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## Taxation Determination

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Income tax: can a payment to a non-resident author for the use of his or her article be a royalty for the purposes of subsection 6(1) of the *Income Tax Assessment Act 1936*?

**ⓘ This Ruling provides you with the following level of protection:**

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 (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and 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.

### **Ruling**

1. Yes. If the payment to an author is consideration for the use of, or the right to use, the author's copyright in the article it will be a royalty as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).

### **Date of effect**

2. This Determination 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 the Determination.

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**Commissioner of Taxation**

5 April 2006

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## Appendix 1 – Explanation

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**❶** *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.*

### Explanation

3. Royalty income derived by a non-resident from an Australian resident or from an Australian business of a non-resident is taxed under Division 11A of Part III of the ITAA 1936 and the payer of the royalty must withhold an amount from the royalty under section 12-280 of Part 2-5 in Schedule 1 to the *Taxation Administration Act 1953*.
4. Whether the consideration is for the use of, or the right to use, the copyright and as such the payment is a royalty, or whether some other kind of transaction is being entered into, will depend on the circumstances.
5. In the case where an article is submitted to one or more potential publishers and there is nothing at that time that evidences something other than an offer to allow use of the copyright, a subsequent payment will, *prima facie*, exhibit the characteristics of a royalty.
6. Moreover, this will still be the case if the author submits an invoice which describes the amount due as being for the assignment of the Australian copyright to the publisher for a short period and that period encompasses the date of intended use. The Commissioner does not accept that merely invoicing the publisher in this manner, again, in the absence of more evidence as to the true nature of the agreement struck between the parties prior to use, means that the publisher has paid an amount other than a royalty for the use of the copyright.

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## References

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*Previous draft:*

TD 2005/D26

*Subject references:*

-non-resident royalty withholding tax

*Legislative references:*

-TAA 1953

-TAA 1953 Sch 1 12-280

-ITAA 1936 6(1)

-ITAA 1936 Pt III Div 11A

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*ATO references*

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