
Taxation Determination

Income tax: interest withholding tax exemption under section 128F of the *Income Tax Assessment Act 1936* - when is a non-resident borrowing subsidiary treated as a 'resident' for the purposes of the tax law of a country other than Australia?

Preamble

*This Taxation Determination is a 'public ruling' for the purposes of Part IVAAA of the **Taxation Administration Act 1953** and is legally binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Determination is a public ruling and how it is legally binding.*

Date of effect

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

1. Subsection 128F(8) of the *Income Tax Assessment Act 1936* (the Act) provides for the situation where a resident company raises finance through a non-resident borrowing subsidiary (the subsidiary) where the finance is raised in a country listed in the Income Tax Regulations. Subsection 128F(8) sets out the conditions that must be satisfied before interest paid on debentures issued through the subsidiary can qualify for the interest withholding tax exemption. In particular, paragraph 128F(8)(d) requires that, at the time the debentures are issued, the subsidiary is treated as a resident for the purposes of the tax law of the country in which the debentures are issued.
2. Concerns have been expressed that the concept of 'residency' in relation to companies may not be recognised by the tax law of certain countries; for example, the United States of America.
3. However, the intention of subsection 128F(8) is to provide the exemption where, among other things, the subsidiary is subject to tax on a worldwide source tax base in the country in which the debentures are issued. Accordingly, the term 'resident' is given a wide interpretation.
4. It follows that paragraph 128F(8)(d) is administered along similar lines to the effect produced by section 331 of the Act. That is, if the tax law of the country in which the debentures are issued adopts some criterion other than residency as the criterion for applying a worldwide source tax base to a company, then that criterion is treated as being the same as the residency requirement in paragraph 128F(8)(d).
5. In the case of the United States, support for this approach is contained in the Australia – United States of America Double Tax Convention (DTC). Article 4(1)(b)(i) of the DTC provides that a person (which includes a company) is a resident of the United States if the person is a United States corporation as specified in the DTC.

Commissioner of Taxation

12 May 1999

Previous draft:

TD 1999/D4

Related Rulings/Determinations:

TD 1999/8; TD 1999/9; TD 1999/10; TD 1999/12; TD 1999/13; TD 1999/14; TD 1999/15; TD 1999/16;
TD 1999/17; TD 1999/18; TD 1999/19; TD 1999/20; TD 1999/21; TD 1999/22; TD 1999/23; TD 1999/24;
TD 1999/25; TD 1999/26

Subject references:

Legislative references:

ITAA 128F; ITAA 128F(8); ITAA 128F(8)(d); ITAA 331; Australia-US DTC Art 4(1)(b)(i)

Case references:

ATO references:

NO 97/6464-0; 99/658-1

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