IT 355 - Sharedealing transactions by overseas investors

This document has been Withdrawn.
There is a Withdrawal notice for this document.

This ruling contains references to repealed provisions, some of which may have been rewritten. The ruling still has effect. Paragraph 32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten. The legislative references at the end of the ruling indicate the repealed provisions and, where applicable, the rewritten provisions.

TAXATION RULING NO. IT 355

SHAREDEALING TRANSACTIONS BY OVERSEAS INVESTORS

F.O.I. EMBARGO: May be released

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F.O.I. INDEX DETAIL REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1070810	DOUBLE TAX AGREEMENTS	US AGREEMENT -
	DOUBLE TAX - UNITED STATES	ARTICLE III
	DOUBLE TAX - CANADA	CANADIAN AGREEMENT
	DOUBLE TAX - UNITED KINGDOM	- ARTICLE III
	DOUBLE TAX - NEW ZEALAND	UK AGREEMENT -
	BUSINESS PROFITS - DOUBLE TAX	ARTICLE 5
		NZ AGREEMENT -
		ARTICLE 5
		26(a)
		26AAA

PREAMBLE Consideration was given to the effect of double tax agreements upon the assessments of profits from sharedealing transactions by overseas investors not maintaining a permanent establishment in Australia.

RULING United States and Canadian Agreements

2. The exemption under Article III of the respective agreements is available only for the profits of an "industrial or commercial enterprise". A fiscal operation such as dealing in shares is certainly not industrial, and it is arguable that it is outside the scope of anything than can fairly be described as commercial. Kitto J. was inclined to take this view in E.S. & A. Bank Ltd v FCT, 69 ATC 4069 at p.4071; 1 ATR 104 at p.106. However, the agreements appear to have the effect of exempting all profits of an industrial or commercial enterprise (apart from certain specific exclusions not presently relevant). If the enterprise is industrial or commercial, it does not appear to matter whether the particular profit can be described as industrial or commercial.

3. It should therefore be maintained that the share dealing profits made by an individual investor or by one not engaged in industry or commerce in the strict sense are not exempt under the double taxation agreements. However, it may eventually have to be conceded exemption in any case in which it is clear the investor would have to be categorised as an industrial or commercial enterprise.

(NOTE : A new Canadian agreement came into effect on 1 July 1975. Article 7 of the new agreement replaced Article III of the old agreement but the new agreement does not use the term "industrial or commercial enterprise".)

United Kingdom and New Zealand Agreements

4. The position is very much weaker in relation to the United Kingdom. Under the old double taxation agreement, the businesses of banking, insurance and dealing in investments were expressly deemed to be industrial or commercial and the proceeds of such businesses were deemed to be industrial or commercial profits. The new agreement is much wider in its terms. It still uses the expression "industrial or commercial profit" but now it is a rigorously defined expression, which is declared to mean (subject again to exclusions not here relevant) "income derived by an enterprise from the conduct of a trade or business".

5. No possible basis can be seen for arguing that a United Kingdom investor which is buying and selling Australian shares or other property in the course of a business is ineligible for the exemption provided by Article 5 on the ground that the proceeds are not industrial or commercial profits within the meaning of the agreement. The new agreement is drafted in such a way that it is no longer relevant to consider whether or not share dealing is within the ambit of the expression "commercial profits" as it is understood in common usage.

6. The decision of the Full High Court in the Investment and Merchant Finance Co. Ltd. Case (1971) 125 CLR 249 and other Australian decisions seem to leave no room for doubt that a finance company or bank which deals in shares in its own right would be held to be doing so in the course of conducting a business: cf. also Ostime v Australian Mutual Provident Society, (1960) AC 459.

7. This leaves no option but to concede that UK banks and financial institutions which buy and sell Australian property in their own right in the ordinary course of their businesses are entitled to have their profits exempted on the ground that Article 5 of the double taxation agreement prevails over sections 26(a) and 26AAA.

8. Simple investors whose activities do not amount to the carrying on of a business do not appear to be affected by the double taxation agreement with the UK. Business operators buying and selling on behalf of overseas beneficial owners would also be outside the ambit of the exemption.

9. The effect of the New Zealand agreement which came into force in relation to the income year ended 30 June 1973 is designedly similar to the UK agreement in the relevant respects and what has been said about the effects of the UK agreement applies also to the New Zealand agreement in the securities context. However, special provisions apply to profits from the sale of land in shares representing land, so that these are never "industrial or commercial profits".

10. Should a question arise under the former NZ agreement, however, it is considered that the matter should be resolved on

the basis that the effect of the the former agreement was the same as that of the United States and Canadian agreements as outlined above.

COMMISSIONER OF TAXATION