TD 1999/D10 - 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?

This cover sheet is provided for information only. It does not form part of *TD 1999/D10 - 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?*

This document has been finalised by TD 1999/17.

Draft Taxation Determination

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

Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office (ATO). DTDs may not be relied on; only final TDs are authoritative statements of the ATO.

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).

Your comments

4. If you wish to comment on this draft Determination, please send your comments promptly by Friday 26 February 1999 to:

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Commissioner of Taxation
27 January 1999

Previous draft:
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Related Rulings/Determinations:

TD 1999/D1; TD 1999/D2; TD 1999/D3; TD 1999/D4: TD 1999/D5; TD 1999/D6; TD 1999/D7; TD 1999/D8; TD 1999/D9; TD 1999/D11; TD 1999/D12; TD 1999/D13; TD 1999/D14; TD 1999/D15; TD 1999/D16; TD 1999/D17; TD 1999/D18; TD 1999/D19

Subject references:

Legislative references:

ITAA128F; ITAA128F(8)(b); ITAA128F(8)(d); ITAA128F(9); TLAA (No.2) 1997

Case references:

ATO References:
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