

***TD 2007/D11 - Income tax: will the hire of substantial equipment in Australia under a hire-purchase agreement create a deemed permanent establishment for a Singaporean resident hirer under Article 4(3)(b) of the tax treaty between Australia and Singapore as a result of the decision in McDermott Industries (Aust) Pty Ltd v. Federal Commissioner of Taxation [2005] FCAFC 67?***

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This document has been finalised by TD 2007/31.



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## Draft Taxation Determination

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Income tax: will the hire of substantial equipment in Australia under a hire-purchase agreement create a deemed permanent establishment for a Singaporean resident hirer under Article 4(3)(b) of the tax treaty between Australia and Singapore as a result of the decision in *McDermott Industries (Aust) Pty Ltd v. Federal Commissioner of Taxation* [2005] FCAFC 67?

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This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes. You can rely on this publication (excluding appendixes) to provide you with protection from interest and penalties in the way explained below. If a statement turns out to be incorrect and you underpay your tax as a result, you will not have to pay a penalty. Nor will you have to pay interest on the underpayment provided you reasonably relied on the publication in good faith. However, even if you don't have to pay a penalty or interest, you will have to pay the correct amount of tax provided the time limits under the law allow it.

### Ruling

1. Yes. In accordance with the decision in *McDermott Industries (Aust) Pty Ltd v. Federal Commissioner of Taxation* [2005] FCAFC 67 (*McDermott's case*), a Singaporean resident hirer will be deemed to have a permanent establishment in Australia in relation to the hire of substantial equipment in Australia under a hire-purchase agreement.
2. This view is not limited to the tax treaty between Australia and Singapore but also applies in respect of other tax treaties with Australia as specified in paragraphs 10 to 12 of this Determination.

### Example

3. A Singaporean enterprise hires substantial equipment to an entity for operation in Australia, under a hire-purchase agreement.

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4. *As the Singaporean enterprise is using the substantial equipment it will have a deemed permanent establishment under Article 4(3)(b) of the tax treaty between Australia and Singapore (the Singapore Agreement) in Australia.*<sup>1</sup>

## **Date of effect**

5. It is proposed that when the Determination is issued, it will apply both before and after its date of issue. However, the Determination does not apply to the extent that it conflicts with the terms of settlement of a dispute agree to before the date of issue of the Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

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**Commissioner of Taxation**

6 June 2007

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<sup>1</sup> See Schedule 5 of the *International Tax Agreements Act 1953* (the Agreements Act).

## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.*

### Explanation

6. For the purposes of this Determination, the term hire-purchase agreement has the same meaning as it does in Draft Taxation Ruling TR 2006/D8.<sup>2</sup>

7. Article 4(3)(b) of the Singapore Agreement provides that a Singaporean enterprise will be deemed to have a permanent establishment in Australia and to carry on trade or business through that permanent establishment if substantial equipment is being used in Australia by, for or under contract with the Singaporean enterprise.

8. In interpreting Article 4(3)(b) of the Singapore Agreement, the Full Federal Court in McDermott's case held that the relevant use might, but need not be, use by an Australian enterprise.<sup>3</sup> The Court considered that there was nothing in the context of Article 4 or the Singapore Agreement that required a reading down of the natural meaning of the provision. As a result, the Court held that a permanent establishment was deemed to arise because the substantial equipment was being used in Australia either by the Singaporean resident or by McDermott Industries under contract with the Singaporean resident.<sup>4</sup>

9. While McDermott's case involved bare boat charters being a particular type of standard leasing arrangement, the Commissioner considers that the same outcome arises where the arrangement involves the hiring of substantial equipment under a hire-purchase agreement. This is because the Singaporean hirer maintains legal rights over the equipment under the hire-purchase agreement. Thus, the Singaporean hirer is using the equipment in Australia because it is gaining income from equipment it legally owns being operated by the other entity in Australia. Also, the equipment is used in Australia by the other entity under contract with the Singaporean hirer.

<sup>2</sup> See paragraph 27 of TR 2006/D8.

<sup>3</sup> [2005] FCAFC 67 at paragraph 39.

<sup>4</sup> [2005] FCAFC 67 at paragraph 71.

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10. The Commissioner's interpretation is not limited to Article 4(3)(b) of the Singapore Agreement but also applies in respect of the tax treaties specified below:

| <b>Tax Treaty</b>    | <b>Schedule No. to Agreements Act</b> |
|----------------------|---------------------------------------|
| New Zealand          | 4                                     |
| Malaysian            | 16                                    |
| Irish                | 20                                    |
| Norwegian            | 23                                    |
| Papua New Guinea     | 29                                    |
| Thai                 | 30                                    |
| Sri Lankan           | 31                                    |
| Kiribati             | 34                                    |
| Indian               | 35                                    |
| Vietnamese           | 38                                    |
| Czech <sup>5</sup>   | 40                                    |
| South African        | 42                                    |
| Argentine            | 44                                    |
| Russian <sup>6</sup> | 46                                    |
| Mexican <sup>7</sup> | 47                                    |

11. For the tax treaties listed below, the view in this Taxation Determination will only apply where the substantial equipment is present in Australia under the hire-purchase agreement for more than the time period specified in the relevant tax treaty. The tax treaties and respective time periods are specified in the following table:

| <b>Tax Treaty</b> | <b>Schedule No. to Agreements Act</b> | <b>Time period</b> |
|-------------------|---------------------------------------|--------------------|
| French            | 11                                    | 6 months           |
| Philippine        | 14                                    | 6 months           |
| Polish            | 36                                    | 12 months          |
| Taipei            | 41                                    | 3 months           |
| Romanian          | 45                                    | 6 months           |

<sup>5</sup> Applies to heavy equipment not substantial equipment.

<sup>6</sup> Applies to heavy industrial equipment not substantial equipment.

<sup>7</sup> Applies to heavy equipment not substantial equipment.

12. For the tax treaties listed below, a non-resident will only have a permanent establishment where, under the hire-purchase agreement, the substantial equipment is used in exploration for, or the exploitation of, natural resources, or in activities connected with such exploration or exploitation in Australia for more than the time period specified in the relevant tax treaty. The tax treaties and respective time periods are specified in the following table:

| <b>Tax Treaty</b>    | <b>Schedule No. to Agreements Act</b> | <b>Time period</b> |
|----------------------|---------------------------------------|--------------------|
| Netherlands          | 10                                    | 12 months          |
| Belgian              | 13                                    | 12 months          |
| Swiss                | 15                                    | 12 months          |
| Swedish              | 17                                    | 12 months          |
| Danish               | 18                                    | 12 months          |
| Italian              | 21                                    | 12 months          |
| Korean               | 22                                    | 12 months          |
| Finnish              | 25                                    | 12 months          |
| Chinese <sup>8</sup> | 28                                    | 3 months           |
| Hungarian            | 33                                    | 12 months          |
| Spanish <sup>9</sup> | 39                                    | 12 months          |

<sup>8</sup> The Chinese Agreement specifies that a PE will be deemed where: 'a structure, installation, drilling rig, ship or other equipment used for the exploration for or exploitation of natural resources, or in activities connected with that exploration or exploitation, but only if so used continuously, or those activities continue, for a period of more than three months.'

<sup>9</sup> The Spanish Agreement specifies that a PE will be deemed where: 'A structure, installation, drilling rig, ship or other like substantial equipment is used for the exploration for, or exploitation of, natural resources or in activities connected with that exploration or exploitation, in either case if used continuously or those activities continue for a period of more than twelve months.'

## Appendix 2 – Your comments

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13. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date. (Note: The Tax Office prepares a compendium of comments for the consideration of the relevant Rulings Panel or relevant Tax officers. The Tax Office may use a version (names and identifying information removed) of the compendium in providing responses to persons providing comments. Please advise if you do not want your comments included in the latter version of the compendium.)

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|-------------------------|--|
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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10; TR 2006/D8; TD 2007/D12

*Subject references:*

- hire-purchase agreements
- permanent establishment
- Singapore tax treaty
- substantial equipment
- tax treaties

*Legislative references:*

- International Tax Agreements Act 1953 Sch 5
- International Tax Agreements Act 1953 Sch 10
- International Tax Agreements Act 1953 Sch 11
- International Tax Agreements Act 1953 Sch 13
- International Tax Agreements Act 1953 Sch 14
- International Tax Agreements Act 1953 Sch 15
- International Tax Agreements Act 1953 Sch 16
- International Tax Agreements Act 1953 Sch 17
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- International Tax Agreements Act 1953 Sch 42
- International Tax Agreements Act 1953 Sch 44
- International Tax Agreements Act 1953 Sch 45
- International Tax Agreements Act 1953 Sch 46
- International Tax Agreements Act 1953 Sch 47

*Case references:*

- McDermott Industries (Aust) Pty Ltd v. Federal Commissioner of Taxation [2005] FCAFC 67

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ATO references

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