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## Taxation Determination

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### **Income tax: interest withholding tax exemption under section 128F of the *Income Tax Assessment Act 1936* - does the sole business test in paragraph 128F(8)(b) allow the borrowing subsidiary to enter into credit enhancements and swap arrangements in respect of finance raised for the purposes of the parent company?**

#### ***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. The explanatory memorandum accompanying the *Taxation Laws Amendment Act (No 2) 1997*, which inserted the provision, clearly sets out that a resident company may raise finance through a non-resident borrowing subsidiary. It provides that the following conditions must be satisfied:

- the finance must be raised by the issue of debentures in a country listed in the Income Tax Regulations (currently, the United States of America is the only country listed in the Regulations); and
- the non-resident borrowing subsidiary must also be treated as a resident of the country in which the debentures are issued, for the purposes of that country's tax law at the time the debentures are issued. The term 'tax law' for the purposes of new paragraph 128F(8)(d) is defined in new subsection 128F(9); and
- the subsidiary is wholly owned by an Australian resident company and the sole business of the subsidiary is to raise finance for its parent.

2. If the non-resident subsidiary meets the requirements of section 128F, the parent company is treated as having raised finance and is eligible for the exemption from interest withholding tax.

3. The subsidiary may enter into such enhancements and arrangements if the subsidiary's only business is to raise funds and/or lend, or otherwise pass, the net proceeds (after the deduction of relevant expenses incurred by the subsidiary in respect of the issue) to its parent. Similarly, a

subsidiary may raise finance in one currency and swap the proceeds into another currency prior to lending, or passing on, such proceeds to the parent company without jeopardising the sole business test in paragraph 128F(8)(b).

**Commissioner of Taxation**

12 May 1999

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*Previous draft:*

TD 1999/D10

*Related Rulings/Determinations:*

TD 1999/8; TD 1999/9; TD 1999/10; TD 1999/11; TD 1999/12; TD 1999/13; TD 1999/14; TD 1999/15;  
TD 1999/16; 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:*

ITAA128F; ITAA128F(8)(b); ITAA 128F(8)(d); ITAA128F(9); TLA (No 2) 1997

*Case references:*

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ATO references:

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

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