

TR 1999/8 - Income tax: international transfer pricing: the effects of determinations made under Division 13 of Part III, including consequential adjustments under section 136AF

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Taxation Ruling

Income tax: international transfer pricing: the effects of determinations made under Division 13 of Part III, including consequential adjustments under section 136AF

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Preamble

*The number, subject heading, **Class of person/arrangement**, **Date of effect** and **Ruling and explanations** parts of this document are a 'public ruling' for the purposes of Part IVAAA of the **Taxation Administration Act 1953** and are legally binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a public ruling and how it is binding on the Commissioner.*

What this Ruling is about

Class of person/arrangement

1. This Ruling explains the effects on taxpayers of a determination made under the provisions of Division 13 of Part III ('Division 13') of the *Income Tax Assessment Act 1936* ('the Act' or 'the 1936 Act') in relation to non-arm's length arrangements. In particular, the Ruling explains:

- (1) the effect of the terms 'for all purposes of the application of this Act' and 'for all purposes of this Act' used in sections 136AD and 136AE respectively (**paragraphs 3 to 6**);
- (2) the operation of section 136AF where a determination has been made under section 136AD (**paragraphs 9 to 31**);
- (3) the application of section 170 to a determination made under Division 13 (**paragraphs 34 to 37**); and
- (4) the relationship between Division 13 and other arm's length provisions in the Act (**paragraphs 38 to 39**).

As Division 13 remains in the 1936 Act, all subsequent legislative references are to the 1936 Act unless otherwise stated. Division 13, however, operates in relation to both the 1936 Act and the *Income Tax*

Assessment Act 1997 ('the 1997 Act') in its interaction with other provisions.

Date of effect

2. This Ruling applies to years commencing both before and after its date of issue. However, it does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Ruling and explanations

The terms 'for all purposes of the application of this Act' and 'for all purposes of this Act'

3. A determination made under section 136AD or 136AE applies, in relation to the particular taxpayer, 'for all purposes of the application of this Act' in the case of section 136AD and 'for all purposes of this Act' in the case of section 136AE, but does not alter the actual terms, conditions, or prices agreed to between the parties. The term 'this Act' is defined in subsection 995-1(1) of the 1997 Act to include the 1936 Act.

Adjustments under sections 136AD and 136AE

4. A determination made under section 136AD for a taxpayer in relation to the consideration in respect of the supply or acquisition of property can result in adjustments to increase assessable income or disallow or reduce an allowable deduction. Other adjustments for the taxpayer that may result from a determination made under section 136AD are addressed in paragraphs 180 and 181 of Taxation Ruling TR 94/14 and include adjustments to:

- (1) exempt income (including expenses incurred in deriving such income);
- (2) income covered under section 128B (interest and royalties) that is subject to withholding tax; and
- (3) other matters for which the 1936 Act and the 1997 Act make special provision including:
 - (a) capital costs for special provisions that allow for a full, or partial, capital deduction - e.g., depreciation for equipment under Subdivision 42-A of the 1997 Act (Division 3 of Part III), or allowance for intellectual property under

Division 373 of the 1997 Act (Division 10B of Part III) and building allowance under Division 43 of the 1997 Act (Division 10D of Part III);

- (b) costs for specific deduction provisions (e.g., research and development costs under section 73B);
- (c) the amount of expenditure subject to recoupment provisions (e.g., sections 82KJ, 82KK and 82KL); and
- (d) taxable income ascertained under special provisions (e.g., taxation of overseas ships under Division 12 of Part III).

5. An adjustment made under section 136AD can also have flow-on consequences for the taxpayer into subsequent years, where that consideration is also relevant to the operation of other provisions of the Act. The term 'for all purposes of the application of this Act' in section 136AD, therefore, would operate to include flow-on effects in matters such as:

- (1) changing the values of closing and opening trading stock under section 70-35 of the 1997 Act (section 28) - see paragraphs 136, 439 and 440 of TR 94/14;
- (2) the amount of bad debts that may be available for write-off under section 8-1 of the 1997 Act (subsection 51(1)) or section 25-35 of the 1997 Act (section 63) - but see the comment in paragraphs 182 and 183 of TR 94/14 on the possible restriction on the availability of a deduction for bad debts; and
- (3) reducing losses, for example, under sections 79D and 160AFD, Subdivision 36-A of the 1997 Act (section 79E or, previously, section 80) including a reduction as a result of increasing exempt income or Australian source or foreign source income in the current year (also see paragraphs 197 to 199 of TR 94/14).

The flow-on effects may also depend on elections or other relevant tax effects under other sections of the Act. For example, if the taxpayer adopted market value for closing stock under subsection 70-45(1) of the 1997 Act (subsection 31(1)), the tax result of that election will need to be adjusted if a section 136AD determination is made to adjust the cost of trading stock.

6. Determinations made under subsections 136AE(4) to (6) with respect to a single legal entity may have the following consequences:

- (1) for an Australian resident taxpayer:

- (a) the application of section 23AH - exempt foreign branch income;
 - (b) the application of subsection 160AF(1) - foreign tax credits; and
 - (c) the application of sections 79D and 160AFD - treatment of foreign losses;
- (2) for a non-resident taxpayer:
 - (a) determining assessable income under subsections 6-5(3) and 6-10(5) of the 1997 Act (paragraph 25(1)(b)); and
 - (b) determining the deductibility of expenditure under various provisions, including section 8-1 of the 1997 Act (subsection 51(1)).

Secondary adjustments

7. Secondary adjustments are not addressed in this Ruling because Australian law does not presently provide a general power to make such adjustments. The 1995 OECD Report (*Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*) addresses secondary adjustments at paragraphs 4.67 to 4.77.

8. A secondary adjustment can broadly be described as an adjustment arising from a secondary constructive transaction that can be triggered by a primary transfer pricing adjustment made under Article 7 or 9 of a Double Tax Agreement ('DTA'), or under domestic law anti-transfer pricing measures. For example, if a primary transfer pricing adjustment increased the price of services provided by an enterprise in one country (Aco) to its associated enterprise in another country (Bco), a secondary adjustment could deem a loan by Aco to Bco equal to the additional profits resulting from the primary transfer pricing adjustment, as such profits would not be actually paid to Aco. As a result, the secondary adjustment could impute a notional arm's length interest payment by Bco for the deemed loan which would give rise to assessable income of Aco.

Consequential adjustments under section 136AF

9. Consequential adjustments under section 136AF must be distinguished from secondary adjustments.

10. Section 136AF presently authorises the Commissioner to make the following three types of consequential adjustments in relation to the relevant taxpayer:

- (1) excluding an amount of income from the assessable income of the relevant taxpayer - paragraph 136AF(1)(a);
- (2) allowing a deduction to the relevant taxpayer - paragraph 136AF(1)(b); and
- (3) deciding that an amount of **interest** withholding tax (or part thereof) should not have become payable by the relevant taxpayer - subsection 136AF(3). (The terms of this subsection do not, at present, authorise a consequential adjustment where **royalty** withholding tax should not have been payable by the relevant taxpayer.)

The 'relevant taxpayer' may be the taxpayer or another party to the international agreement that is the subject of the initial adjustment under section 136AD.

11. It is a pre-requisite to the operation of section 136AF that section 136AD must have been applied by the Commissioner to increase assessable income or disallow or reduce a deduction of a taxpayer. Section 136AF cannot apply if the provisions of subsections 136AE(4) to (6) have been applied, as these provisions deal with an allocation (within a single legal entity) of the taxpayer's income or expenditure and only apply in cases where section 136AD has not been applied to the particular dealing.

12. Where a consequential adjustment is made under paragraph 136AF(1)(b) to allow a deduction, in whole or in part, subsection 136AF(2) authorises the Commissioner to allow the deduction under such provision of the Act as the Commissioner determines. The Commissioner has a similar power as for ordinary deductions where more than one deduction may be applicable - see section 8-10 of the 1997 Act (subsection 82(1)). Paragraph 136AF(1)(b) and subsection 136AF(2) also ensure that the deduction will be allowed, notwithstanding that the relevant expenditure has not been paid or was not payable.

13. The basic operation of section 136AF is shown in the flow-chart illustrated on the next page.

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graph TD
    Q1{Has section 136AD been applied to increase assessable income or disallow or reduce a deduction?} -- NO --> NO_BOX[NO]
    Q1 -- YES --> Q2{If the parties to the relevant dealing had been dealing at arm's length then, for a relevant taxpayer}
    Q2 --> Q3a{Has income been included in assessable income that would not have been included? [s136AF(1)(a)(ii)]}
    Q2 --> Q3b{Would an amount have been allowed as a deduction? [s136AF(1)(b)(i)]}
    Q2 --> Q3c{Has interest withholding tax become payable, and been paid, that would not have become payable? [s136AF(3)(b)]}
    Q3a -- YES --> Q4a{Is it fair and reasonable that:}
    Q3a -- NO --> Q4a
    Q3b -- YES --> Q4a
    Q3b -- NO --> Q4a
    Q3c -- YES --> Q4a
    Q3c -- NO --> Q4a
    Q4a --> Q5a{The amount should not be included in the relevant taxpayer's assessable income? [s136AF(1)(a)(ii)]}
    Q4a --> Q5b{The amount should be an allowable deduction to the relevant taxpayer? [s136AF(1)(b)(ii)]}
    Q4a --> Q5c{The amount of interest withholding tax should not be payable by the relevant taxpayer? [s136AF(3)(c)]}
    Q5a -- YES --> Q6a[A consequential adjustment would follow under section 136AF]
    Q5a -- NO --> Q6a
    Q5b -- YES --> Q6a
    Q5b -- NO --> Q6a
    Q5c -- YES --> Q6a
    Q5c -- NO --> Q6a
    Q6a --> Q7a[s136AF(1)(a)]
    Q6a --> Q7b[s136AF(1)(b)]
    Q6a --> Q7c[s136AF(3)]
    Q7a --> Q8[The deduction would be granted under such provision of the ITAA as the ATO determines [s136AF(2)]]
    Q7b --> Q8
    Q7c --> Q8
    NO_BOX --> Q9[section 136AF does not apply]
  
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The flowchart determines if section 136AD applies to increase assessable income or disallow/reduce a deduction. It starts with a decision point: "Has section 136AD been applied to increase assessable income or disallow or reduce a deduction?". If "NO", the process ends with "section 136AF does not apply". If "YES", it proceeds to a box: "If the parties to the relevant dealing had been dealing at arm's length then, for a relevant taxpayer". This leads to three parallel questions: "Has income been included in assessable income that would not have been included? [s136AF(1)(a)(ii)]", "Would an amount have been allowed as a deduction? [s136AF(1)(b)(i)]", and "Has interest withholding tax become payable, and been paid, that would not have become payable? [s136AF(3)(b)]". Each of these has a "YES" or "NO" outcome. All "YES" and "NO" outcomes from these three questions lead to a central box: "Is it fair and reasonable that:". This leads to three more parallel questions: "The amount should not be included in the relevant taxpayer's assessable income? [s136AF(1)(a)(ii)]", "The amount should be an allowable deduction to the relevant taxpayer? [s136AF(1)(b)(ii)]", and "The amount of interest withholding tax should not be payable by the relevant taxpayer? [s136AF(3)(c)]". Each of these has a "YES" or "NO" outcome. All "YES" and "NO" outcomes from these three questions lead to a box: "A consequential adjustment would follow under section 136AF". This leads to three parallel boxes: "[s136AF(1)(a)]", "[s136AF(1)(b)]", and "[s136AF(3)]". All three of these lead to a final box: "The deduction would be granted under such provision of the ITAA as the ATO determines [s136AF(2)]".

* subsection 136AF(1A) is not dealt with in this flow-chart

Fair and reasonable

14. The addition of the requirement in subparagraphs 136AF(1)(a)(ii) and (b)(ii) and paragraph 136AF(3)(c) that the Commissioner form the opinion that it is fair and reasonable that an adjustment should be made, indicates that the adjustment is not to be made automatically when the circumstance in those subparagraphs or paragraph has arisen. It is necessary for the Commissioner to form an opinion that it is fair and reasonable, both from the point of view of the taxpayer and the revenue, that an adjustment should be made. If the primary requirements are satisfied, it will be a rare occasion where the discretion would not be exercised. An example may be where there are collection difficulties associated with the liability imposed pursuant to section 136AD.

Circumstances where a consequential adjustment under section 136AF would be appropriate

15. Where a determination has been made under section 136AD, the Commissioner will have regard to the objectives of Division 13 in reconstructing a taxpayer's affairs to what they would have been if the relevant arrangement had not been effected. As a result, it could normally be expected that a consequential adjustment under section 136AF would follow where the conditions in subparagraphs 136AF(1)(a)(i) and (ii), 136AF(1)(b)(i) and (ii), or paragraphs 136AF(3)(b) and (c) are met. To ensure that the overall result achieves the objective of Division 13, the provision for consequential adjustments to be made under section 136AF needs to be borne in mind when the Commissioner is deciding in the first place whether to make a determination and adjustment under section 136AD.

16. As an example of the operation of section 136AF in the case of a loan, assume that an Australian resident company has paid interest to a non-resident company that is excessive under arm's length principles, a determination and adjustment would be expected to be made under subsection 136AD(3) to reduce the deduction for the interest payment to an arm's length amount. If the non-resident company had paid interest withholding tax, a determination and consequential adjustment would also be expected to follow under subsection 136AF(3) in respect of the payment to the non-resident company that was subjected to interest withholding tax to the extent that it was in excess of the arm's length amount.

17. In these circumstances, subsection 136AF(3), by authorising the Commissioner to 'take such action as he considers necessary' to give effect to the section 136AF(3) determination, effectively allows for a remission of the relevant part of the withholding tax, notwithstanding the absence of a specific provision in the law to that effect.

Circumstances where section 136AF does not apply

18. Section 136AF only provides for the consequential adjustments described in **paragraph 10** to be made in circumstances described in **paragraph 11**. If these circumstances do not exist, there is no power to make such an adjustment under section 136AF.

Interest free loans to residents

19. In an interest free loan situation, for example, where interest could have been charged by a non-resident company to an Australian resident company, if the Commissioner were to make a determination and adjustment under subsection 136AD(2) against the non-resident company so as to deem an interest withholding tax liability, no consequential adjustment could be made by way of a deemed deduction to the resident company under section 136AF. The reason for this is that the circumstances specified in subsection 136AF(1) do not provide for a consequential adjustment where a section 136AD determination is made to impose or increase a taxpayer's withholding tax liability.

20. However, the Commissioner will have regard to whether the relevant transaction has disadvantaged the Australian revenue (see paragraph 117 of TR 94/14). In situations where there is a commercial reason for the interest free loan and the interest free loan has not by itself disadvantaged the revenue, it would not be appropriate for the Commissioner to make a subsection 136AD(2) determination and adjustment against the non-resident company to raise the withholding tax liability in the first instance. Such an interest free loan arrangement does not involve the allowance of a deduction to the Australian borrower and, thus, has not by itself disadvantaged the Australian revenue.

21. By contrast, a determination and adjustment under subsection 136AD(2) could be appropriate where the Australian borrower is a tax exempt entity. Another case would be where section 8-1 of the 1997 Act (subsection 51(1)) would not allow a deduction.

22. It could be argued that such a determination would also be appropriate where, if interest had been charged, the thin capitalisation provisions of Division 16F of Part III of the Act would operate to deny a deduction. However, given that interest free debt does not count as foreign debt in terms of section 159GZF, it is recognised that an interest free loan arrangement may be designed to enable the Australian entity to satisfy the relevant thin capitalisation debt/equity prescribed ratio. Where the taxpayer can demonstrate that this is the case, it is considered that the making of a withholding tax liability determination under subsection 136AD(2) would not be appropriate.

23. The question has also been raised whether a determination and adjustment under subsection 136AD(2) to raise a withholding tax liability to the non-resident with respect to an interest free loan would be appropriate where the Australian resident is in a genuine tax loss position. Because of the effects of provisions such as the carry-forward loss and loss transfer provisions of the Act, it is difficult to evaluate the overall revenue effect in those situations. Accordingly, the approach in **paragraphs 20 to 22** should be followed with no determination and adjustment under subsection 136AD(2).

24. A contrary view, in relation to interest free loan situations of the type described above, is that a determination under subsection 136AD(2) cannot result in an interest withholding tax liability being imposed. The basis for this view is that the deeming provision of subsection 136AD(2) is not sufficient to satisfy the requirement of the law that, in order for an interest withholding tax liability to arise under subsection 128B(2), **interest** must be **paid** to the non-resident by the relevant person. The case of *Woodlock & Ors. v Commissioner of Land Tax (NSW)* [1974] 2 NSWLR 411 has been cited to support the view.

25. This view is not accepted given the scheme of Division 13, the context for its application in the circumstances described, and that a determination made under subsection 136AD(2) is ‘applicable for all purposes of the Act in relation to the taxpayer’. It is also considered that the *Woodlock* decision is distinguishable.

26. The purpose of the subsection 136AD(2) determination power is to enable the deemed amount of arm’s length consideration to be taxed in accordance with the relevant taxing provisions of the Act, which in this case are the interest withholding tax provisions. The contrary view would negate that purpose. Accordingly, it is considered to be implicit that the deeming of an arm’s length amount to have been **received and receivable** by the non-resident lender means that it must also be treated as being interest paid to it by the Australian entity for the purposes of the withholding tax provisions.

The operation of subsections 136AF(4) to (6)

27. The purpose of subsections 136AF(4) to (6) is to extend the ordinary dispute resolution procedures available in Part IVC of the *Taxation Administration Act 1953* to a taxpayer who is dissatisfied with the Commissioner’s decision not to make a determination under section 136AF.

28. It could normally be expected, as outlined in **paragraph 15**, that a subsection 136AF(1) or subsection 136AF(3) determination and consequential adjustment would be made by the Commissioner for a relevant income year(s) following the making of a section 136AD

determination, whether or not the relevant taxpayer so requests, if all the material facts and circumstances are clear, and the amended assessment made as a consequence of the section 136AD determination is not in dispute. As a procedural matter, however, the relevant taxpayer should request the Commissioner to make a determination under section 136AF.

29. The Commissioner would not normally consider making a determination under section 136AF where an objection or appeal lodged in relation to the relevant section 136AD determination and adjustment is undecided or a Mutual Agreement Procedure under a DTA is in course.

30. Where a section 136AF determination and consequential adjustment is made, but the assessment made to give effect to the relevant section 136AD determination is subsequently overturned, it is considered that the better view is that the Commissioner may revoke or amend the section 136AF determination and take the necessary recovery action.

Interest on overpayments resulting from section 136AF adjustments

31. There is no time limit on the making of an amendment to give effect to a subsection 136AF(1) determination. Any refund of tax paid resulting from such an amendment may qualify for payment of interest by the Commissioner under subsection 9(1) of the *Taxation (Interest on Overpayment and Early Payments) Act 1983* (the IOEP Act). Any refund of overpaid withholding tax under subsection 136AF(3) is not subject to an interest payment, because it is not covered by the IOEP Act.

Penalties arising from a Division 13 adjustment

32. Where a determination has been made by the Commissioner under section 136AD or 136AE to increase assessable income or disallow or reduce a deduction, section 225 applies.

33. The operation of section 225 and other relevant provisions of Part VII of the Act, where Division 13 has been applied in a taxpayer's assessment, is covered in a separate Ruling (Taxation Ruling TR 98/16).

Amendments to give effect to Division 13 adjustments

34. Where a determination has been made under section 136AD and/or 136AE, any relevant amendment to an assessment would be made under subsections 170(1) and 170(9B) of the Act. This ensures there is no time limit for making an amendment to give effect to

transfer pricing adjustments made under section 136AD or section 136AE ('prescribed provisions'), or under either the Business Profits or Associated Enterprises Articles of a DTA ('relevant provisions'). These terms are defined in subsection 170(14).

35. Subsection 170(9C), however, limits the operation of subsection 170(9B) in that it does not authorise an amendment where a prescribed provision has previously been applied in relation to the particular supply or acquisition, or a prescribed or relevant provision has previously been applied in relation to the same subject matter. In these cases, any further amendment in respect of the specific supply or acquisition, or subject matter, as the case may be, can only be made in accordance with the other provisions of section 170.

36. If the Commissioner has previously applied subsection 170(9B) in relation to the same subject matter in making or amending an assessment for a taxpayer in relation to a year of income, the power of the Commissioner to make a further amended assessment to give effect to a fresh determination under section 136AD is subject to the time limits provided for in section 170. That time limit commences from the date of the original assessment, not from the date of the first amended assessment.

37. As indicated in **paragraph 31**, subsection 170(10) provides for amendments to be made 'at any time' to give effect to the consequential adjustment provisions of section 136AF.

Relationship between Division 13 and other arm's length provisions

38. By virtue of subsection 136AB(1), nothing in the 1936 Act and 1997 Act (other than Division 13) limits the operation of the arm's length principle of Division 13. However, these Acts themselves contain other specific provisions (e.g., trading stock in sections 70-90 and 70-95 of the 1997 Act (subsection 36(1)), which implicitly or explicitly provide for the self executing application of the arm's length provision consistent with Division 13.

39. Where these specific self-executing arm's length provisions apply, they do not preclude the operation of Division 13 (e.g., in relation to the determination of source of income or allocation of deductions). In such cases, consideration should be given to both provisions in determining whether Division 13 should be applied. This follows from the fact that section 136AD can be activated when the actual consideration is more or less than the arm's length amount. As explained in **paragraph 11**, however, the consequential adjustments under section 136AF can only be made if there has been an adjustment made under section 136AD.

Detailed contents list

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Commissioner of Taxation

23 June 1999

Previous draft:

TR 97/D5

- arrangements
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- penalties
- transfer pricing

Related Rulings/Determinations:

TR 94/14; TR 98/16

Subject references:

- arm’s length principle

Legislative references:

- ITAA 23AH

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- | | |
|-----------------------|---------------------|
| - ITAA 25(1) | - ITAA 136AF(1)(a) |
| - ITAA 25(1)(b) | - ITAA 136AF(1)(b) |
| - ITAA 28 | - ITAA 136AF(2) |
| - ITAA 51(1) | - ITAA 136AF(3) |
| - ITAA 63 | - ITAA 136AF(3)(b) |
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| - ITAA 82KL | - ITAA 170(10) |
| - ITAA Pt III Div 10B | - ITAA 170(14) |
| - ITAA Pt III Div 10D | - ITAA 221YRA(1A) |
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| - ITAA 136AD | - TAA Pt IVC |
| - ITAA 136AD(2) | - T(IOEP)A 9(1) |
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-

Case references:

- Woodlock and ors v. Commissioner of Land Tax (NSW) [1974] 2 NSWLR 411

ATO references:

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