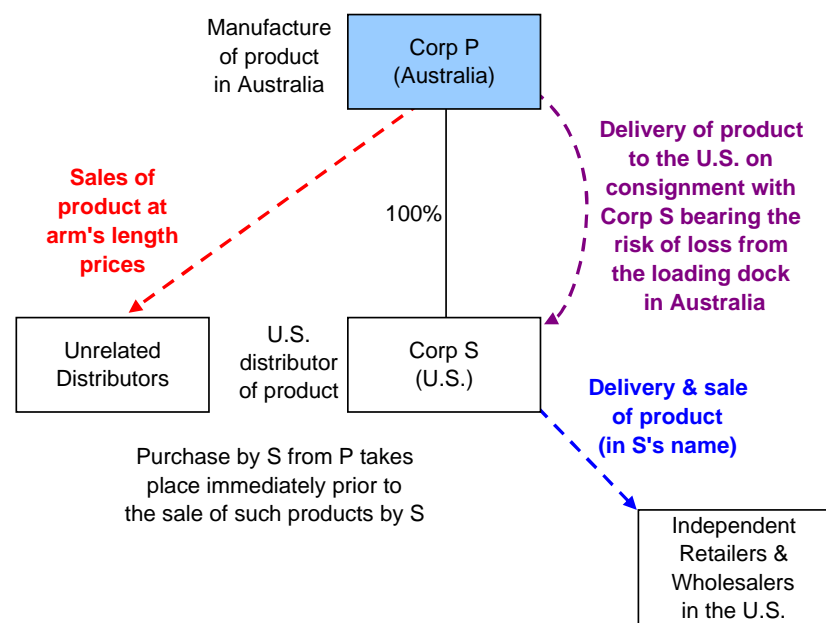


Revenue Ruling 76-322

No PE for Consignment Sales to U.S. Subsidiary

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P, a foreign corporation organized under the laws of Australia, manufactures products distributed in various countries. S, a domestic corporation whose principal place of business is in the United States, is a wholly owned subsidiary of P. P sells its products at arm's-length prices to S, a United States distributor for the products. S, on its own behalf, then sells such products (at prices it determines) to independent retailers and wholesalers throughout the United States. In addition, P sells its products at arm's-length prices to other unrelated and independent distributors in the United States. These distributors do not constitute permanent establishments of P under the Income Tax Convention between the United States and Australia (the Convention), T.D. 6108.



The agreement between P and S provides, among other things, that products will be delivered to a carrier at P's plant in Australia, to be forwarded by such carrier for and on behalf of, and at the expense and risk of, S to such point or points in the United States as S may designate. All responsibility for such products is assumed by S which may from time to time and without notice to or consent of P move such products to such locations as it desires. The products are held by S on consignment. The title to and ownership of such products is in P until purchased by S in accordance with the provisions of the agreement. The purchase by S from P takes place immediately prior to the sale of such products by S. The agreement further provides that S is responsible to P for damage, destruction, theft, or loss of goods prior to purchase by S. S bears the cost of insurance of the consigned goods with the loss payable to P. Upon request, S furnishes P with an inventory of all products held on consignment, but it is not liable to account to P for the proceeds of sales made by S. Also, S is under no obligation to purchase the consigned products. P has the right to recall any consigned products prior to the time of their purchase by S. P has no employees in the United States and conducts no other business in the United States. S sells in its own name to its own customers.

The Convention provides that an Australian enterprise shall not be subject to United States tax in respect of its industrial or commercial profits unless it is engaged in trade or business in the United States through a permanent establishment therein. The Convention defines the term "permanent establishment," in part, as meaning a branch, agency, management or fixed place of business. Where an enterprise of one of the Contracting States has a subsidiary corporation that is engaged in trade or business in the other State, whether through a permanent establishment or otherwise, or has an agent in that other State (other than an agent who has and habitually exercises, a general authority to negotiate and conclude contracts on behalf of that enterprise, or regularly fills orders on its behalf from a stock of goods located in that other State), that enterprise shall not, merely by reason thereof, be deemed to have a permanent establishment in that other State.

Under the concepts of the Convention, the absence of a permanent establishment, on the part of an enterprise having business dealings in the country concerned, is based in part upon the premise that such business dealings are handled through a commission agent, broker or other independent agent. A subsidiary corporation will be treated as an independent agent, as distinguished from an agent of the parent, under similar circumstances. The subsidiary corporation's presence in the country concerned, where it is engaged in trade or business, is by itself no basis to hold that the parent corporation has a permanent establishment in such country, unless the subsidiary has and habitually exercises a general authority to contract for its parent, or as an agent of the parent regularly fills orders of goods on behalf of the parent from a stock of the parent's goods located in such country.

Under the agreement in the instant case, neither a limited agency nor a general agency is established. The relationship between P and S is that of seller and purchaser, since the power that S has in determining when title to the consigned goods passes from P is exercisable only as a purchaser. See Rev. Rul. 63-113, which holds under substantially similar circumstances, that the relationship between a foreign corporation and an unrelated domestic consignee was that of seller and purchaser. Further, since S is not considered P's agent, although P has a "stock of goods" in the United States, P has no employee or agent in the United States that could fill orders from such stock of goods. Accordingly, P does not have a permanent establishment in the United States within the meaning of the Convention. Therefore, the income derived by P from transactions with S, its subsidiary, in accordance with the terms of the agreement discussed herein, is not subject to Federal income tax.