

PS LA 2003/5 - International Transfer Pricing - Making a determination under Division 13 of Part III of the Income Tax Assessment Act 1936 and applying the Business Profits Article or Associated Enterprises Article of Australia's Double Tax Agreements.

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FOI status: may be released

This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.

SUBJECT: **International Transfer Pricing – Making a determination under Division 13 of Part III of the *Income Tax Assessment Act 1936* and applying the Business Profits Article or Associated Enterprises Article of Australia's Double Tax Agreements.**

PURPOSE: **To advise on the procedure to be followed when making a Division 13 determination or applying the Treaty Articles.**

STATEMENT

1. All SES officers have the delegated authority to make a determination under Division 13 of Part III of the *Income Tax Assessment Act 1936* ('the Act') and to apply the Business Profits or Associated Enterprises Articles of Australia's Double Tax Agreements (the corresponding Treaty Articles). They may also authorise officers to exercise their delegated authority to make a Division 13 determination or to apply the corresponding Treaty Articles.
2. However, before an SES delegate, or an officer duly authorised by an SES delegate, makes a Division 13 determination, or applies the corresponding Treaty Articles, they must refer the issue/case to the Transfer Pricing Practice of International Strategy & Operations (ISO). The only exception to this direction applies to the Senior Tax Counsel in the Jurisdictional Income Practice.
3. In addition, any decision to make a Division 13 determination or apply the corresponding Treaty Articles must be adequately documented. The documentation must include all facts and considerations taken into account by the decision-maker as well as references to all reports or other written material considered in making the decision.

EXPLANATION

4. Division 13 of Part III of the Act enables the Commissioner to make a determination to adjust the consideration passing between parties not dealing at arm's length under an international agreement. Where the Commissioner makes such a determination, the consideration is deemed to be equal to the arm's length consideration: see paragraphs 136AD(1)(d), 136AD(2)(d) and 136AD(3)(d) of the

Act. Similar powers to adjust in respect of non arm's length dealings are contained in the Business Profits Article (for dealings with permanent establishments) and Associated Enterprises Article (for dealings between associated enterprises) of Australia's Double Tax Agreements.

5. The Jurisdictional Income Practice has a particular expertise in relation to these matters and, therefore, must be consulted by any officer who is proposing to make a Division 13 determination or apply the corresponding Treaty Articles.

Amendment history

Date of amendment	Part	Comment
22 November 2011	Paragraphs 2 & 5	Updated 'Transfer Pricing Practice of ISO' to 'Jurisdictional Income Practice'.

subject references: division 13 determination
double tax agreements
transfer pricing

legislative references: ITAA 1936 Part III Division 13
ITAA 1936 136AD(1)(d)
ITAA 1936 136AD(2)(d)
ITAA 1936 136AD(3)(d)

file references: 2003/006729

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Other Business Lines consulted