-19(c).

