
Taxation Determination

Income tax: how is double taxation avoided in the following situations where a Controlled Foreign Company (CFC) pays a dividend to an attributable taxpayer:

- (a) Out of income or profits derived by the CFC during a statutory accounting period that are subject to attribution and paid after the end of the CFC's statutory accounting period but before the end of the attributable taxpayer's year of income?**
- (b) Out of income or profits derived by the CFC during a statutory accounting period that are subject to attribution and paid both before the end of the CFC's statutory accounting period and the attributable taxpayer's year of income?**

Preamble

*The number, subject heading, date of effect and paragraphs 1 and 2 of this document are a 'public ruling' for the purposes of Part IVAAA of the **Taxation Administration Act 1953** and are legally binding on the Commissioner. The remainder of this Determination is administratively binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Determination is a 'public ruling' and how it is binding on the Commissioner.*

1. In relation to (a), double taxation is avoided by treating the dividend as non-assessable non-exempt income¹ of the attributable taxpayer to the extent of the attribution debit.

¹ Section 23AI of the *Income Tax Assessment Act 1936* (ITAA 1936) was amended by *Tax Laws Amendment Act (No.4) 2003*. Essentially, this Act substitutes all references to exempt income in section 23AI of the ITAA 1936 with references to non-assessable non-exempt income. The effect of the changes is to treat amounts that fall within section 23AI of the ITAA 1936 as income that is neither assessable income nor

2. In relation to (b), double taxation is avoided by reducing the amount of attributable income of the CFC by the amount of the dividend that is included in the assessable income of the attributable taxpayer.

Explanation

3. If a dividend is paid to an attributable taxpayer out of a CFC's income or profits that have been previously subject to tax on attribution, section 23AI of the *Income Tax Assessment Act 1936* (ITAA 1936) treats the dividend as non-assessable non-exempt income. This is how double taxation is avoided. For a dividend to be treated as non-assessable non-exempt income under section 23AI several requirements must be satisfied:

- there needs to be an 'attribution account entity';
- the attribution account entity must make an 'attribution account payment'; and
- an 'attribution debit' must arise for the attribution account entity making the payment.

An **attribution account entity** is a company (that is not a Part X Australian resident), a partnership or a trust. This entity makes the payment to the attributable taxpayer (see section 363). In this Determination, the attribution account entity is the CFC.

An **attribution account payment** includes a dividend, a share of partnership net income, a share of the net income of a trust estate and a distribution from a trust estate (see section 365). In this Determination, the attribution account payment is a dividend.

An **attribution debit** will arise when an attribution account entity makes an attribution account payment and there is an attribution surplus. The amount of the debit cannot exceed the attribution surplus (see section 372).

An **attribution surplus** is the excess of the attribution account entity's attribution credits arising in relation to the attributable taxpayer over attribution debits arising in relation to the attributable taxpayer at a given time (see section 370).

An **attribution credit** will arise for an attribution account entity in relation to the attributable taxpayer where, broadly, an amount is included in the assessable income of the taxpayer by virtue of it being attributed to the taxpayer under Part X of the ITAA 1936 (see section 371).

4. For a dividend to be wholly or partly non-assessable non-exempt income under section 23AI of the ITAA 1936 when received by the attributable taxpayer, there must be an attribution surplus for the CFC at the time of the payment in relation to that taxpayer.

exempt income. Previously, amounts that fell within section 23AI of the ITAA 1936 were treated as exempt income, although they were also treated as excluded exempt income for the purposes of Division 36 of the *Income Tax Assessment Act 1997* (ITAA 1997), (that Division deals with losses of earlier income years). The treatment of the relevant amount as non-assessable non-exempt income has effect for all purposes of the ITAA 1936 and ITAA 1997 (unless otherwise stated) and applies to the 2004 income year and subsequent income years.

For there to be any attribution surplus, there must be an earlier credit to the attribution account for the CFC in relation to the attributable taxpayer.

5. Paragraph 371(1)(a) of the ITTA 1936 states that an attribution credit arises for a CFC where an amount is included in the assessable income of a taxpayer in respect of the attributable income of the CFC. Paragraph 371(5)(a) states that for the purposes of paragraph (1)(a), an attribution credit arises at the end of the CFC's statutory accounting period. Note the timing of the credit to the attribution account - it arises at the end of the CFC's statutory accounting period and not at the end of the attributable taxpayer's year of income. Accordingly, as the credit gives rise to an attribution surplus, any subsequent payment of a dividend to the attributable taxpayer (assuming there are no other attribution account payments) made after the end of that CFC's statutory accounting period but before the end of the attributable taxpayer's year of income, will be non-assessable non-exempt income under section 23AI to the extent of that surplus.

6. In cases where a dividend is paid to an attributable taxpayer before the end of the CFC's statutory accounting period, that is out of current-year profits, and the whole or part of the dividend is included in the assessable income of the attributable taxpayer, the attributable income of the CFC is reduced by the amount of the dividend that is assessable to the attributable taxpayer (see section 387). This provision is designed to prevent the attributable taxpayer being taxed twice on the same amount.

Example 1

7. *Ausco, an Australian company, owns 100% of the shares in Forco (a CFC) which is resident in an unlisted country. Forco's statutory accounting period runs from 1 January to 31 December and this is the eligible period during which the attributable income of the CFC is calculated. Ausco's year of income runs from 1 July to 30 June. Forco's first year as a CFC is the statutory accounting period ending 31 December 2002 (i.e. it has no attribution account balance prior to that time).*

8. *During that period, Forco has attributable income and as a result an amount of \$10,000 is attributed to Ausco and included in Ausco's assessable income for the year ending 30 June 2003. By virtue of paragraph 371(5)(a) of the ITAA 1936, an attribution credit arises in Forco's attribution account on 31 December 2002 in relation to Ausco for an amount of \$10,000, being the amount to be included in Ausco's assessable income for the 2003 year of income.*

9. *On 2 January 2003, Forco - the attribution account entity - pays a dividend of \$10,000 to Ausco out of the income derived during its statutory accounting period.*

10. *Immediately before the time that Forco pays a dividend to Ausco (i.e. 2 January 2003), there is an attribution surplus of \$10,000 in the attribution account. The payment of the dividend of \$10,000 is an attribution account payment which gives rise to an attribution debit for the same amount.*

11. *As the dividend payment of \$10,000 gives rise to an attribution debit to the attribution account of Forco in relation to Ausco, the entire dividend of \$10,000 received by Ausco is non-assessable non-exempt income under section 23AI.*

TD 2003/27**Example 2**

12. Assume the same facts as example 1 above, except that instead of Forco paying a \$10,000 dividend on 2 January 2003, it pays a \$10,000 dividend to Ausco on 29 December 2002.

13. As there is no attribution surplus in the attribution account of Forco in relation to Ausco at the time of the dividend payment, no attribution debit can arise in relation to the payment of the dividend and so section 23AI does not apply. Therefore, the dividend of \$10,000 is included in Ausco's assessable income under section 44 of the ITAA 1936 for the 2003 year of income.

14. However, to prevent double taxation, the amount of the attributable income that would otherwise be included in Ausco's assessable income for the 2003 year of income is reduced by the amount of the assessable dividend (section 387). In this case, Forco's attributable income of \$10,000 is reduced by the amount of the assessable dividend of \$10,000. This results in Forco's attributable income being reduced to nil and, consequently, no amount of Forco's attributable income is included in Ausco's assessable income. Therefore, the \$10,000 is included in Ausco's assessable income as a dividend under section 44 only.

Date of effect

15. This Determination applies to years commencing both before and after its date of issue. However, it does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Commissioner of Taxation29 October 2003

Previous draft:

TD 2003/D17

Related Rulings/Determinations:

TR 92/1; TR 92/20; TR 97/16

Subject references:

- controlled foreign corporations
- exempt dividends
- attributable income

Legislative references:

- ITAA 1997 Div 36
- ITAA 1936 23AI
- ITAA 1936 44
- ITAA 1936 363
- ITAA 1936 365
- ITAA 1936 370

- ITAA 1936 371
- ITAA 1936 371(1)(a)
- ITAA 1936 371(5)(a)
- ITAA 1936 372
- ITAA 1936 387
- TAA 1953 Pt IVAAA
- Taxation Laws Amendment Act (No 4) 2003

ATO references

NO: 2003/007876
ISSN: 1038-8982