

TD 93/146 - Income tax: should a resident deduct withholding tax from interest payable under a loan from a non-resident if there is no actual payment of the interest?

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! This document has changed over time. This is a consolidated version of the ruling which was published on *18 October 2000*

This Determination, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the *Taxation Administration Act 1953*, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Determination is a public ruling and how it is binding on the Commissioner. Unless otherwise stated, this Determination applies to years commencing both before and after its date of issue. However, this Determination does 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 the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

[Note: This is a consolidated version of this document. Refer to the Tax Office Legal Database (<http://law.ato.gov.au>) to check its currency and to view the details of all changes.]

Taxation Determination

Income tax: should a resident deduct withholding tax from interest payable under a loan from a non-resident if there is no actual payment of the interest?

1. Yes, provided the interest is income derived by the non-resident and is not an outgoing incurred by the resident in carrying on a business at or through a permanent establishment outside Australia. The requirement to withhold the tax arises at the time the interest is 'paid' or 'payable' according to Division 4 of Part VI of the *Income Tax Assessment Act 1936*. For payments made after 30 June 2000, the requirement to withhold tax arises as a result of Subdivision 12-F, Schedule 1 of the *Taxation Administration Act 1953*.

2. Subsections 221YL(2A) and 221YL(2B) require a person to deduct withholding tax from interest 'paid' or 'payable' to a non-resident. Subsection 221YK(3) deems interest to have been paid or payable when it is 'reinvested, accumulated, capitalised, carried to any reserve, sinking fund or insurance fund however designated, or otherwise dealt with on behalf of the other person or as the other person directs'. Therefore, the requirement to withhold the tax from the interest does not require an actual payment of the interest. It is enough if the interest liability arises and any of the actions outlined in subsection 221YK(3) occurs. For payments made after 30 June 2000, sections 12-245, 12-250 and 12-255 of Subdivision 12-F, Schedule 1, of the *Taxation Administration Act* require a person to withhold amounts from payments of interest. Subsection 11-5(1) of the same Schedule deems an amount to have been paid when the paying entity applies or deals with the amount in any way on the other's behalf or as the other directs. This provision expresses the same idea as subsection 221YK(3).

3. Conversely, the non-resident is liable, under subsection 128B(5), to withholding tax on interest 'paid' to him/her. Subsection 128A(2) deems the interest to have been paid to a non-resident when it is dealt with in the same manner as described in subsection 221YK(3). The non-resident's liability to withholding tax in these circumstances is therefore unaffected by the absence of an actual payment of the interest. Section references in this determination are to the *Income Tax Assessment Act 1936* unless otherwise specified.

Example:

A is an Australian resident who borrows \$250 000 on 1 July 1992 from non-resident, NR, at 10% simple interest calculated and payable annually over 5 years. By agreement between them, the annual interest is

capitalised each year until the 5th year when the total amount standing to the credit of the loan account is payable.

A has an annual interest liability of \$25 000 payable on 30 June. Even though the interest is not actually paid over to NR each year the interest debt is to be satisfied each year by crediting it to NR's loan account. This arrangement is enough to invoke the requirements of the withholding tax provisions to deduct withholding tax from the interest credited each year. Therefore, A is required to deduct \$2 500 at the time interest is credited to the loan account and remit it to the Australian Taxation Office.

Commissioner of Taxation

29/7/93

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