
Taxation Determination

Income tax: Interest Withholding Tax Exemption - for the purposes of subsection 128F(5) of the *Income Tax Assessment Act 1936* , when will a company be taken to have the requisite knowledge or suspicion that the debenture or an interest in the debenture was being, or would later be, acquired by an associate?

Preamble

*The number, subject heading, date of effect and paragraphs 1 to 6 of this Taxation Determination 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 Determination is administratively binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain how a Determination is legally or administratively 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(5) provides that a debenture issued by a company will not satisfy the public offer test in section 128F if, at the time of issue, the company *knew* or had *reasonable grounds to suspect* that the debenture, or an interest in it, was being, or would later be, acquired by an “associate”. An exception applies when the associate acquires the debenture in their capacity as a dealer, manager or underwriter in relation to the placement of the issue. Associate is defined by subsection 128F(9), which adopts the meaning of associate found in section 159GZC of the *Income Tax Assessment Act 1936* (‘ITAA 1936’), with a few exceptions not relevant to this determination.

2. Knowledge in the sense used here refers to the actual knowledge of the company, assessed at the time the debentures are issued. Suspicion needs to be looked at objectively in light of what is reasonable in the individual circumstances of the particular case. When subsection 128F(5) refers to the knowledge or suspicion of the company, knowledge or suspicion of all company personnel involved with the issue itself, and other personnel who are concerned in or take part in the overall management of the company, would be relevant. Accordingly, issuing officers will need to undertake enquiries to ensure that other officers of the company do not have such knowledge or suspicion, otherwise the subsection may operate.

3. A company will be taken to have the requisite knowledge or suspicion if the company enters into an agreement, arrangement, understanding or scheme in relation to the purchase of its debentures by an associate. Such an agreement, arrangement, understanding or scheme would exist whether it is formal or informal, express or implied, and whether or not enforceable or intended to be enforceable *and* the debenture is issued to or ultimately acquired by an associate.

4. A company will not be taken to have the requisite knowledge or suspicion if the company takes reasonable steps to ensure that its associates do not acquire its debentures. While every case has to be judged on its merits, one reasonable step would be to write to associates asking them not to acquire debentures (otherwise than in their capacity of a dealer, manager or underwriter in relation to the placement of the debenture). Another reasonable step would be for the debenture itself, and/or the prospectus, to contain a statement advising that the purchase of the debenture by associates could result in the entire issue failing the public offer test. A further such step could be for the issuer to instruct its manager, dealer or underwriter not to sell debentures to the issuer's associates. An issuer may, but is not obliged to by subsection 128F(5), obtain undertakings to this effect from its dealers, managers or underwriters.

5. Knowledge or suspicion by a dealer, manager or underwriter that associates of an issuer are acquiring debentures of that issuer, will generally only attract the operation of the subsection if the issuer has that same knowledge or suspicion. However, a company cannot ignore persons it knows or has reasonable grounds to suspect are associates, and then use the defence that it relied on the bona fide representations of a dealer, manager or underwriter.

6. Where a company proceeds to issue debentures, despite possessing the requisite knowledge or suspicion of acquisition of those debentures by associates, as discussed above, the issue fails the public offer test and is not exempt under section 128F. Withholding tax, and the general interest charge, will then be payable on the entire issue. In addition, depending on the circumstances, the Commissioner may also apply any relevant penalty provisions. The Commissioner may also consider the application of Part IVA of the ITAA 1936 in such situations.

Commissioner of Taxation**28 March 2001**

Previous draft:

TD 2000/D21

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 1999/17; 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:

- associates
- debenture issues
- interest withholding tax exemption
- public offer test

Legislative references:

- ITAA 1936 128F
- ITAA 1936 128F(5)
- ITAA 1936 159GZC
- ITAA 1936 Part IVA

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