TR 2003/11 - Income tax: the interpretation of the general exclusion provision of the Dependent Personal Services Article, or its equivalent, of Australia's Double Tax Agreements

This ruling contains references to repealed provisions, some of which may have been re-enacted or remade. The ruling has effect in relation to the re-enacted or remade provisions. Paragraph 32 in TR 2006/10 provides further guidance on the status and binding effect of public rulings where the law has been repealed or repealed and rewritten.
Australia's tax treaties and other agreements except for the Taipei Agreement are set out in the Australian Treaty Series. The citation for each is in a note to the applicable defined term in sections 3AAA or 3AAB of the International Tax Agreements Act 1953.

This document has changed over time. This is a consolidated version of the ruling which was published on *17 September 2003*

Taxation Ruling

Income tax: the interpretation of the general exclusion provision of the Dependent Personal Services Article, or its equivalent, of Australia's Double Tax Agreements

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Preamble

The number, subject heading, ***What this Ruling is about*** *(including* ***Class of person/arrangement*** *section),* ***Date of effect****, and* ***Ruling*** *parts of this document are a 'public ruling' for the purposes of* ***Part IVAAA of the Taxation Administration Act 1953*** *and are legally binding on the Commissioner. The remainder of the document is administratively binding on the Commissioner of Taxation. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Ruling is a 'public ruling' and how it is binding on the Commissioner.*

What this Ruling is about

1. This Ruling states how the general exclusion provision provided under the Dependent Services Article, or its equivalent, of Australia's Double Tax Agreements ('DTAs') ('general exclusion') applies to non-resident individuals providing employment services in Australia.

2. In particular, this Ruling addresses the approach to be taken in determining the meaning of the term 'employer' for the purposes of the general exclusion.

3. The Ruling provides guidance for all employment situations involving non-resident individuals providing employment services in Australia including international labour hire arrangements.[1]

4. International labour hire arrangements generally involve expatriate workers being either hired out or seconded to the user entity in Australia by a non-resident intermediary. It is not uncommon for the user and the intermediary to be members of the same corporate group. Uncertainties have arisen in respect of these arrangements from the fact that the employer functions which are normally exercised by one person are shared between two persons or entities (i.e. intermediary and user).

[1] See paragraph 26 of this Ruling and also footnote 20 for a working definition.

5. This Ruling does not deal with the definition of 'employer' for PAYG withholding tax purposes or for any other purposes relating to income tax. This ruling does not deal with fringe benefits tax.

Date of effect

6. This Ruling applies to years commencing both before and after its date of issue. However, the Ruling does not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

Ruling

7. The meaning of the term 'employer' for the purposes of the general exclusion is to be determined having regard to the context of the DTAs. Consistent with the Commentary on the equivalent article (Article 15) in the Organisation for Economic Cooperation and Development Model Tax Convention on Income and on Capital[2], ('OECD Commentary on Article 15'), a 'substance over form' approach should be adopted in analysing the relevant employment relationships.

8. The employer is the person having rights on the work produced and bearing the relative responsibility and risks. Where an intermediary is involved, each case should be examined to see whether the functions of employer were exercised by the user entity or the intermediary. In cases of international hiring out of labour, the employer functions are to a large extent exercised by the user entity. In these circumstances, the user entity would be regarded as being the economic employer of the expatriate[3] worker.

9. Where the services rendered by the expatriate employee are more integrated to the business activities of the user entity than those

[2] For convenience, the article is referred to as Article 15 in this ruling, though its numbering varies in some of Australia's DTAs. Article 15(1), Article 15(2), paragraph (1) or paragraph (2) are used to refer to the relevant paragraphs of the DTAs for the purposes of this Ruling.

[3] Although the word 'inpatriate' has been used in the OECD Commentary, the word 'expatriate' is used in this ruling to take its often applied meaning, that is, individuals who choose for professional reasons to live in another country and persons whose emigration was either voluntary or involuntary (refer to P Peters, *The Cambridge Australian English Style Guide,* Cambridge University Press, Melbourne, 1995).

of the non-resident intermediary[4], the user entity would be regarded as being the economic employer of the expatriate worker.

10. The 'substance over form' approach is not limited to cases which involve tax avoidance or abuse. This is consistent with the object and purpose of the general exclusion.

11. Notwithstanding any contract for services existing between the user entity in Australia and the non-resident intermediary, the exception to source taxation provided under the provisions in Australia's DTAs equivalent to Article 15(2) of the OECD Model Tax Convention on Income and on Capital ('OECD Model') will therefore not be available for the income of the individual who, in an economic sense, is providing services to the user entity in an employment context. This result follows whether the user is a resident of the source country or a permanent establishment or fixed base of a non-resident of the source country.

12. In cases where Article 15(2) does not apply, Article 15(1) will allocate to the source country taxing rights in relation to any income earned by the expatriate worker for employment services provided in that country.

13. The source of income Articles contained in most of Australia's DTAs will deem such income to have a source in the source country for domestic tax law purposes with the result that, where Australia is the source country, the income will be assessable to Australian tax as Australian source income of a non-resident.

Explanation

The Dependent Personal Services Article

14. Australia's DTAs contain an article that allocates source and residence country taxing rights in respect of income derived from dependent personal services.[5] Paragraph (1) of Article 15 of the

[4] The term 'intermediary' is used here for convenience as it is the term used in the OECD Report, *Trends in International Taxation: Taxation Issues relating to International hiring out of labour*, OECD, Paris, 1985. It is not intended to have any connotation of tax avoidance or abuse.

[5] The exact wording of the Article including the period of 'employment' may vary in some DTAs, for example, Canada and New Zealand; 90 days for Papua New Guinea and Kiribati and 120 days for Indonesia. Nevertheless, the interpretation provided in this ruling will apply to these countries. In the cases of Singapore and Malaysia, the relevant Articles do not refer to 'in respect of employment' or 'employer' and hence the interpretation provided in this ruling will not apply to them. This exclusion would also apply to Fiji as its Article does not refer to any non-resident employer condition even though the word 'employment' has been used.

Polish DTA[6] (and its equivalents in Australia's other DTAs) which is in the same terms as the Article 15(1) of the OECD Model states as follows:

> Subject to the provisions of Articles 16, 18, 19 and 21, salaries, wages and other similar remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived from that exercise may be taxed in that other State.

This paragraph states the general rule that income from employment derived by an individual who is a resident of one of the Contracting States may be taxed in the other Contracting State if the employment is exercised, that is the services are performed, in that State.

15. Paragraph (2) of Article 15 of the Polish DTA[7] and its equivalents in Australia's other DTAs[8] state as follows:

> Notwithstanding the provisions of paragraph 1, remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State if:
>
> (a) the recipient is present in that other State for a period or periods not exceeding in the aggregate 183 days in the year of income of that other State; and
>
> (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and
>
> (c) the remuneration is not deductible in determining taxable profits of a permanent establishment or a fixed base which the employer has in that other State.

Some treaties negotiated by Australia may also contain a fourth condition for exemption. For example, Australia's treaty with New Zealand contains the following additional condition:[9]

> (d) the remuneration is, or upon the application of this Article will be, subject to tax in the first-mentioned State.

16. All the conditions prescribed in paragraph (2) must be satisfied for the remuneration to qualify for the general exclusion. However,

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[6] The Polish DTA is referred to merely as a general example of the Dependent Personal Services Article.
[7] See footnote 6.
[8] See footnote 5.
[9] Also contained in Australia's DTAs with Sweden, Denmark, Malta, Finland, Austria, Papua New Guinea and Kiribati.

this exclusion would apply only to the extent that their remuneration does not fall under the provisions of other Articles such as those applying to government services or artistes and sportsmen.

17. The first condition is that the exclusion is limited to the 183 day period.[10] This time period may vary in some DTAs and the interpretation of this condition will also depend on the manner in which the provision is drafted. Satisfaction of the condition specified in Article 15(2)(a) will depend on individual circumstances.[11]

18. The second condition is that the employer paying the remuneration must not be a resident of the State in which the employment is exercised. This will also cover the situations where an Australian entity pays the non-resident worker on behalf of his or her employer resident in an overseas country with which Australia has a DTA.

19. The second condition will be satisfied if the non-resident intermediary is the employer of the expatriate worker for DTA purposes. The non-resident intermediary is generally intended by the parties to be the employer of the expatriate worker under general employment laws and the employment contract is structured accordingly. However, it is necessary to look beyond the form of the employment contract and other related contracts to establish the true relationship of the parties involved.[12] In many cases involving international hiring out of labour, the facts of the arrangement will indicate that the Australian user entity is in an economic employment relationship with the expatriate worker so as to constitute the employer for purposes of subparagraphs 2(b) and (c).

20. Under the third condition, if the employer has a permanent establishment in the State in which the employment is exercised, the exclusion is given only on condition that the remuneration is not borne by the permanent establishment which it has in that State. The OECD Commentary on Article 15 at paragraph 7 states:

> The phrase 'borne by' must be interpreted in the light of the underlying purpose of subparagraph (c) of the Article, which is to ensure that the exception provided for in paragraph (2) does not apply to remuneration that is deductible, having regard to the principles of Article 7, in computing the profits of a permanent establishment situated in the State in which the employment is exercised. In this regard, it must be noted that the fact that the employer has, or has not, actually deducted the remuneration in computing the profits attributable to the permanent establishment is not necessarily conclusive since the proper test is whether the remuneration would be allowed as a deduction for tax purposes; that

[10] See footnote 5.
[11] See OECD Commentary on Article 15 – as updated to January 2003.
[12] The factors to be used to determine the true nature of the relationship are discussed in detail at paragraphs 32 to 40.

> test would not be met, for instance, even if no amount was actually deducted as a result of the permanent establishment being exempt from tax in the source country or of the employer simply deciding not to claim a deduction to which they were entitled.[13]

Determining the meaning of the term 'employer'

21. The term 'employer' is not defined in Australia's DTAs. Where a term is undefined in a DTA, the DTA provides that, in the application of the DTA by a State, such a term will, unless the context otherwise requires, take the meaning that it has under domestic tax law[14] (refer to paragraph 63-71 of Taxation Ruling TR 2001/13).

22. Careful consideration needs to be given to both the context of the DTA and the domestic law. It follows that an undefined term in a DTA will not necessarily take the domestic law meaning where the context of its use in the DTA may indicate that such a meaning is not intended.

23. In determining whether the context requires a different meaning, it is appropriate to have regard to the OECD Model and Commentaries to the OECD Model[15], together with the various Observations and Reservations[16] of OECD member countries which provide important guidance on interpretation and application of DTAs. As a matter of guidance, the OECD Commentaries will often need to be considered in interpretation of DTAs and come within the broad meaning of context for this purpose.[17] Hence, if the OECD Commentaries indicate that a particular term in a treaty is to be interpreted in a particular way, this context may exclude the use of the domestic tax law meaning of the term.

24. The OECD Commentary on Article 3 has clarified that the law to be looked at is the law at the time of the DTA being applied to the relevant fact situation, not the historical meaning at the time of the

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[13] A contrary view was held in the New Zealand case of *Commissioner of Inland Revenue v JFP Energy Incorporated* [1990] 3 NZLR 536; (1990) 12 NZTC 7,176. However, there is considerable doubt as to the correctness of this view or its application in Australia. The OECD Commentary on Article 15 was changed in 2000 to make the present point. The ATO considers that the current Commentaries should generally be used in interpreting Australia's DTAs, see further paragraph 24.

[14] See, for example, paragraph 3 of Article 3 of the Australia/Poland DTA.

[15] The OECD published a report on international hiring out of labour in 1985 ('OECD REPORT') (refer *Trends in International Taxation: Taxation issues relating to international hiring out of labour*, OECD, Paris, 1985). Changes were made to the OECD Commentary on Article 15 (the equivalent to Australia's Dependent Personal Services Article) of the OECD Model in 1992 incorporating the recommendations of the OECD Report.

[16] These Observations and Reservations place on record that the relevant DTA policies and practices of the countries concerned are based on a different approach than that indicated in the OECD Model or its Commentaries.

[17] TR 2001/13, paragraphs 72, 101 to 105.

DTAs conclusion. This approach is taken if the context does not require an alternative interpretation. The OECD position is not clear in respect of cases where the context requires an alternative interpretation and raises the question whether the interpretation should relate to the current time or the time when the DTA was negotiated. Taxation Ruling TR 2001/13 discusses this issue in paragraphs 106 to 108 and concludes (in paragraph 108) that, unless it is apparent that the substance of the OECD Model has itself changed since the DTA was negotiated, the ATO considers it appropriate, as a matter of practice, to consider, at least, the most recently adopted/published OECD Commentaries as well as others which may have been available at the time of negotiation.

25. Article 15 operates like most other distributive provisions in DTAs by allocating residence and source taxing rights in relation to a particular category of income. The category of income is referred to in the article as 'remuneration ... in respect of an employment' without any further definition.[18]

26. The OECD Commentary on Article 15[19] states as follows:

> The object and purpose of subparagraph (b) and (c) of paragraph 2 are to avoid the source taxation of short term employment to the extent that the employment income is not allowed as a deductible expense in the State of source because the employer is not taxable in that State as he is neither a resident nor has a permanent establishment therein …. Paragraph 2 has given rise to numerous cases of abuse through adoption of the practice known as 'international hiring out of labour'[20]. In this system, a local employer wishing to employ foreign labour for one or more periods of less than 183 days recruits through an intermediary established abroad who purports to be the employer and hires the labour out to the employer. The worker thus fulfils prima facie the three

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[18] Compare this with Articles in Australia's DTAs on dividends, interest and royalties which have specific definitions of the category of income (see, for example, Articles 10, 11 and 12 of the Polish DTA).

[19] At paragraph 6.2 and 8 of the OECD Commentary on Article 15 – updated as at January 2003.

[20] Paragraph 6 of the OECD Report provided a working definition of the activity of the hiring out of labour as follows:

> Hiring out of labour is one where labour is put at the disposal of a 'user' enterprise by an intermediary. This situation normally involves three parties: the inpatriate employee who provides the personal services, the intermediary who recruits and supplies him or her to the user in return for a fee (out of which the inpatriate employee is paid) and the user for whom the services are exercised. The contract of employment in the traditional sense, if any, appears formally to be between the inpatriate employee and the intermediary, and not between the user and the inpatriate employee, although the latter is expected to work at the user's place of business and commonly under the user's instructions. The intermediary has responsibility for the provision of the labour itself, and bears no responsibility or risks as regards the result of the work …

> conditions laid down by paragraph 2 and may claim exemption from taxation in the country where he is temporarily working. To prevent such abuse in situations of this type, the term 'employer' should be interpreted in the context of paragraph 2. In this respect, it should be noted that the term 'employer' is not defined in the Convention but it is understood that the employer is the person having rights on the work produced and bearing the relative responsibility and risks …

27. In international hiring out of labour arrangements, the employer functions such as the rights on the work produced and the bearing of the relative responsibility and risks are to a large extent exercised by the user entity. This is despite the fact that the employment relationship in the sense of general Australian law is with the non-resident intermediary. The user entity in this situation can be described as the 'economic employer'.

28. If the employer under the general law meaning applied in Australian tax law is a non-resident while the economic employer is a resident or a permanent establishment of a non-resident, the purpose of the provision as stated by the OECD is defeated as the user entity in effect deducts the payment to the non-resident as a cost incurred in carrying on business in the source country to earn assessable income and this payment covers the remuneration of the employee. Yet the employee would not be taxed on the remuneration in the source country.

29. It would be contrary to the object and purpose of paragraph 2 to exclude an expatriate worker from tax when he or she is economically in an employment relationship with the user entity which deducts the cost instead of the non-resident intermediary. It is concluded that the context of the article requires a contrary meaning be given to the term 'employer' in paragraph (2), namely, the reference is to the economic employer in DTAs which may be different to the employer under domestic employment law.

30. Interpreting the meaning of employer in terms of the context of the Article does not affect the domestic law view of the relationship between an individual providing personal services and the entity to which these services are rendered. It seeks to ensure that the term employer is not interpreted in a way that would allow the exception provided for by paragraph (2) to apply in unintended situations, i.e. where the services rendered by the worker are more integrated to the business of a resident entity than to those of his or her formal employer.

31. It is sometimes suggested that the economic employer approach is only to be applied in cases of obvious tax avoidance or abuse.[21] Although it can be the case that hiring out of labour arrangements are deliberately engineered to take advantage of paragraph 2 of Article 15 of DTAs, the ATO considers that the economic employer approach is to be applied in all cases so that paragraph 2 is not available if it is concluded that the Australian user entity is the economic employer.[22]

Determining the economic employer

32. The OECD Commentary on Article 15 at paragraph 8 states as follows:

> … In cases of international hiring out of labour, these (employment) functions are to a large extent exercised by the user. In this context, substance should prevail over form, that is, each case should be examined to see whether the functions of employer were exercised mainly by the intermediary or by the user. It is therefore up to the Contracting States to agree on the situations in which the intermediary does not fulfil the conditions required for him to be considered as the employer within the meaning of paragraph 2. In settling this question, the competent authorities may refer not only to the above-mentioned indications but to a number of circumstances enabling them to establish that the real employer is the user of the labour (and not the foreign intermediary):
>
> - the hirer does not bear the responsibility or risk for the results produced by the employee's work;
> - the authority to instruct the worker lies with the user;
> - the work is performed at a place which is under the control and responsibility of the user;
> - the remuneration to the hirer is calculated on the basis of the time utilised, or there is in other ways a connection between this remuneration and wages received by the employee;
> - tools and materials are essentially put at the employee's disposal by the user;
> - the number and qualifications of the employees are not solely determined by the hirer.

33. An analysis of the above factors will be necessary in determining who performs the functions of an economic employer in

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[21] Observation by Switzerland in paragraph 13 of the OECD Commentary on Article 15 which states that 'Switzerland is of the opinion that the comments in paragraph 8 should only apply to situations of international hiring out of labour in case of abusive arrangements'.

[22] The UK Inland Revenue takes the same view, see *UK Inland Revenue Tax Bulletin*, 1995, p. 220.

international hiring out of labour arrangements. This analysis involves a weighing up of the factors on a case by case basis to determine whether the user entity is economically more in an employment relationship with the worker than the non-resident intermediary. Some of the factors may be more important in one case and others in a different case.

The responsibility or risk for the work produced

34. In an employment situation, the employer generally bears the risk of the costs arising out of any defective work produced or the injury suffered by the worker during the performance of his or her duties. In the context of international hiring out of labour arrangements, it is necessary to ascertain whether the user entity bears more of such risks than the non-resident intermediary. In such cases, this is a factor indicating that the user entity is the economic employer of the expatriate worker for Article 15(2) purposes.

35. The higher the degree to which a user entity is exposed to the risk of commercial loss (and the chance of commercial profit) the more the user entity is likely to be regarded as being the economic employer of the expatriate worker.

Authority to give instructions

36. In an international hiring out of labour arrangement, the user entity in Australia may have the authority to give direct or indirect instructions to the expatriate worker in relation to the manner in which he or she is expected to perform a particular task. The presence of this authority to instruct the worker is a factor indicating that the user entity is the economic employer of the expatriate worker.

Control and responsibility in relation to the place of work

37. If a user entity is empowered under an international hiring out of labour arrangement to specify in detail how the contracted services are to be performed, this is a factor indicating that the user entity is the economic employer of the expatriate worker. The same conclusion can be reached if the work is performed at a place which is under the control and responsibility of the user entity.

How the remuneration is calculated

38. It may be relevant to examine the basis used by the user entity to calculate any remuneration or payment made to the non-resident intermediary as part of an international hiring out of labour arrangement. For example, payments made by the Australian user

entity to the non-resident intermediary may consist almost entirely of a 'salary and wages' component representing amounts payable to the expatriate worker for the services performed by the expatriate worker. In such cases, this is a factor indicating that the user entity is the economic employer of the expatriate worker.

Who provides the tools and materials

39. When the user entity or its associate provides the tools and materials used by the expatriate worker in the performance of the work, this is a factor indicating an economic employment relationship existing between the parties.

Number and qualifications of employees

40. Generally, an employer determines how many workers would be required to complete a task and what their qualifications, skills and experience should be. In an international hiring out of labour arrangement, while the non-resident intermediary may undertake a selection or recruitment process to find suitably qualified workers for an overseas user entity, the actual labour requirements may be specified by the user entity in the country in which the personal services are to be performed. Specification of labour requirements by the user entity, which may include the number required, their skills and their qualifications and experience, is a factor indicating an economic employment relationship between the employee and the end user.

Permanent establishment (PE) or a fixed base

41. In the context of international hiring out of labour arrangements, the user entity may be either a resident entity of the source country or a permanent establishment of a non-resident. The analysis so far in this ruling is generally based on the assumption that the user entity is a resident and that any remuneration paid to the expatriate worker is not deductible in determining the profits of a PE or a fixed base which the non-resident intermediary may have in the source country. Under these circumstances, if it is established that the user entity is the economic employer and not the non-resident intermediary, the condition in subparagraph (b) of Article 15(2) would not be satisfied. The same result will apply for the purposes of subparagraph (c) if the user is a PE or fixed base of a non-resident in the source country and is the economic employer rather than the non-resident intermediary.

42. If the non-resident intermediary has a PE or a fixed base in the source country through which the services of the worker are provided

to the user, the remuneration paid to the worker would be normally deductible in determining the taxable profits attributable to the PE or the fixed base of the non-resident intermediary. In these circumstances, the requirement under subparagraph (c) of Article 15(2) would not be satisfied in relation to the intermediary and as a result the exception under Article 15(2) would not be available even if the intermediary is the economic employer of the worker.

Source of Income

43. In cases involving international hiring out of labour arrangements where the user entity is established as the economic employer of the expatriate worker, the conditions under Article 15(2) of the Dependent Personal Services Articles contained in Australia's DTAs will not be satisfied. It follows that taxing rights over the payments or income received by the expatriate worker in respect of employment exercised in the source country would be allocated to that country in accordance with paragraph 15(1).

44. In these circumstances, the 'source of income' articles contained in most of the DTAs of Australia (see, for example, Article 23 of the Polish Agreement) would have the effect of deeming such income to have its source in Australia for domestic tax law purposes. As a result, the non-resident worker will be subject to source country tax on the employment income under the normal assessment rules applicable to non-residents. If in a particular case the relevant DTA does not contain a source rule that has this effect, the assessment of the employment income of the non-resident will depend on the normal source rules for employment income.[23]

Examples

Example 1

45. Aco, a company resident in State A, concludes a contract with Bco, a company resident in Australia, for the provision of training services. Australia has a DTA with State A in the same terms as the Australia Poland DTA. Aco is specialised in training people in the use of various computer software and Bco wishes to train its personnel to use recently acquired software. X, an employee of Aco who is a resident of State A, is sent to Bco's offices in Australia to provide training courses as part of the contract.

46. Aco is the economic employer of X for purposes of Article 15(2) of the DTA between States A and B. X is formally an employee

[23] Refer to *FC of T v Mitchum* (1965) 113 CLR 401; 39 ALJR 23; 13 ATD 497 and *FC of T v French* (1957) 98 CLR 398; 11 ATD 288.

of Aco whose own services are an integral part of the business activities of Aco. The services that he renders to Bco are rendered on behalf of Aco under the contract concluded between the two parties. Thus, provided X is not present in State B for more than 183 days during any relevant 12 month period and that Aco does not have in State B a permanent establishment which bears the cost of X's remuneration, the exception of paragraph 2 of Article 15 will apply to X's remuneration.

Example 2

47. Cco is a company resident in State C. It carries on the business of filling temporary business needs for highly specialised personnel. Dco is a company resident in Australia which provides engineering services on building sites. Australia has a DTA with State C in the same terms as the Australia Poland DTA. In order to complete one of its contracts in Australia, Dco needs an engineer for a period of 5 months. It contracts Cco for that purpose. Cco recruits Y, an engineer resident of State Y, and hires him under a 5 month employment contract. Under a separate contract between Cco and Dco, Cco agrees to provide the services of Y to Dco during that period. Under these contracts, Cco will pay Y's remuneration, social contributions, travel expenses and other employment benefits and charges. Dco will pay Cco this amount plus 10% for Y's services.

48. Y provides engineering services while Cco is in the business of filling short-term business needs. By their nature, the services rendered by Y are an integral part of the business activities of Dco, an engineering firm, but not of his formal employer. Under the 'substance over form' approach, Australia would apply the relevant employment factors discussed in this Ruling in paragraphs 32-40 and could come to the conclusion that the exception of paragraph 2 of Article 15 does not apply on the basis that Dco is more in an economic employment relationship with Y than the formal employer Cco.

Detailed contents list

49. Below is a detailed contents list for this Ruling:

Commissioner of Taxation
17 September 2003

Previous draft:
Previously released as TR 2003/D1

Related Rulings/Determinations:
TR 92/20; TR 2001/13

Subject references:
- international tax
- Double Tax Agreements
- employment income
- dependent personal services
- deemed source rules
- international hire of labour arrangements

Legislative references:
- International Tax Agreements Act 1953 Sch 36, Art 15
- International Tax Agreements Act 1953 Sch 36, Art 15(1)
- International Tax Agreements Act 1953 Sch 36, Art 15(2)

- International Tax Agreements Act 1953 Sch 36, Art 15(2)(a)
- International Tax Agreements Act 1953 Sch 36, Art 15(2)(b)
- International Tax Agreements Act 1953 Sch 36, Art 23

Case references:

- FC of T v Mitchum (1965) 113 CLR 401; 39 ALJR 23; 13 ATD 497
- FC of T v French (1957) 98 CLR 398; 11 ATD 288
- Commissioner of Inland Revenue v JFP Energy Incorporated [1990] 3 NZLR 536 (1990); 12 NZTC 7,176

ATO References
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