TR 2007/11A - Income tax: withholding tax and related implications for a non-resident head lessor or hire-purchase provider of substantial equipment where the equipment is obtained by another non-resident entity that subleases, subprovides or leases it for use in Australia

Addendum

Taxation Ruling

Income tax: withholding tax and related implications for a non-resident head lessor or hire-purchase provider of substantial equipment where the equipment is obtained by another non-resident entity that subleases, subprovides or leases it for use in Australia

This Addendum amends Taxation Ruling TR 2007/11 to clarify which Australian tax treaties do not include rules to treat income as being sourced for the domestic law purposes of a country where the treaty allocates a taxing right to that country for that income. This Addendum also corrects a technical error in Example 5.

Taxation Ruling TR 2007/11 is amended as follows:

1. Footnote 6

Omit the last sentence; substitute 'However, Australia's 1969 tax treaty with Japan does not include such a provision for royalties.'

2. Paragraphs 37, 38 and 39

Omit the paragraphs; substitute:

> 37. The facts are the same as Example 1 except that the non resident head lessor is resident of Vietnam for tax treaty purposes and the sublessor is resident of Belgium for tax treaty purposes. As with Example 1, the Vietnamese head lessor is not liable under section 128B(5A) of the ITAA 1936 for royalty withholding tax on the royalty payment it receives from the Belgian sublessor's permanent establishment in Australia because the sublessor is not carrying on business in Australia through that permanent establishment.

38. However, the Vietnamese head lessor is liable to tax in Australia on an assessment basis because the royalty payments it receives from the Belgian sublessor are deemed to have an Australian source under the tax treaty between Australia and Vietnam (the Vietnamese Agreement). This outcome arises because the Belgian sublessor of the equipment has a deemed permanent establishment in accordance with Article 5.8 and the principles set down in Article 5.4(b) of the Vietnamese Agreement. Therefore the royalty payment (which is a royalty under Article 12.3 of the Vietnamese Agreement) incurred by the Belgian sublessor in connection with that deemed permanent establishment is deemed to arise in Australia under Article 12.5 of the Vietnamese Agreement.

39. As Australia is allocated a right to tax the royalty payment from the Belgian sublessor's deemed permanent establishment to the Vietnamese head lessor under Article 12.1 of the Vietnamese treaty, the royalty payment is deemed to have an Australian source for the purposes of Australia's domestic tax law under Article 22.1 of the Vietnamese Agreement. Accordingly, the Vietnamese head lessor is liable to tax on an assessment basis in relation to the Australian sourced royalty payments it derives under subsection 6-5(3) of the ITAA 1997.

3. Paragraph 91

Omit the first dot point; substitute:

- the non-resident head lessor is a resident of a tax treaty country that contains provisions corresponding to either Article 5.4(b)[30] or Article 5.8[30A] of the Vietnamese Agreement, which results in a non-resident sublessor being deemed to have a permanent establishment in Australia for the purposes of the Royalties Article;

4. Footnote 31

Omit text; substitute:

See, for example, Article 12.3 of the Vietnamese Agreement.

[30] This arises because Article 5.4(b) refers to 'an enterprise' and therefore applies to enterprises of a third country. See for example Australia's treaties with Argentina (Article 5.4), China (Article 5.3(c)) and the Philippines (Article 5.4).

[30A] This paragraph is particularly relevant for tax treaties where Article 5.4(b) or its equivalent refers to 'an enterprise of a Contracting State', which would otherwise exclude Article 5.4 from applying to enterprises of a third country.

5. Footnote 32

Omit text; substitute:

> See, for example, Article 12.5 and 12.1 respectively of the Vietnamese Agreement.

6. Footnote 33

Omit text; substitute:

> See, for example, Article 22 of the Vietnamese Agreement.

7. References

Omit

- International Tax Agreements Act 1953 Sch 16

Insert:

- International Tax Agreements Act 1953 Sch 38

This Addendum applies on and from 17 December 2008.

Commissioner of Taxation
17 December 2008

ATO references
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