TR 2007/1 - Income tax: international transfer pricing: the effects of determinations made under Division 13 of Part III of the Income Tax Assessment Act 1936, including consequential adjustments under section 136AF of that Act

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Taxation Ruling

Income tax: international transfer pricing: the effects of determinations made under Division 13 of Part III of the *Income Tax Assessment Act 1936*, including consequential adjustments under section 136AF of that Act

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This publication (excluding appendixes) 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, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you – provided we are 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.

What this Ruling is about

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* (ITAA 1936) in relation to non-arm's length schemes. 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 of the ITAA 1936 respectively (paragraphs 2 to 5 of this Ruling);

(2) the operation of section 136AF of the ITAA 1936 where a determination has been made under section 136AD (paragraphs 6 to 22 of this Ruling);

(3) the application of section 170 of the ITAA 1936 to a determination made under Division 13 (paragraphs 26 to 28 of this Ruling); and

(4) the relationship between Division 13 and other arm's length provisions in the ITAA 1936 (paragraphs 29 and 30 of this Ruling).

As Division 13 remains in the ITAA 1936, all subsequent legislative references are to the ITAA 1936 unless otherwise stated. Division 13, however, operates in relation to both the ITAA 1936 and the *Income Tax Assessment Act 1997* (ITAA 1997) and in its interaction with other provisions.

Ruling

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

2. 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 6(1) to include the ITAA 1997.

Adjustments under sections 136AD and 136AE

3. 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 ITAA 1936 and the ITAA 1997 make special provision including:

(a) capital costs provisions that allow for a full or reduced deduction for the decline in value of depreciating assets (such as equipment and items of intellectual property) under Division 40 of the ITAA 1997 and deductions for capital works under Division 43 of the ITAA 1997;

(b) costs for specific deduction provisions (for example, research and development costs under section 73B);

(c) the amount of expenditure subject to recoupment provisions (for example, sections 82KJ, 82KK and 82KL); and

(d) taxable income ascertained under special provisions (for example, taxation of overseas ships under Division 12 of Part III of the ITAA 1936).

4. 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, may 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 ITAA 1997 (former section 28 of the ITAA 1936) – 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 ITAA 1997 (former subsection 51(1) of the ITAA 1936) or section 25-35 of the ITAA 1997 (section 63 of the ITAA 1936) – 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 of the ITAA 1936,[1] Subdivision 36-A of the ITAA 1997 (former section 79E of the ITAA 1936) including a reduction as a result of increasing exempt income or Australian source or foreign source income in the current year.

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 cost for closing stock under subsection 70-45(1) of the ITAA 1997, 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.

[1] In the 2005 Federal Budget the Government announced that it would abolish foreign loss and foreign tax credit quarantining rules. The announcement advised these changes will apply to the income years first commencing on or after the date of Royal Assent to the enabling legislation. See Treasurer's Press Release No. 044 2005.

5. 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 – 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]

(2) for a non-resident taxpayer:

(a) determining assessable income under subsections 6-5(3) and 6-10(5) of the ITAA 1997; and

(b) determining the deductibility of expenditure under various provisions, including section 8-1 of the ITAA 1997.

Consequential adjustments under section 136AF

6. 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 or royalty withholding tax (or part thereof) should not have become payable by the relevant taxpayer – subsection 136AF(3).[3]

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.

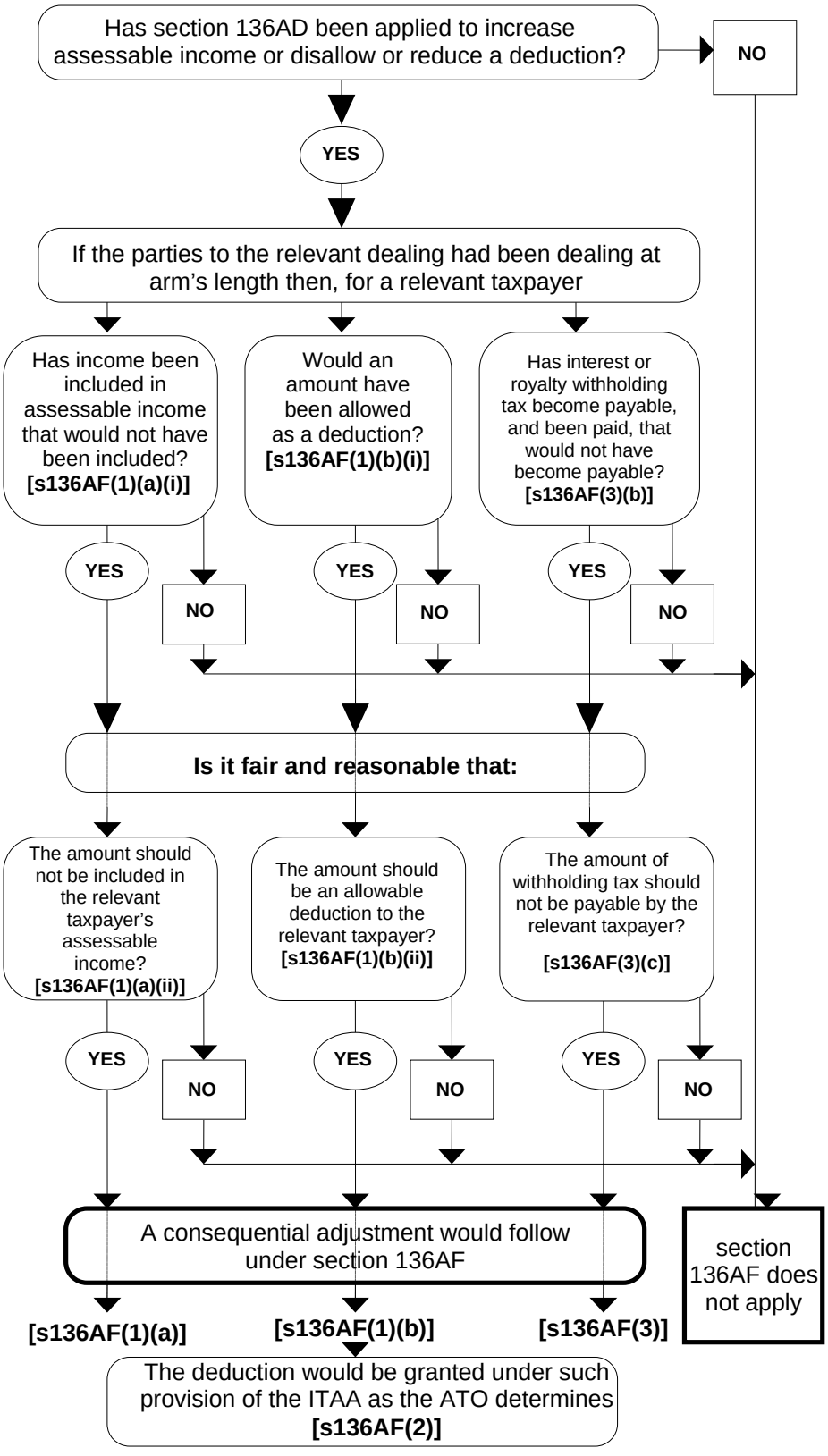
[2] Refer to footnote 1.
[3] Paragraph 136AF(3)(b) was amended to include royalty withholding tax where section 136AD is applied on or after 23 June 2004.

7. It is a prerequisite 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.

8. 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. 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.

9. The basic operation of section 136AF is shown in the following flow-chart.

Flow-chart for the basic operation of section 136AF



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

Fair and reasonable

10. 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

11. 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.

12. 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.

13. In these circumstances, subsection 136AF(3), by authorising the Commissioner to 'take such action as he considers necessary' to give effect to the subsection 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

14. Section 136AF only provides for the consequential adjustments described in paragraph 6 of this Ruling to be made in circumstances described in paragraph 7 of this Ruling. If these circumstances do not exist, there is no power to make such an adjustment under section 136AF.

Interest free loans to residents

15. 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.

16. 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.

17. By contrast, a determination and adjustment under subsection 136AD(2) of the ITAA 1936 could be appropriate where the Australian borrower is a tax exempt entity. Another case would be where section 8-1 of the ITAA 1997 would not allow a deduction.

18. 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 16 and 17 of this Ruling should be followed with no determination and adjustment under subsection 136AD(2).

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

19. The purpose of subsections 136AF(4) to (6) of the ITAA 1936 is to extend the ordinary dispute resolution procedures available in Part IVC of the *Taxation Administration Act 1953* (TAA) to a taxpayer who is dissatisfied with the Commissioner's decision not to make a determination under section 136AF.

20. It could normally be expected, as outlined in paragraph 11 of this Ruling, 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.

21. 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 Double Taxation Agreement (DTA) is in course.

22. 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

23. There is no time limit on the making of an amendment to give effect to a subsection 136AF(1) of the ITAA 1936 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 T(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 T(IOEP) Act.

Penalties arising from a Division 13 adjustment

24. Where a determination has been made by the Commissioner under section 136AD or 136AE of the ITAA 1936 to increase assessable income or disallow or reduce a deduction, Subdivision 284-C of Schedule 1 to the TAA applies in respect of the 2001 and later income years. For income years prior to the 2001 income year, section 225 of the ITAA 1936 applies.

25. Guidance on the administration of section 225 transfer pricing penalties can be found in Taxation Ruling 98/16 which deals with the imposition of and remission of penalties.

Amendments to give effect to Division 13 adjustments

26. Where a determination has been made under section 136AD and/or 136AE, any relevant amendment to an assessment would be made under section 170. Subsection 170(9B) 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).

27. 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.

28. As indicated at paragraph 23 of this Ruling 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

29. By virtue of subsection 136AB(1), nothing in the ITAA 1936 and ITAA 1997 (other than Division 13) limits the operation of the arm's length principle of Division 13. However, these Acts themselves contain other specific provisions (for example, item 8 of the Table in subsection 40-180(2) of the ITAA 1997 in relation to the cost of a depreciating asset) which implicitly or explicitly provide for the self executing application of the arm's length provision consistent with Division 13.

30. Where these specific self-executing arm's length provisions apply, they do not preclude the operation of Division 13 (for example, 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 7 of this Ruling however, the consequential adjustments under section 136AF can only be made if there has been an adjustment made under section 136AD.

Date of effect

31. 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.

Previous Ruling

32. This Ruling replaces Taxation Ruling TR 1999/8 which is withdrawn on and from 7 March 2007. That Ruling can continue to apply to schemes that had begun to be carried out before 7 March 2007. To the extent that our views in that Ruling still apply, they have been incorporated into this Ruling.

Commissioner of Taxation
7 March 2007

Appendix 1 – Explanation

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.

Secondary adjustments

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

34. 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.

35. 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 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 (A Co) to its associated enterprise in another country (B Co), a secondary adjustment could deem a loan by A Co to B Co equal to the additional profits resulting from the primary transfer pricing adjustment, as such profits would not be actually paid to A Co. As a result, the secondary adjustment could impute a notional arm's length interest payment by B Co for the deemed loan which would give rise to assessable income of A Co.

Appendix 2 – Alternative views

This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the binding public ruling.

Interest free loans to residents

36. A contrary view in relation to interest free loan situations of the type described in paragraphs 15 to 18 of this Ruling, 'Circumstances where section 136AF does not apply', 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.

37. 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.

38. 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.

Appendix 3 – Detailed contents list

39. The following is a detailed contents list for this Ruling:

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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 94/14; TR 98/16

Previous Rulings/Determinations:

TR 1999/8

Subject references:

- arm's length principle
- arrangements
- consequential adjustments
- determinations
- penalties
- transfer pricing

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 23AH
- ITAA 1936 28
- ITAA 1936 51(1)
- ITAA 1936 63
- ITAA 1936 73B
- ITAA 1936 79D
- ITAA 1936 79E
- ITAA 1936 82KJ
- ITAA 1936 82KK
- ITAA 1936 82KL
- ITAA 1936 128B
- ITAA 1936 128B(2)
- ITAA 1936 Pt III Div 12
- ITAA 1936 Pt III Div 13
- ITAA 1936 136AB(1)
- ITAA 1936 136AD
- ITAA 1936 136AD(2)
- ITAA 1936 136AD(3)
- ITAA 1936 136AE
- ITAA 1936 136AE(4)
- ITAA 1936 136AE(5)
- ITAA 1936 136AE(6)
- ITAA 1936 136AF
- ITAA 1936 136AF(1)
- ITAA 1936 136AF(1)(a)
- ITAA 1936 136AF(1)(a)(i)
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- ITAA 1936 136AF(1)(b)
- ITAA 1936 136AF(1)(b)(i)
- ITAA 1936 136AF(1)(b)(ii)
- ITAA 1936 136AF(1A)
- ITAA 1936 136AF(2)
- ITAA 1936 136AF(3)
- ITAA 1936 136AF(3)(b)
- ITAA 1936 136AF(3)(c)
- ITAA 1936 136AF(4)-(6)
- ITAA 1936 160AF(1)
- ITAA 1936 160FD
- ITAA 1936 170
- ITAA 1936 170(9B)
- ITAA 1936 170(9C)
- ITAA 1936 170(10)
- ITAA 1936 170(14)
- ITAA 1936 225
- ITAA 1997 6-5(3)
- ITAA 1997 6-10(5)
- ITAA 1997 8-1
- ITAA 1997 Div 13
- ITAA 1997 25-35
- ITAA 1997 Subdiv 36-A
- ITAA 1997 Div 40
- ITAA 1997 40-180(2)
- ITAA 1997 Div 43
- ITAA 1997 70-35
- ITAA 1997 70-45(1)
- TAA 1953
- TAA 1953 Pt IVC
- TAA 1953 Sch 1 Subdiv 284-C
- T(IOEP)A 9(1)

Case references:

- Woodlock and Ors v. Commissioner of Land Tax (NSW) [1974] 2 NSWLR 411; (1974) 5 ATR 57

Other references:

- OECD Report: Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations

ATO references:

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