TR 2021/D4EC - Compendium

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Ruling compendium – TR 2021/D4

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Summary of issues raised and responses

Issue number	Issue raised	ATO response
1	**Scope, timing, and retrospectivity** Further clarity is required in the final Ruling on circumstances covered by TR 93/12 *Income tax: computer software* (now withdrawn) which are not covered in the draft Ruling. The draft Ruling should apply prospectively only, and TR 93/12 should otherwise apply as the concepts in the draft Ruling are in contrast to the government policies at the time of TR 93/12. TR 93/12 set out principles capable of general application regardless of the mode of delivery, and was consistent with the characterisation approach taken on an international stage. Consequently, many taxpayers may have relied on TR 93/12 notwithstanding that there were limited delivery options for software at the time TR 93/12 was released. This should not limit the ability of taxpayers to rely on TR 93/12. Examples 4 and 5 in the draft Ruling are a change in position in that taxpayers interpreted TR 93/12 to provide support for the position that a payment from a distributor is not a royalty where the end-user's rights are no more than simple use. Per subsection 358-20(3) of Schedule 1 to the *Taxation Administration Act 1953*, the draft Ruling should apply based on when distribution arrangements were entered into	Software distribution arrangements need to be considered on a case-by-case basis. For example, the application of withholding tax was confirmed in *International Business Machines Corporation v Commissioner of Taxation* [2011] FCA 335. Paragraph 39 of TR 2021/D4 (paragraph 43 of TR 2024/D1 (the revised draft Ruling)) provides that the final Ruling will not prevent TR 93/12 applying prior to withdrawal, to the extent that it has been relied upon and applied appropriately. Paragraphs 44 and 45 of the revised draft Ruling set the context as to why TR 93/12 is outdated and is no longer relevant.

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	such as post 1 July 2021 or post the issue date of the draft Ruling. There should also be a transitional period to allow taxpayers to design and test new compliance systems and update licence agreements to reflect the impact of the ATO view. Clarity is required on the ATO's compliance approach where taxpayers have applied TR 93/12 (prior to its withdrawal) in a manner that is contrary to the draft Ruling. We recommend that the ATO take a broad view in considering whether a taxpayer 'relied upon' TR 93/12 in relation to their arrangements and that the Commissioner provide further guidance on how the ATO would make this assessment. The ATO should include in the final Ruling, its consideration of Law Administration Practice Statement PS LA 2011/27 *Determining whether the ATO's views of the law should be applied prospectively only* to support the draft Ruling's retrospective application.	
2	**Acts subject to copyright protection** In relation to simple use software and footnote 13 of the draft Ruling, the ATO should consider whether the simple use of software is an act comprised in copyright or a limitation in the *Copyright Act 1968* (Copyright Act) regarding what constitutes copyright use. Payment for the use of, or the right to use, a software copyright needs to be distinguished from payment for the use of a software program copy as a copyrighted work – the latter is standardised for end-users and such payments are not a royalty, for example, payment for a physical or electronic book.	The revised draft Ruling provides a more comprehensive explanation in respect of copyright rights. The use of copyright necessary for the function of computer programs is usually subject to an end-user licence agreement (EULA) or otherwise is an implied term as part of the contract for sale or use of the software. The use of copyright in a computer program would be excluded from being a non-infringing use of copyright if it involves an infringing copy of the computer program or if it is not both incidental and automatic as part of a technical process of running a copy of the program for the purposes for which the program was designed. For example, see subsection 47B(2) and section 15 of the Copyright Act. In considering whether there is use of, or right to use, copyright (or other like property or right), as discussed at paragraphs 167 and 168 of the revised draft Ruling, it is not necessarily determinative whether the act authorised by a distributor would be an infringement of copyright, or that the act is specifically excluded from constituting an infringement of copyright.

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3	**Whether an authorisation right is a copyright right** The draft Ruling ignores the context that copyright is a right to prevent others from exercising the exclusive rights of the owner. The primary rights reserved to a copyright owner are set out in section 31 of the Copyright Act. Section 31 does not refer to authorisation. The act of authorisation per subsection 13(2) of the Copyright Act is ancillary to the primary copyright rights set out in subsection 31(1). Authorisation is not interpreted by the courts as a separate right independently of section 31, but rather as a secondary right that is linked to, and dependent upon, a downstream act comprised in the copyright, being one of the acts set out in section 31 of the Copyright Act. If there is no such downstream 'act comprised in the copyright' as set out in section 31 of the Copyright Act, there can be no exercise of an authorisation right under subsection 13(2) or infringement by authorisation under section 36. In situations where the software distributor pays for the right to grant 'simple use' sublicences to end-users (that is, to access and use the software only), it is difficult to see how this involves the software distributor authorising the end-user to do any of the primary copyright rights listed in subsection 31(1) (for example, the right to copy, modify, adapt the software or communicate the software to the public). There is also a question whether the act of authorisation itself should be considered to be an exercise of a primary copyright right given subsection 13(2) is ancillary to the primary copyright rights set out in subsection 31(1). The ATO should undertake further analysis of how the authorisation right covers the software industry given the limited activities and functions of Australian distributors in the communication process to an individual customer.	Greater detail is provided regarding authorisation in the revised draft Ruling, see paragraphs 163 to 174. We think it is clear from section 13 of the Copyright Act, being entitled 'Acts comprised in copyright' that the authorisation right is an exclusive right that is protected under the Copyright Act. Subsection 13(2) specifies that the right to 'authorize' an act in relation to a work is itself an exclusive right (paragraph 168 of the revised draft Ruling). An exercise of the right to 'authorize' will arise where any act that the owner of the copyright has the exclusive right to do is so authorised (paragraph 169 of the revised draft Ruling).] The examples as set out in the original draft Ruling are not included in the revised draft Ruling.

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	If the ATO consider that the mere ability of a distributor to enter a sublicence agreement with an end-user is an act comprised in copyright, irrespective of what actual rights are granted under the sublicence, we request the ATO provides an explanation for this view under copyright law. We would understand the proper rights-based analysis under the Copyright Act would require an analysis of the actual rights granted under any sublicence to determine whether the distributor has authorised activities that would be acts comprised in the copyright. Example 4 does not provide any authority on why the right to enter into an EULA including for simple use software is the exclusive right of the copyright owner. Such a right is not one of the exclusive rights of copyright holders per section 31 of the Copyright Act. The ATO should include an analysis of the interaction between section 31, section 13 and section 36 of the Copyright Act. Example 4 does not provide any authority on why the right to enter into an EULA including for simple use software is an exclusive right of the copyright owner. Such a right is not one of the exclusive rights of copyright holders per section 31 of the Copyright Act. The right to publish, which is one of the exclusive rights of the copyright owner in a literary work, including computer software, is a more relevant reference for the purposes of establishing copyright use, than the right to enter into EULAs.	
4	**Communicate to the public – software as a service and other cloud products** The ATO analysis should focus on how the right to communicate a copyright work to the public is exercised in software download and software as a service (SaaS)	Greater detail is provided regarding communication (including making available online) in the revised draft Ruling, see paragraphs 142 to 155 SaaS is discussed at paragraphs 144, 149 to 152 and 172 to 174. Whether or not the distribution function involves the reproduction or communication of software, the draft Ruling also considers:

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	arrangements, what the actual communication is and how that communication is made. SaaS arrangements may initially involve some reproduction of software when that software is downloaded (that is, 'use' of copyright in a work), but thereafter the substance of the arrangement is for the on-going provision of the service. The principal component of the arrangement is the on-going provision of services and not the initial download that enables the services to be provided. The exclusive right 'to communicate the work to the public' per subparagraph 31(1)(a)(iv) is read as the exclusive right to make available online or electronically transmit a work to the public within or outside Australia per subsection 10(1) definition of 'communicate' and 'to the public'. Although paragraph 62 asserts that actual communication is not required, this is a reference to the first limb, 'make available online', rather than an unconstrained reading of 'communication'. 'Make available online' cannot be taken to mean an act of someone who accesses what is already online. When SaaS is used, the important part of the communication is not the underlying software itself, but rather the result of using that software, and therefore it cannot be viewed as communication by an end-user or a distributor within the definition in subsection 10(1). This is because a computer program is 'a set of statements or instructions' and a defining feature of SaaS is that the program (set of instructions) remains in control of the service provider. It is at best arguable under Australian copyright law that the distributor who acts as an intermediary between the copyright owner and end-users, may communicate the work to end-users because they have a contractual control over the end-user's access to the relevant source code including, in some cases, the contractual ability to request or require	• commercial rental arrangements covered by section 30A of the Copyright Act, where the 'computer program' is the essential object of what is in substance a rental of a copy of the computer program. Such a commercial rental arrangement is considered an act subsisting in copyright under paragraph 31(1)(d) of the Copyright Act. This is discussed at paragraphs 157 to 162 of the revised draft Ruling. • the right of copyright owners to control access to a work by access control technological protection measures. The Copyright Act provides legal remedies against the circumvention of such measures in connection with the exercise of copyright in a work. Therefore, any role that the distributor has in enabling access would otherwise be subject to the access control technological protection measures without the licence of the copyright owner under section 116AN of the Copyright Act. This is discussed at paragraphs 131 and 171 of the revised draft Ruling. In this regard, the reference in the definition of royalties to 'other like property or right' should also be considered.

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	the copyright owner to disable, suspend or otherwise limit access by an end-user.	
5	**Australian domestic law interaction with double tax agreements** The draft Ruling relies on the Australian domestic law definition of a royalty in subsection 6(1) of the ITAA 1936 rather than the relevant double-tax agreement definition where applicable. The ATO should explain how the Australian domestic law position would be reconciled with the relevant double-tax agreement.	The ATO view on the interaction between the domestic tax law definition of royalty and the definition in a double-tax agreement is explained in paragraphs 51 to 56 of the revised draft Ruling with reference to a standard tax treaty definition of royalties.
6	The ATO's rights-based approach is contrary to the essential nature/economic substance approach in the OECD Commentary on Article 12.[1] The draft Ruling goes against the Commissioner's stated approach to the OECD Commentary as set out in TR 2001/13 *Income tax: Interpreting Australia's Double Tax Agreements* and places undue weight on the legal form of a transaction rather than its underlying economic substance. The highly technical copyright law analysis relied on in the draft Ruling has consequences beyond software for other industries. This results in a significant compliance burden for taxpayers of all sizes as the approach taken in the draft Ruling requires taxpayers to seek advice from intellectual property (IP) counsel as well as tax advisers to ascertain whether an end-user is exercising any primary copyright right, which is a question of mixed fact and law. The draft Ruling is inconsistent with paragraph 14.4 of the OECD Commentary on Article 12.	The relevance of the OECD Model Tax Convention[2] Commentary (OECD Commentary) on Article 12 is explained at paragraphs 61 to 70 of the revised draft Ruling. The example in paragraph 14.4 of the OECD Commentary on Article 12 depends upon the facts of an arrangement and the application of relevant domestic law of the country from which the payment was made**.** The ATO's approach to the distribution of software is intended to be consistent with the application of Australian domestic law in relation to other IP and like property or rights. See paragraphs 56, 58 to 60 and 175 to 176, and Appendix 2 of the revised draft Ruling.

[1] OECD (2019) 'Commentary on Article 12: Concerning the Taxation of Royalties' in *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris.
[2] OECD (2019) *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris.

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	Paragraph 14.4 states that the use of copyright that is necessary to facilitate the distribution of software regardless of the mode of distribution should be disregarded in analysing the character of the payment for tax purposes. While Australia had an observation in the 1990s with respect to the relevant commentary to the OECD model, it removed that observation in 2000. This suggests an understanding and agreement with the OECD Commentary as to the tax treatment of software transactions (including for distributors and resellers).	
7	**Copyrighted articles** As drafted, the draft Ruling does not appropriately distinguish between payments for acquiring copyrighted articles and payments for exploiting copyright rights. A change of this nature would make Australia an outlier with respect to global norms regarding the tax treatment of payments by software resellers and distributors; at this time, we are not aware of another jurisdiction that has implemented this approach to the classification of certain software payments. In fact, the Indian Supreme Court reached the opposite conclusion as that which was included in the draft Ruling.	The revised draft Ruling contains the ATO view on the characterisation of payments made under a 'software arrangement', being an arrangement or scheme under which a distributor makes the payment directly or indirectly to the owner or licensee of the IP. The rights granted or used by a distributor are not necessarily the same as those granted or use by an end-user. The revised draft Ruling does not cover the character of payments made directly from an end-user to the owner or licensee of the IP, or payments to a distributor acting as agent for the owner or licensee of the IP. In relation to the acquisition of 'copyrighted articles', the revised draft Ruling states that payments from a distributor are not royalties where they are consideration wholly for the acquisition of hardware with embedded software (paragraph 15(c) of the revised draft Ruling) or physical carrying media on which software is stored (paragraph 15(d) of the revised draft Ruling).
8	**Different outcomes to direct sales** It also seems a particularly odd outcome, that there is no royalty where a foreign resident makes a simple use sale directly to an end-user, there is no royalty where a distributor who does not have authorisation rights makes a simple use sale directly to an end-user, but there is a royalty where a distributor can license simple use. Under TR 93/12, there was a broad symmetry between transactions involving the end-user on the one hand, and the transactions involving a reseller or distributor on the	The revised draft Ruling contains the ATO view on the characterisation of payments made under a 'software arrangement', being an arrangement or scheme under which a distributor makes the payment directly or indirectly to the owner or licensee of the IP. The rights granted or used by a distributor are not necessarily the same as those granted or use by an end-user. The revised draft Ruling does not cover the character of payments made directly from an end-user to the owner or licensee of the IP, or payments to a distributor acting as agent for the owner or licensee of the IP.

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	other. If the transaction involving an end-user was characterised as simple use and therefore did not give rise to royalties, then the transactions involving the reseller or distributor would also not give rise to royalties. See paragraphs 27, 29 and 34 of the draft Ruling. Under the draft Ruling, even if an end-user transaction is not a royalty, the transaction involving the reseller or distributor will be. If the lack of symmetry is intended, the rationale for it is not clear and the final ruling would be better if it was. It is unclear why the mere ability of a distributor to sublicence 'simple use' rights would give rise to a royalty, while the direct provision of such rights by the copyright holder to an end-user would not. Such an approach would also result in an artificial distinction being drawn between the provision of 'simple use' rights by a distributor under a sublicensing agreement, and of the same rights by a distributor in some other fashion (without any policy or principled basis for drawing this distinction).	
9	**Different modes of delivery** The tax characterisation should not change simply because the way in which software copies are delivered continues to evolve. It is internationally accepted that there should be neutrality between traditional and highly digitalised business models, and more specifically in a software context, the OECD has recognised that the same characterisation principles should apply regardless of the mode of delivery. Imposing royalty withholding tax in these circumstances is anomalous in that no such tax would be imposed: (a) if the SaaS agreements were directly between the developer and the end-user, or (b) if the exact same results of the services under the SaaS model were obtained by the developer providing the relevant software to the end-user through a medium such as a CD.	The revised draft Ruling is focused on scenarios in which software is delivered through electronic means. Different modes of delivery will not necessarily involve the grant or use of the same rights. The ATO view regarding the relevance of the OECD Commentary has been further explained in paragraphs 61 to 70 of the revised draft Ruling.

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10	**Nature of software distributor** A distributor's income arises from the activities related to distributing software copies, whereas a software copyright holder derives income from activities related to the exploitation of software copyrights. A distributor is not paying for the 'right to stand in the shoes of the copyright owner and exploit the copyright in the software', nor is the distributor paying for the right to use copyrights. Instead, the distributor is paying for the right to distribute, which enables the distributor to derive income from sale of software programs to end-users. The 'right to distribute' itself is not a copyright right. The copyright owner earns income by developing the copyrighted work and determining how and when to distribute copies in commerce. In contrast, the distributor earns income by deploying its personnel and assets in order to perform a distribution function. The 2 roles are not economically or commercially equivalent. Businesses undertaking software distribution are not undertaking a commercial activity of exploiting copyright. That is, software distributors are deriving business profits (and assessable income) from sales to customers without the need to access any copyright rights beyond those necessary to enable the customer to enjoy the use of the software. In the context of software that is downloaded by the ultimate customer, rather than physically delivered, the rights to reproduce the software for the customer and communicate the software to the customer are of negligible value. The distributors payments are not 'for' these rights. This is because the ease with which software can be reproduced, regardless of the location or ownership of the physical infrastructure in which it is contained, means the reproduction element itself is of limited value. Whether the server from which software is downloaded is owned by the	The revised draft Ruling contains the ATO view on the characterisation of payments made under a 'software arrangement', being an arrangement or scheme under which a distributor makes the payment directly or indirectly to the owner or licensee of the IP. The rights granted or used by a distributor are not necessarily the same as those granted or used by an end-user. The revised draft Ruling does not cover the character of payments made directly from an end-user to the owner or licensee of the IP, or payments to a distributor acting as agent for the owner or licensee of the IP. For example, in *International Business Machines Corporation v Commissioner of Taxation* [2011] FCA 335, the agreement was not simply a distribution agreement which conferred distribution rights independently of the grant of IP rights. In our view, it is commonly the case in a software arrangement that any IP rights granted are neither separate nor severable from any other rights granted. That is, in taking the whole of the agreement into account, the distribution agreements cannot be performed without use of the IP rights granted. In this situation, the entirety of the consideration will be characterised as a royalty. See also paragraphs 111 to 114 of the revised draft Ruling.

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	copyright owner or the distributor is of limited or negligible importance to the overall arrangement. This principle would not apply where the distributor has more expansive rights in relation to the copyright or where there is an impediment to the owner of the copyright making the software directly available to the ultimate customer.	
11	**End-user licence agreements** The primary purpose of an end-user licence agreement (EULA) is to contractually restrict the user's ability to deal with the software copy it obtains, not to grant rights to use the copyright in the copyrighted work. Commercially, it is expected that the more common scenario is that either: (a) the copyright owner specifies the EULA terms under which the distributor is entitled to facilitate the end-user's access to the software, and this is replicated in the distributor's agreement with the end-user, or (b) the copyright owner grants the EULA and the distributor only provides the end-user with an access or activation key.	Noted. Whilst granting an EULA is a right exclusive to the copyright owner, in our view liability for royalty withholding tax is not dependent on whether the distributor grants the EULAs. In particular, we understand a distributor may grant access to the software even when it does not grant an EULA.
12	**Exclusive rights under the Copyright Act** While we assume that subparagraph 5(a) of the draft Ruling (consideration for the grant of a right to do something in relation to software that is the exclusive right of the owner of the copyright in the software) does not intend to state a different position to paragraph 55 of the draft Ruling, subparagraph 5(a) should be amended by adding the words 'under the *Copyright Act 1968'* to this sentence, in order to clarify that a copyright will not be used unless one of the exclusive rights under that Act is used. It is not correct that a reseller is making a payment 'for the right to stand in the shoes of the copyright owner and exploit the copyright' in a computer program if the copyright owner	The exclusive rights of a copyright owner are not necessarily limited to those specified in section 31 of the Copyright Act. For instance, the right to 'authorize' an act in relation to a work is itself an exclusive right in accordance with subsection 13(2) of the Copyright Act. Furthermore, we note the definition of royalties is broader than use of copyright and covers the use of 'other like property or right'.

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	has not granted to the reseller any of the principal copyright rights protected under section 31 of the Copyright Act. To genuinely maintain a rights-based approach in respect to copyright, the consideration characterised as a royalty ought to be limited to arrangements or acts which would infringe on the copyright owner's exclusive rights, if there was no licence to exercise those rights in place excluding the 'simple use concept referred to in paragraphs 67 to 72 of the draft Ruling.	
13	**Apportionment and de minimis** The question of 'extent' has been given little focus in the draft Ruling. Further guidance should be provided on determination of the royalty amount including: • how and when it would be determined that the use of copyright is 'central' to a distribution function deeming all payments to be royalties • confirmation that where the right to use copyright is ancillary to the use of software, or merely facilitates the operation of a product or the provision of a service, no apportionment is required • the value attributable to the right to distribute software should be apportioned out of any payments that only relate to right to use copyright (except where such rights are merely incidental or ancillary to the exercise of the distribution rights) • what constitutes fair and reasonable apportionment approach (with reference to specific facts and circumstances), and whether a practical compliance guideline is required for this purpose • whether transfer pricing principles can be applied to the extent that taxpayers can identify independent	The phrase 'to the extent' is discussed at paragraphs 103 to 114 of the revised draft Ruling. The argument that 'the right to use' copyright is of minimal value is not supported by the principles established in *International Business Machines Corporation v Commissioner of Taxation* [2011] FCA 335 at [14]. The extent to which a payment has the character of royalty income in the hands of its recipient must be determined by considering the substance, not just the form, of the transaction. Refer also to Scenario 3 in the revised draft Ruling, from paragraphs 116 to 118, which discusses the need for a reasonable method of apportionment. The ATO is considering whether further administrative guidance concerning apportionment is required. The revised draft Ruling invites comments on this aspect.

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	arrangements involving the payment of royalties for the use of copyright. • where the core function is the distribution function and authorisation is an ancillary function which can be disregarded in any apportionment exercise.	
14	**General comments** The analysis and examples in the draft Ruling should be clarified to specifically identify the relevant copyright work in the context of software. The draft Ruling and examples generically refer to reproduction, communication etc of software rather than analysing the specific work in which copyright subsists. The facts provided in the examples where royalties are determined, are not sufficient to justify the conclusion that the payments are royalties. More details are required to establish the type of distribution function the examples apply to, including, specific contractual terms, conditions and the business functions and activities of the relevant entities. The Commissioner should make it clear that the examples do not apply where: • technology is merely involved in providing a digital service (for example online banking) • the Australian distributor in substance only undertakes marketing of the copyrighted article while selling it in Australia rather than exploiting the underlying copyright in the software, or • where the end-user is not ultimately exercising underlying copyright in the software. **Examples 4 and 5** Examples 4 and 5 of the draft Ruling are contrary to the view in TR 93/12 and appear to be a change in the ATO's opinion.	The examples as set out in the draft Ruling are not included in the revised draft Ruling. We have noted the feedback and in response included in the revised draft Ruling: • Scenario 1, a more comprehensive situation which outlines facts and circumstances generally expected in a software distribution arrangement which applies the 'standard tax treaty' definition of royalties • Scenario 2, representing a situation where there is no end-user licence granted by the Australian distributor. The revised draft Ruling is limited to software arrangements involving distributors. The need for further guidance on other scenarios is currently being considered.

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	The distinction between Examples 4 and 5 (royalties) and Example 6 (not royalties) appears primarily to be technological (that is, the means of distribution to end-users), rather than by reference to a focus on the terms of the agreement as endorsed by the case law. The tax outcome set out in Example 5 of the draft Ruling is not correct because the distributor does not exercise any rights under subsection 31(1) of the Copyright Act (including reproduction and communication to the public) given the cloud services are made available online to the end-user via servers which are not owned or controlled by the Australian distributor. Alternatively, the tax outcome in Example 5 is correct, however the reasoning should be reconsidered to refer to the act of entering into a commercial rental arrangement in respect of a computer program (paragraph 31(1)(d) of the Copyright Act). The distributor acquires this rental right from the copyright owner under the cloud distribution agreement. **Examples 7 and 8** These examples don't provide adequate guidance on impact of ancillary services in bundled licence and maintenance arrangements. **Additional examples** The following additional examples should be included in the final Ruling: • a distributor who sells digital software but does not issue the EULA • an example to demonstrate the outcomes under different circumstances in which an employee of the software distributor assists in the implementation of the end-user software • an example to clarify the treatment of the payment between the offshore software provider and an	

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	onshore distributor who is granted the right to distribute the software to an end-user as well as a right to sublicense the software to a third-party distributor who distributes the software together with a piece of technical equipment • an example covering a specific and common double tax treaty with Australia • an example covering an Australian entity that is a contract DVD manufacturer which is granted some IP rights to provide services to third parties with no express fees for use of copyright.	
15	**Consistency with treatment of distributors in other industries where there is IP underlying the products** The draft Ruling has consequences beyond software industries. Distributors of tangible assets, such as products incorporating patented inventions, must also be authorised by the supplier to import and sell those products into a territory which protects patents under their IP law, yet payments by such distributors do not give rise to a royalty.	The mischaracterisation risk in relation to tangible goods distribution arrangements is covered by Taxpayer Alert TA 2018/2 *Mischaracterisation of activities or payments in connection with intangible assets*.
16	**Economic impacts** Additional taxes on distribution models covered will generate distortions in the Australian market and will likely discourage the use of local distributors including third-party channel partners. Further, the draft Ruling may result in companies moving to offshore models or increase prices for Australian businesses and consumers. It may also result in increased compliance costs. As a consequence of the ATO views in the draft Ruling, distribution agreements with third-party Australian resellers will likely need to be renegotiated to include gross-up clauses which would likely be passed on to the third-party Australian seller.	The revised draft Ruling sets out the Commissioner's preliminary view of the law, for comment. To the extent it is appropriate for the ATO to respond to these issues, the ATO may consider safe harbours for compliance purposes in future administrative guidance. The way in which software is supplied and used has changed significantly over time and is not necessarily analogous to the distribution of physical goods.

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17	**Alignment of ATO view with other competent authorities** The Commissioner should confirm the approach taken in the draft Ruling with other Competent Authorities in the event of disputes, including regarding availability of tax credits in the payee jurisdiction.	The draft Ruling (and all versions including the finalised version) seeks to clarify the ATO view of the definition of royalties having regard to Australian domestic law. An established ATO view would inform other competent authorities of the ATO's approach in applying the standard treaty definition.
18	**Indian Supreme Court decision** (*Engineering Analysis Centre of Excellence Pvt Ltd v CIT* LL 2021 SC 124) In this decision, the Indian Supreme Court ultimately held that the software distribution agreements and EULAs in issue did not create any interest or right in the distributors or end-users that would amount to the use of or right to use any copyright, based on the definition of royalty in the relevant tax treaties. This ruling of the Indian Supreme Court on the subject has settled that end-user payments are not royalties however it is not as conclusive on distributor payments.	The Indian Supreme court decision, while informing approaches taken by other jurisdictions under their own domestic laws, is not determinative of whether payments under software arrangements are royalties for the purposes of an Australian double-tax agreement (including where Australian law results in differing outcomes). The Commissioner does not consider this decision as being a relevant precedent and it can be readily distinguished on the basis of differences in the application of domestic law provisions.
19	**Interaction with other tax provisions** Assessability of receipts in respect of software and the treatment of software as trading stock under subsection 70-10(1) of the *Income Tax Assessment Act 1997* should be addressed in interpretative guidance (either in a taxation ruling or taxation determination). As a significant portion of taxpayers Impacted by the draft Ruling are likely to be significant global entities who are in scope of the Multinational Anti-Avoidance Law (MAAL), the ATO should include further guidance on the features of arrangements which might bring to question MAAL application. The term 'royalty' appears in other parts of the Australian tax law outside of withholding tax provisions. Additional guidance should be provided on how ATO's broader scope	Software as an intangible asset is not trading stock within the meaning of subsection 70-10(1) of the *Income Tax Assessment Act 1997* if it is not held for sale in its entirety. This concept is considered well understood and not requiring additional guidance. The operation of MAAL is outside the scope of this Ruling. The comment regarding interaction with other tax provisions referencing 'royalties' is noted.

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	of royalty definition will impact taxpayers' historical tax treatment under other provisions.	
20	**Penalties and interest** The final Ruling should include the ATO position on the application of administrative penalties and late payment interest for voluntary withholding tax payments made for periods prior to when the final Ruling is published.	Application of administrative penalties for failure to withhold and any general interest charges that may accrue to the Australian resident or to the non-resident IP owner or licensor will be subject to specific case facts and circumstances.
21	**Restructures post issue of the draft Ruling** To the extent the Commissioner maintains retrospective application of the Ruling, this places unfair burden on taxpayers who fall within scope of the Ruling merely because of terms of their arrangements. Taxpayers may amend their arrangements so that withholding tax does not apply for example, with the Australian distributor no longer entering end-user licence agreements. The Commissioner's commitment is required that anti-avoidance rules are not applied to such restructures. If this protection is not provided, further guidelines should be provided on how a restructure could be done in a manner that is appropriate.	The Ruling does not address the application of the general anti-avoidance provisions, which would be subject to specific case facts and circumstances.
22	**Undefined terms** There are a number of undefined terms and expressions used in the draft Ruling.	A definitions section has been included in the revised draft Ruling.