IT 354 - Sharedealing transactions by overseas investors : application of sections 254 and 255

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TAXATION RULING NO. IT 354

SHAREDEALING TRANSACTIONS BY OVERSEAS INVESTORS : APPLICATION OF SECTIONS 254 AND 255

F.O.I. EMBARGO: May be released

REF

*** NOTE - THIS RULING HAS BEEN SUPERSEDED BY IT 2544

H.O. REF: J206/11 P1 F63 DATE OF EFFECT:

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F.O.I. INDEX DETAIL

REFERENCE NO:	SUBJECT REFS:	LEGISLAT. REFS:
I 1070826	SHAREDEALING - NON-RESIDENT	254
	SHAREDEALING TRANSACTIONS	255
	OVERSEAS INVESTORS	26AAA
	STOCKBROKERS	26(a)

PREAMBLE Following the introduction of section 26AAA, consideration was given to the interpretation of sections 254 and 255 as it relates to the sharedealing transactions of non-resident investors.

RULING 2. Section 255 deals specifically with persons having the receipt, control or disposal of money belonging to a non-resident. On a literal interpretation, the section might be thought to cast upon any person having a liability to pay money to a non-resident a duty to retain funds sufficient to meet an unspecified tax demand, and would render that person liable if he failed to do so.

3. However, the context in which the section appears in the Act suggests that it was intended to be as a general provision directed towards facilitating the recovery, from moneys in Australia, of tax assessed in cases where a person in receipt or control of money for a non-resident has received a notice from the Commissioner requiring him to pay the tax due.

4. This is how the provision has always been interpreted by the Commissioner. The view is taken that section 255 does not require stockbrokers or other persons having the receipt, control or disposal of money belonging to a non-resident to retain any part of the money unless tax has been assessed and the person has received notice of that fact from the Commissioner.

5. Section 254 deals with the position under the Act of an agent. "Agent" is defined in section 6 as including -

(a) every person who in Australia, for or on behalf of any person out of Australia holds or has the control,

receipt or disposal of any money belonging to that person; and

(b) every person declared by the Commissioner to be an agent or the sole agent of any person for any of the purposes of the Act.

6. Under section 254 an agent is answerable as taxpayer to make returns in respect of income and is required to retain out of money which he receives as agent an amount sufficient to pay the tax which is or will become due in respect of the income.

7. The view has always been taken that this provision is directed at agents carrying on continuing business activities on behalf of a non-resident and that money need not be withheld in a case where an agent or trustee is engaged in an isolated transaction unless an assessment has been made and the agent or trustee has notice of that fact.

8. It remains to consider the effect of the requirement of section 254 that the agent or trustee shall be answerable as taxpayer for the doing of all things that are required under the Act in respect of income derived by virtue of his agency. A supporting provision says that he shall make the returns in respect of such income.

9. It is open to argument that an agent can be called upon to lodge a return whenever he knows, for example, that shares have been sold within one year of purchase because section 26AAA raises at least a presumption that there is income that may be subject to tax. However, the Commissioner accepts that section 254 does not require a stockbroker or other agent to take the initiative in lodging returns on behalf of an overseas principal if the agent is only handling particular transactions and does not have the general management of his principal's affairs and is not in a position to know whether the principal has a potential liability to pay tax.

10. To sum up, the new provisions of the law relating to casual profits arising from the sale of property are viewed on the basis that sections 254 and 255 do not impose on stockbrokers any liability to deduct tax from money received on behalf of non-residents unless an assessment has been raised and the stockbroker concerned has notice that tax is outstanding. Nor is there an obligation to take the initiative and lodge income tax returns, in the circumstances referred to, without being specifically requested to do so. The non-residents themselves remain liable to lodge annual income tax returns and to pay the tax assessed. If they fail to do so, they render themselves liable to prosecution and to the penalties which the Act imposes for failing to lodge correct returns.

11. There can be no question, of course, that our general powers of obtaining information enable us to require that stockbrokers and other persons holding information about the transactions of non-residents should, on demand, furnish such

information as is in their possession.

COMMISSIONER OF TAXATION

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