IT 2529 - Income tax : foreign tax credit system - foreign tax credit determinations

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TAXATION RULING NO. IT 2529

INCOME TAX : FOREIGN TAX CREDIT SYSTEM - FOREIGN TAX CREDIT DETERMINATIONS

F.O.I. EMBARGO: May be released

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I 1011184	FOREIGN TAX CREDIT SYSTEM MISCELLANEOUS PROVISIONS WITH RESPECT TO CREDITS	160AF(1) DIV 19

OTHER RULINGS ON TOPIC IT 2527 IT 2528

PREAMBLE This Ruling deals with various issues relating to the determination of foreign tax credits. The Ruling has been written against the background of the requirement of subsection 160AF(1) of the Income Tax Assessment Act ("the Assessment Act") that foreign tax claimed as a credit must have been paid before it may be offset against the Australian tax payable on the foreign income. It should be read in conjunction with Taxation Rulings Nos IT 2527 and IT 2528, which address other aspects of the practical administration of that requirement.

2. Division 19 of the Assessment Act contains a number of requirements governing the procedures for determination by the Commissioner of claims made by persons for foreign tax credits under that Act and the Income Tax (International Agreements) Act 1953. The Division therefore provides the machinery provisions relating to Division 18 (Credits in Respect of Foreign Tax, including credits pursuant to Australia's international taxation agreements), Division 18A (Credits in Respect of Foreign Tax Paid on Certain Film Income) and Division 18B (Credits in Respect of Foreign Tax Paid on Certain Shipping Income). It contains rules relating to amendments of such determinations, objection and appeal rights for taxpayers against such determinations, power for the Commissioner to apply credits in settlement of any outstanding tax and a limitation on the total credits allowable to a person to the amount of Australian tax payable in respect of the taxpayer's taxable income of the year of income.

RULING 3. Taxation Ruling No. IT 2527 deals generally with the difficulties that can arise in the practical application of subsection 160AF(1) of the Assessment Act where foreign income is included in a return of income of an Australian resident taxpayer for a year of income but the foreign tax on that income has not been paid or is not quantifiable at the time the return is required to be submitted, or where there are delays in

obtaining documentary evidence supporting a claim for foreign tax paid. In certain cases an extension of time to pay the Australian tax payable in respect of the foreign income may be granted pending the determination and allowance of the taxpayer's foreign tax credit entitlement (see Taxation Ruling No. IT 2528). However, circumstances of the type addressed in those Rulings are not grounds for the granting to a taxpayer of an extension of time to lodge the relevant return.

4. Those circumstances affect the making of a determination by the Commissioner (pursuant to subsection 160AI(1) of the Assessment Act) of the taxpayer's foreign tax credit entitlement rather than the making of an assessment. Such a determination does not form part of an assessment (subsection 160AI(2)), and hence an assessment can be made independently of the calculation of the foreign tax credit entitlement.

5. A person may make a claim for a foreign tax credit either at the time of lodging the return of income which includes foreign income in respect of which foreign tax has been paid or at some later date. Subsections 160AI(1) and (3) require the Commissioner to determine whether a credit claimed by the taxpayer is allowable and, if so, the amount of the credit, whenever the claim is made, and to advise the taxpayer accordingly. While the determination of a credit does not form part of an assessment, the Commissioner's notification may be included either in a notice of assessment (subsection 160AI(4)), or in a separate written advice.

6. Section 160AM provides that where a person makes a claim for a credit, the credit shall not be allowed unless the taxpayer furnishes to the Commissioner all the information necessary for determining the amount of the credit, i.e., including documentary evidence demonstrating that the relevant foreign tax has been paid and information relating to any reduction or refund of the relevant foreign tax. Such information has to be furnished within three years after the date upon which the Australian tax against which the credit is claimed became due and payable (see also paragraphs 42 to 74 of Taxation Ruling No. IT 2527).

7. However, the section empowers the Commissioner to determine a further period of up to three years within which to furnish the necessary information in special circumstances. The section does not require for this purpose that the taxpayer advise the Commissioner prior to the expiry of the initial three year period that a further period is required. That power could be expected to be exercised where a taxpayer can demonstrate that the delay in claiming a credit is due to circumstances beyond the control of the taxpayer. An example would be where the delay in claiming a credit is due to action, or inaction, by the relevant foreign revenue authority.

8. The terms of section 160AM are such that requests made outside these time constraints cannot be allowed. However, the effects of the comments which follow - concerning the procedures to apply where insufficient information has been provided to

determine the amount of credit to be allowed and the absence of a time limit on the amendment of a credit determination - may provide some flexibility in that regard in particular cases.

9. It should also be noted that a credit determination made at a date subsequent to the issue of the relevant assessment, but within the time period specified in section 160AM, would (if no previous credit determination had been made in respect of that assessment) constitute an original determination even though from the view point of practical administration the allowance of any such credit may be included in a notice of amended assessment.

10. In cases in which insufficient information has been provided to determine the amount of the credit to be allowed, the relevant branch Taxation Office should advise the taxpayer to that effect and remind that person of the time limit imposed by that section for the submission of the additional details required. That notification will not constitute a determination within the context of subsection 160AI(1) and such action by the Commissioner will not of course provide the basis from which a right of objection or appeal can flow. Where, however, on receipt of such a notification a taxpayer advises the Commissioner in writing that additional relevant information cannot or will not be provided, and sets out the pertinent circumstances, the claim for credit will be reviewed. A determination as to allowance or disallowance of the claim for credit will then be notified to the taxpayer. Upon receipt of this latter notification a taxpayer whose claim for a credit is disallowed will have a right of redress pursuant to the objection and appeal provisions - see paragraph 16 below.

11. Where all the information necessary to make a determination has been supplied by a taxpayer, the Commissioner will notify the taxpayer whether the claim has been allowed in full, allowed in part, or disallowed.

12. Section 160AK provides for the amendment of a determination of credit. Subsection 160AK(1) permits the Commissioner to amend a determination at any time subject to the succeeding provisions of the section (see paragraph 15 below). Those provisions recognise that a variation of the amount of Australian or foreign tax payable in respect of foreign income may give rise to a consequent variation of the credit allowable. As it is not practicable to determine the period in which the amount of Australian or foreign tax may be altered, it would accordingly be inappropriate for a time limit to apply with respect to the amendment of determinations in these circumstances. Such a limitation could be detrimental to either the taxpayer or the Revenue.

13. Accordingly, if an amount of foreign tax claimed or allowed as a credit in any year of income is subsequently altered by an overseas tax authority - so as to either increase, decrease or refund the amount of the foreign tax paid - sections 160AK and 160AM require that the relevant branch Taxation Office be notified in order that an appropriate credit determination or

amended determination can be made for the Australian year concerned.

14. As indicated in Taxation Ruling No. IT 2527, a credit determination or amended credit determination may result in a complementary amendment of the taxpayer's assessment for the income year concerned in order to adjust the assessable amount of the relevant foreign income. As also indicated there, further consideration is being given in this context to the situation where the need for a credit determination or amended credit determination might arise outside the relevant time limitations specified in section 170 of the Assessment Act for amendment of assessments.

15. In certain circumstances (subsections 160AK(2) and (3)), the Commissioner is precluded from amending a determination to decrease or increase a credit to correct an error in law after the end of three years after the date on which the relevant determination was made. For practical purposes, that date may be regarded as the date of issue of the determination notification. Where such a notification is incorporated in a notice of assessment the date of issue of that notice may be treated as the relevant date.

16. Section 160AL extends to persons claiming credits the same rights of objection and appeal against determinations as are given to taxpayers dissatisfied with their assessments. Accordingly, a valid objection or appeal lodged against either an original or amended credit determination will give rise to an entitlement for the taxpayer to be paid interest on amounts refunded as a result of a successful resolution of that dispute in accordance with the provisions of the Taxation (Interest on Overpayments) Act 1983.

COMMISSIONER OF TAXATION
4 May 1989