TD 94/D16 - Income tax: how does the time threshold in the substantial equipment provision of the permanent establishment article of the Australia-Spain Double Taxation Agreement ("the DTA") operate?

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This document has been finalised by TD 94/44.

Australian Taxation Office

Taxation Determination TD 94/D16

Draft Taxation Determinations (TDs) represent the preliminary, though considered, views of the ATO. Draft TDs may not be relied on; only final TDs are authoritative statements of the ATO.

Draft Taxation Determination

Income tax: how does the time threshold in the substantial equipment provision of the permanent establishment article of the Australia-Spain Double Taxation Agreement ("the DTA") operate?

1. Under Article 5(4)(b) of the DTA, where certain substantial equipment is used continuously for more than twelve months, or activities continue for more than twelve months there may be a "permanent establishment". The twelve month time limit is consistent with limits included in some of Australia's other DTAs.

2. However, the drafting approach used in the Agreement is unique among Australia's DTAs. Article 5(4)(b) provides as follows:

> "(4) An enterprise shall be deemed to have a permanent establishment in one of the Contracting States and to carry on business through that permanent establishment if:
>
> (a) . . .
>
> (b) a structure, installation, drilling rig, ship or other like substantial equipment is used:
>
> (i) for the exploration for, or exploitation of, natural resources; or
>
> (ii) 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."

3. One issue is whether the phrase "activities continue for a period of more than twelve months" is meant to apply to both subparagraphs (i) and (ii), or whether it is confined to "activities" referred to in subparagraph (ii). As the twelve month threshold is expressed to apply "in either case", the view is taken that it qualifies both subparagraphs (i) and (ii).

4. Another issue is whether the twelve month threshold applies to both continuous use of substantial equipment *and* continuing activities. The Explanatory Memorandum could be read as applying the twelve month time threshold only to activities connected with the exploration for, or exploitation of, natural resources continuing for more than twelve months and *not* to cases where equipment is used continuously. However, the provision will be administered in a manner consistent with the actual wording of Article 5(4)(b) of the DTA, that is, by applying the twelve month time threshold *both* to equipment used continuously and equipment used in activities continuing for that period.

Commissioner of Taxation
24/2/94

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