

TD 2014/13 - Income tax: the application of Article 10.2(a) of the United Kingdom Convention

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Taxation Determination

Income tax: the application of Article 10.2(a) of the United Kingdom Convention

❶ This publication provides you with the following level of protection:

This publication (excluding appendices) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant 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.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

Ruling

1. UK Co 'holds directly' at least 10 per cent of the voting power in Aus Co for the purposes of Article 10.2(a) of the United Kingdom Convention¹ (the Convention) where:
 - (a) a nominee shareholder owns shares carrying at least 10 per cent of the voting power in Aus Co for the benefit of UK Co, and
 - (b) the nominee undertakes to UK Co to exercise all rights of voting and other privileges attaching to the shares in such manner as UK Co shall direct or approve.

¹ *The Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains [2003] ATS 22.*

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Date of effect

2. This Determination applies to years of income commencing both before and after its date of issue. However, this Determination will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Determination (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

Commissioner of Taxation

4 June 2014

Appendix 1 – Explanation

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

Explanation

3. Under the terms of section 128B of the *Income Tax Assessment Act 1936* (ITAA 1936), non-residents for Australian income taxation purposes may be liable for withholding tax on dividends paid by an Australian resident company.
4. Under the terms of section 7 of the *Income Tax (Dividends, Interest and Royalties Withholding Tax) Act 1974*, the relevant withholding tax rate is set at 30%.
5. However, subsection 17A(1) of the *International Tax Agreements Act 1953* provides that where a provision of an international agreement limits the Australian tax payable in respect of a dividend, the withholding tax shall be reduced to the amount specified in the agreement.
6. In that regard, where a resident of the United Kingdom is the beneficial owner of dividends paid by an Australian resident company, Article 10 of the Convention relevantly provides:
 1. Dividends paid by a company which is a resident of a Contracting State for the purposes of its tax, being dividends beneficially owned by a resident of the other Contracting State, may be taxed in that other State.
 2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident for the purposes of its tax, and according to the law of that State, but the tax charged shall not exceed:
 - (a) 5 per cent of the gross amount of the dividends, if the beneficial owner of the dividends is a company which holds directly at least 10 per cent of the voting power in the company paying the dividends, and
 - (b) 15 per cent of the gross amount of the dividends in all other cases. ...
7. Here, the Contracting State is Australia and the 'other' Contracting State or 'other' State is the United Kingdom.²
8. Key words in the Convention are defined in Article 3. However, the words 'holds directly' are not defined in Article 3 or any other provision of the Convention. Article 3.3 of the Convention which relates to interpreting its provisions, provides:

As regards the application of this Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the laws of that State for the purposes of the taxes to which this Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.
9. In *McDermott Industries (Aust) Pty Ltd v. CoT* [2005] FCAFC 67; (2005) 142 FCR 134; 2005 ATC 4398; 59 ATR 358 (*McDermott*), the Full Federal Court summarised the principles for interpreting the words and phrases of double tax agreements:
 37. Double tax treaties are bilateral treaties entered into between two states. As such they are to be interpreted in accordance with the requirements of the *Vienna Convention on the Law of Treaties* (23 May 1969, entered into force on 22 January 1974) ('the Convention') and in particular Article 31 of the Convention.

² See Article 3.1(e) of the Convention.

38. The application of the Convention has been discussed by McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 and in *Thiel v. FC of T* 90 ATC 4717; (1990) 171 CLR 338, the latter case being concerned with the interpretation of the double taxation agreement between Australia and Switzerland. The leading authority in this Court on interpretation of double taxation agreements is *Lamesa*.³ It is unnecessary here, to set out again what is there said. The following principles can be said to be applicable:

- Regard should be had to the 'four corners of the actual text'. The text must be given primacy in the interpretation process. The ordinary meaning of the words used are presumed to be 'the authentic representation of the parties' intentions' ...
- The courts must, however, in addition to having regard to the text, have regard as well to the context, object and purpose of the treaty provisions. The approach to interpretation involves a holistic approach.
- International agreements should be interpreted 'liberally'.
- Treaties often fail to demonstrate the precision of domestic legislation and should thus not be applied with 'taut logical precision'.

(Footnote inserted)

10. In this particular case, a nominee shareholder owns shares in Aus Co for the benefit of UK Co and must exercise all rights of voting attaching to the shares in such manner as UK Co shall direct or approve. In these circumstances, the Commissioner accepts, in accordance with the principles summarised in *McDermott*, that UK Co 'holds directly' at least 10 per cent of the voting power in Aus Co for the purposes of Article 10.2(a) of the Convention.

³ See *FC of T v. Lamesa Holdings BV* (1997) 77 FCR 597; 97 ATC 4752; (1997) 36 ATR 589.

References

Previous draft:

TD 2014/D9

Related Rulings/Determinations:

TR 2006/10

Subject references:

- double tax agreements
- withholding taxes

Legislative references:

- ITAA 1936 128B
- Income Tax (Dividends, Interest and Royalties Withholding Tax) Act 1974 7
- International Tax Agreements Act 1953 17A(1)
- TAA 1953

Case references:

- McDermott Industries (Aust) Pty Ltd v CoT [2005] FCAFC 67; (2005) 142 FCR 134; 2005 ATC 4398; 59 ATR 358

Other references:

- The Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains [2003] ATS 22 Article 10

ATO references:

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