TD 1999/7 - Income tax: non-profit societies, associations or clubs located outside Australia that promote cultural activities such as the arts: is income derived by these organisations subject to Australian income tax if they provide performances at Australian cultural festivals and events?

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Taxation Determination

Income tax: non-profit societies, associations or clubs located outside Australia that promote cultural activities such as the arts: is income derived by these organisations subject to Australian income tax if they provide performances at Australian cultural festivals and events?

Preamble

This Taxation Determination is a 'public ruling' for the purposes of Part IVAAA of the ***Taxation Administration Act 1953*** *and is legally binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Determination is a public ruling and how it is legally binding.*

Date of effect

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 settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

1. Yes, in accordance with subsection 6-5(3) of the *Income Tax Assessment Act 1997* (the Act), unless:

   (i) one of Australia's double tax agreements (DTAs), which form part of the *International Tax Agreements Act 1953*, operates to exempt the income; or

   (ii) the organisation is a prescribed organisation for the purposes of sections 50-45 and 50-70 of the Act.

2. Australia's more recent DTAs are based on the OECD Model Tax Convention on Income and Capital. Under these DTAs, where income in respect of the personal activities of visiting entertainers (such as theatrical artistes, dancers and musicians) accrues not to the entertainers themselves but to another person (including a non-profit company or other entity), that other person may be subject to Australian tax on the income. In these cases, the *Entertainers Article* overrides the *Business Profits Article* and that other person is subject to Australian tax, regardless of whether the income is attributable to a permanent establishment in Australia. However, the existence of a provision in a DTA dealing specifically with cultural exchange programs, or visits by entertainers that are substantially funded by the public funds of their home country, could operate to exempt the income from Australian tax - see, for example, Article 17(3) of the Chinese Agreement and Article 17(3) of the Spanish Agreement, respectively.

3. The *Entertainers Article* of some of Australia's older DTAs does not contain exemption provisions of that type. However, Australia's taxing right over income, in respect of the activities of a visiting entertainer that accrues to another person, may be conditional on whether the entertainer either directly or indirectly participates in the profits of the other person or controls the other person - see, for example, Article 17(2) of the USA Convention and Article 16(2) of the German Agreement, respectively.

4. Where such conditions are not met, it becomes necessary to consider whether Australia has a taxing right over the income of the organisation under the *Business Profits Article* of the relevant DTA. For example, under the terms of the USA Convention, where Article 17(2) does not give Australia a taxing right over the profits derived by an American dance company that visits Australia to perform at an international festival, Australian tax would only be payable on those profits if the company had a permanent establishment (as defined in the Convention) in Australia.

5. As indicated above, foreign non-profit cultural organisations, which are not relieved from Australian tax under a DTA or which are located in countries with whom Australia has not concluded a DTA, remain subject to Australian tax on their relevant Australian sourced income. However, the incidence of Australian tax would often be likely to be small or even non-existent because of the size of tax deductions available in respect of the expenses associated with the tour.

6. If an overseas cultural organisation is likely to be subject to Australian tax, it may still be possible for it to obtain an exemption if Parliament decides to prescribe it in the Income Tax Assessment Regulations. Sections 50-45 and 50-70 of the Act specifically provide for an exemption to be prescribed by regulation as long as the organisation is exempt from income tax in the country in which it is resident. The Government has decided not to grant tax exempt status to any offshore organisation in this manner unless it considers that a particular organisation warrants concessional tax treatment because of exceptional circumstances. Any requests for an exemption under the Regulations may be made to the ATO, which will forward them to Government for its decision.

7. Any organisations that are concerned about the Australian taxation position of any proposed performances in Australia by overseas cultural organisations should contact their local Taxation Office to ascertain, on behalf of those participants, whether they would have a potential Australian income tax liability. It may be necessary for the matter to be referred to the Major Sporting and Entertainment Events Unit located in the ATO's Hurstville (NSW) Office. Telephone callers who wish to contact this unit directly can do so by calling their local ATO.

Commissioner of Taxation
5 May 1999

Previous draft:
TD 98/D16

Related Rulings/Determinations:

Subject references:
Australian tax: business profits article; cultural associations and societies; cultural festivals and events; cultural organisations; double tax agreements; entertainers article; exempt income; income tax; non-profit associations and clubs

Legislative references:
ITAA97 6-5(3); ITAA97 50-45; ITAA97 50-70

Case references:

ATO references:
NO 98/9486-1; 98/10611-1
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