TD 1999/D4 - 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?

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This document has been finalised by TD 1999/11.

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Draft 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

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. 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, amongst 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.

Your comments

6. 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/D5: TD 1999/D6; TD 1999/D7; TD 1999/D8; TD 1999/D9; TD 1999/D10; 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:

ITAA 128F; ITAA 128F(8); ITAA128F(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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