


TD 2005/D26 - 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?

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This document has been finalised by TD 2006/10.



Draft Taxation Determination

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*?

Preamble

*This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the **Taxation Administration Act 1953**. It is only final Taxation Determinations that represent authoritative statements by the Australian Taxation Office.*

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).
2. 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 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*.
3. 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.
4. 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.
5. 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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Date of Effect

6. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Your comments

7. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date.

Due date: 23 September 2005
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Commissioner of Taxation

24 August 2005

Previous draft:

Not previously issued as a draft

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 Div 11A
- TAA 1953 Pt IVA
- TAA 1953 Sch 1 Pt 2-5 12-280

Related Rulings/Determinations:

TR 92/20

Subject references:

- non-resident royalty withholding tax
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ATO references

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