IT 2544 - Income tax : application of section 254 and 255

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TAXATION RULING NO. IT 2544

INCOME TAX : APPLICATION OF SECTION 254 AND 255

F.O.I. EMBARGO: May be released

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REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1011373	RECOVERY OF TAX NON-RESIDENTS PERSONS IN RECEIPT OF MONEY BELONGING TO NON-RESIDENTS	254 255

OTHER RULINGS ON TOPIC IT 354 (now withdrawn), 2262

PREAMBLE In light of advice from eminent counsel which has been supported by the Attorney-General's Department it has become necessary to modify the views expressed in Taxation Ruling No. IT 354 on sections 254 and 255. The operation of section 255 was discussed in the Commonwealth Auditor General's report dated 26 November 1987 on international profit shifting and by the House of Representative Standing Committee on Finance and Public Administration in its report of 31 May 1989 on the same subject.

2. Section 255 operates where a non-resident derives income, or profits or gains of a capital nature, from sources in Australia or where a non-resident is a shareholder, debenture holder or depositor in a company deriving income, or profits or gains of a capital nature from a source in Australia. The section applies to a person having the receipt, control or disposal of money belonging to the non-resident. Subsection 255(3) expressly provides that the section applies equally to the Commonwealth, a State or an authority of the Commonwealth or State having the receipt, control or disposal of money belonging to a non-resident.

3. The following provisions apply to persons to whom section 255 applies :

"(a) he shall when required by the Commissioner pay the tax due and payable by the non-resident;

(b) he is hereby authorized and required to retain from time to time out of any money which comes to him on behalf of the non-resident so much as is sufficient to pay the tax which is or will become due by the non-resident;

(c) he is hereby made personally liable for the tax payable

by him on behalf of the non-resident to the extent of any amount that he has retained, or should have retained, under paragraph (b); but he shall not be otherwise personally liable for the tax;

(d) he is hereby indemnified for all payments which he makes in pursuance of this Act or of any requirement of the Commissioner."

4. Subsection 255(2) provides that a person who is liable to pay money to a non-resident is deemed to have the control of money belonging to the non-resident and, except for certain natural resource or royalty payments (subsection 255(2A)), all money due to the non-resident is deemed to have come to that person on behalf of the non-resident. Subsection 255(4) states that for the purposes of the section "tax" includes additional tax under section 207 or Part VII.

5. The practice of this Office as stated in Taxation Ruling No. IT 354 was that section 255 did not require a person having the receipt, control or disposal of money belonging to a non-resident to deduct part of the money for the payment of tax and remit it to the Commissioner unless tax had been assessed and that person had received notice from the Commissioner advising that tax was outstanding and requiring the payment of the tax out of the funds belonging to the non-resident.

RULING

6. In view of the counsel opinions and the advice of the Attorney-General's Department, it is now considered that the correct interpretation is that paragraph 255(1)(b) can have effect before an assessment has issued and that it operates of its own force without requiring any notification from the Australian Taxation Office (ATO).

7. This follows from the terms of paragraph 255(1)(b) which authorises and requires persons having the receipt, control or disposal of money belonging to a non-resident to retain enough to pay the tax which is or will become due by the non-resident. In this context the word "due" has its ordinary meaning of "owing".

8. The High Court in Clyne v DFC of T (1981) 12 ATR 173; 81 ATC 4429 held that income tax is due when it is assessed and notice of that assessment is served on the relevant taxpayer. Gibbs CJ expressed the view that it is even open to argue that tax becomes due at the end of the relevant financial year when the activities giving rise to that year's taxable income have taken place. The Chief Justice agreed that, for most practical purposes, tax is due at the latest when it is assessed (12 ATR at 177; 81 ATC at 4432).

9. However, the Full High Court in Clyne's Case decided that tax does not become "due and payable" before the date fixed by section 204 (usually the date for payment specified on the notice of assessment). While Clyne's Case was concerned with section 218, the reasoning is equally applicable to section 255. In fact Gibbs CJ expressly referred to paragraphs

255(1)(a) and (b) as an example of the distinction between the terms "due" and "due and payable".

10. It follows that when paragraph 255(1)(b) refers to the tax which is or will become due it envisages that the paragraph may apply before an assessment has issued.

11. Unlike paragraph 255(1)(a), paragraph 255(1)(b) does not provide for some specific notification from the ATO as a precondition to its operation.

12. Counsel's opinions have indicated that, while section 255 appears to have a wide application, a court might seek to read it down in some way to prevent its operation in circumstances where it would clearly be unreasonable for it to apply. Discussions with tax practitioners and industries likely to be affected by this Ruling have highlighted a wide range of serious practical problems in ascertaining when and how much a person should retain for the payment of tax in the absence of some notification from the ATO.

13. Accordingly, the approach to be adopted in these cases is that the ATO will not regard a person as being required to retain moneys for the payment of a non-resident's tax unless the ATO has notified the person, whether before or after assessment of the non-resident, to retain a certain amount or percentage of the moneys belonging to the non-resident. Having received such a notice it is of course open to the person to seek further advice from ATO of the amount to be retained (e.g., to take account of expenses incurred by the non-resident).

14. It must still be recognised however, that the section, if interpreted literally by a Court, could have much wider application. A person having the receipt, control or disposal of money who is unsure of his or her liability should contact the local office of the ATO for advice. In particular, this Ruling is in no way intended to change the current practice of some persons who contact the ATO for advice on what amounts should be withheld from payments to non-residents. These persons include those who are to make payments to overseas entertainers for performances, appearances or advertising work in Australia, or to non-resident contractors, sub-contractors, service companies and the like to perform services for short periods within Australia.

15. The purpose of section 255 is to assist in the recovery of tax from non-residents in cases where the recovery of tax due and payable would be impeded or frustrated by the moving of funds out of Australia. Accordingly, where the non-resident satisfies the ATO that any assessment will be duly paid, or that sufficient assets will be kept available in Australia to cover payment of any income tax liability, the ATO would not generally require persons having receipt, control or disposal of money belonging to a non-resident to retain any part of the moneys.

16. Paragraph 255(1)(a) empowers the Commissioner to issue a notice to a person to whom the section applies requiring that

person to pay the tax when it becomes due and payable by the non-resident. This notice can be given before or after an assessment has been raised. However, there is no obligation under this paragraph on the person receiving the notice to actually make a payment to the ATO until the relevant tax has been assessed and has become due and payable in accordance with section 204.

17. Paragraph 255(1)(c) complements paragraphs 255(1)(a) and 255(1)(b). It makes a person to whom the section applies personally liable for the tax payable to the extent of any amount retained or any amount that should have been retained. Paragraph 255(1)(d) indemnifies that person for all payments made pursuance of the Act or of any requirement of the Commissioner.

18. Paragraph 254(1)(d) which applies to agents and trustees is in similar terms to paragraph 255(1)(b). Accordingly, the view is taken that paragraph 254(1)(d) may also operate before an assessment of tax is made. Equally, it is proposed that to the extent that section 254 raises similar issues to those discussed above in relation to section 255, the approaches outlined in relation to section 255 will be applied.

19. Taxation Ruling No. IT 354 is withdrawn.

COMMISSIONER OF TAXATION
29 June 1989