TD 1999/D103 - Income tax: is Macau covered by the Australia-China Double Taxation Agreement on or after 20 December 1999?.

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This document has been finalised by TD 2000/9.

Draft Taxation Determination

Income tax: is Macau covered by the Australia-China Double Taxation Agreement on or after 20 December 1999?

Preamble

Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office. DTDs should not be relied on; only final Taxation Determinations represent authoritative statements by the Australian Taxation Office.

1. No. The operation of the Australia-China Double Taxation Agreement (DTA) does not extend to the Special Administrative Region of Macau (Macau SAR) following resumption of Chinese sovereignty over the territory on 20 December 1999.

2. The reasons for this application are similar to those discussed in Taxation Ruling TR 97/19 in relation to the Special Administrative Region of Hong Kong (Hong Kong SAR).

3. 'China' is defined in subparagraph (1)(b) of Article 3 of the DTA in the following terms:

> '… the term 'China' means the People's Republic of China and, when used in a geographical sense, it means all the territory of the People's Republic of China, including its territorial sea, **in which the laws relating to Chinese tax apply**, and any area beyond its territorial sea, within which the People's Republic of China has sovereign rights of exploration for and exploitation of resources of the seabed and its subsoil and superjacent water resources in accordance with international law.' (emphasis added)

4. 'Chinese tax' is defined in subparagraph (1)(i) of Article 3 as meaning 'tax imposed by China, being tax to which this Agreement applies by virtue of Article 2'.

5. Article 2 provides that the existing taxes to which the DTA applies are:

> '(b) in China:
> the income tax imposed under the laws of the People's Republic of China.'

Paragraph (2) of Article 2 extends the application of the DTA to 'any identical or substantially similar taxes that are imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes.'

6. When Chinese sovereignty resumes over Macau, a new Special Administrative Region will be established. The National People's Congress (China's Parliament) has enacted a Basic Law (adopted on 31 March 1993) prescribing the systems to be practised in the Macau SAR. The first 11 Articles of the Basic Law set out the general principles of the Law, including establishing legal authority of the Basic Law under the Constitution of the People's Republic of China.

7. Article 104 of the Basic Law states (in part):

> 'The Central People's Government shall not levy taxes in the Macau SAR.'

8. Article 106 of Macau's Basic Law states that:

> 'The Macau Special Administrative Region shall practise an independent taxation system.
>
> The Macau Special Administrative Region shall, taking the low tax policy previously pursued in Macau as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation. Provisions on taxation for special operations shall be stipulated by law in separate legislation.'

9. Given Article 104 of the Basic Law states that the Central People's Government will not levy taxes in the Macau SAR, and Article 106 provides for an independent taxation system for the Macau SAR, it is our view that 'Chinese tax' as defined in the DTA does not include taxes imposed by the Macau SAR, and that the 'laws relating to Chinese tax' do not apply to the Macau SAR.

10. Even if the Macau SAR was considered to be part of China for the purposes of the DTA, the taxes imposed by the Macau SAR would not be considered 'identical or substantially similar' (as per paragraph (2) of Article 2 of the DTA) to the existing taxes covered by the DTA, since the Macau SAR is expected to continue to adopt the low tax policy previously pursued by the Portuguese administration in Macau, and those taxes will continue to be levied by the Macau SAR and not the Central People's Government. It follows that the taxes imposed by the Macau SAR are not taxes covered under paragraph (2) of Article 2 of the DTA.

11. Thus, for purposes of determining the application of the DTA, 'China' as defined in the DTA, does not extend to the Macau SAR. The DTA does not, therefore, apply to residents of Macau or to taxes imposed by the Macau SAR.

12. For foreign source income measures, the Macau SAR will continue to be treated as an 'unlisted country' for the reasons explained in TR 97/19 in relation to the Hong Kong SAR. As such, resumption of Chinese sovereignty does not give rise to the operation of section 457 of the *Income Tax Assessment Act 1936*.

Your comments

13. We invite you to comment on this Draft Taxation Determination. We are allowing four weeks for comments before we finalise the Determination. If you want your comments considered, please provide them to us within this period.

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Commissioner of Taxation
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Previous draft:
Not previously issued in draft form

Related Rulings/Determinations:
TR 97/19

Subject references:
Australia-China double tax agreement; foreign source income measures; Macau; China

Legislative references:
ITAA 36 457

Case references:

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