TD 1999/D11 - Income tax: interest withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 - for the purposes of the fifth public offer test, in paragraph 128F(3)(e), in what circumstances is a debenture taken to be 'offered for issue'?

This cover sheet is provided for information only. It does not form part of *TD 1999/D11 - Income tax: interest withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 - for the purposes of the fifth public offer test, in paragraph 128F(3)(e), in what circumstances is a debenture taken to be 'offered for issue'?*

This document has been finalised by TD 1999/18.

Draft Taxation Determination

Income tax: interest withholding tax exemption under section 128F of the *Income Tax Assessment Act 1936* – for the purposes of the fifth public offer test, in paragraph 128F(3)(e), in what circumstances is a debenture taken to be 'offered for issue'?

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 public offer test in paragraph 128F(3)(e) (the 'fifth public offer test') enables a company to issue debentures to a dealer, manager or underwriter who agrees with the company to offer the debentures for sale, or procure subscription for the debentures, within 30 days in a way covered by any of paragraphs (a) to (d) of subsection 128F(3). In this case, dealers, managers or underwriters act on their own account as principals.

2. The 30 day period specified in paragraph 128F(3)(e) is taken to commence from the earlier of the day on which the dealer, manager or underwriter has an unconditional obligation to offer the debentures for sale, and the day on which the dealer, manager or underwriter actually offers the debentures for sale.

3. In relation to the public offer test under paragraph 128F(3)(a), both the company and the dealer, manager or underwriter have a responsibility for ensuring the debentures are offered for issue to at least 10 eligible persons who are not known or suspected to be associates. As pointed out in the explanatory memorandum to *Taxation Laws Amendment Act (No 2) 1997*, the company offering the debentures for sale does not need to undertake a detailed examination of the parties to whom the debentures are offered and may generally rely on the expectation the dealer, manager or underwriter has complied with the conditions set out in paragraph 128F(3)(a). The company cannot, however, ignore persons it ***knows*** to be an associate and use the defence that it relied on the dealer, manager or underwriter.

4. If dealers, managers or underwriters subscribe for the debentures on their own behalf and not on the basis they are to be onsold in the marketplace, the public offer test is satisfied if the debentures are offered for issue by the company in accordance with any of paragraphs (a) to (d) of subsection 128F(3). In such a case, the debentures are not required to be offered for issue in accordance with paragraph 128F(3)(e).

Your comments

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

Contact officer: George Montanez
Email: George.Montanez@ato.gov.au
Telephone: (02) 6216 1582
Facsimile: (02) 6216 1509
Address: Mr George Montanez
International Tax Division
Australian Taxation Office
P O Box 900
Civic Square ACT 2608.

Commissioner of Taxation
27 January 1999

Previous draft:
Not previously issued in draft form

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/D10; 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:

ITAA 128F; ITAA 128F(3); ITAA 128F(3)(a); ITAA 128F(3)(b); ITAA 128F(3)(c); ITAA 128F(3)(d); ITAA128F(3)(e); TLAA (No 2) 1997

Case references:

ATO References:
NO 97/6464-0; 99/658-1
BO
ISSN: 1038-8982