TD 1999/D6 - Income tax: interest withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 - for the purposes of the public offer test under paragraph 128F(3)(a) (the 'first public offer test')(a) are pension funds and other 'qualified institutional buyers' considered to be carrying on the business of providing finance, or investing or dealing in securities? (b) what is required of a company to establish that the persons to whom the debentures are offered are carrying on business in the manner required by the legislation? (c) when is a company be taken to know or suspect that such a person is an associate?

This cover sheet is provided for information only. It does not form part of *TD 1999/D6 - Income tax: interest withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 - for the purposes of the public offer test under paragraph 128F(3)(a) (the 'first public offer test')(a) are pension funds and other 'qualified institutional buyers' considered to be carrying on the business of providing finance, or investing or dealing in securities? (b) what is required of a company to establish that the persons to whom the debentures are offered are carrying on business in the manner required by the legislation? (c) when is a company be taken to know or suspect that such a person is an associate?*

This document has been finalised by TD 1999/13.

Draft Taxation Determination

Income tax: interest withholding tax exemption under section 128F of the *Income Tax Assessment Act 1936* – for the purposes of the public offer test under paragraph 128F(3)(a) (the 'first public offer test')

(a) are pension funds and other 'qualified institutional buyers' considered to be carrying on the business of providing finance, or investing or dealing in securities?

(b) what is required of a company to establish that the persons to whom the debentures are offered are carrying on business in the manner required by the legislation?

(c) when is a company be taken to know or suspect that such a person is an associate?

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)(a) requires debentures to be offered for issue to at least 10 persons, each of whom satisfies the criteria set out in subparagraphs 128F(3)(a)(i) and (ii).

2. Subparagraph 128F(3)(a)(i) requires the persons to whom the debentures are offered, to be either:

(i) carrying on the business of providing finance; or
(ii) investing or dealing in securities;

in the course of operating in financial markets.

3. 'Persons' may include a dealer, manager or underwriter, provided they are carrying on a business of the kind required by the section, and are not associates of one another.

4. The explanatory memorandum accompanying the legislation clearly indicates that pension funds operating in overseas financial markets are to be treated as carrying on a business in compliance with the paragraph.

5. 'Qualified institutional buyer' (QIB) is a term used in the United States of America and defined in Rule 144A (*United States Securities Act 1933*) to mean, amongst other things 'certain entities acting for their own account or the accounts of other qualified institutional buyers, that in the aggregate owns and invests on a discretionary basis at least one hundred million (US dollars) in securities of issuers that are not affiliated with the relevant entity'. It appears that a QIB invests in securities whilst operating in a financial market. It is accepted QIBs satisfy the carrying on business requirement of the legislation.

6. It would be unreasonable to expect a company to be aware whether or not persons to whom it offers debentures are carrying on the business of providing finance, or investing or dealing in securities. A company is able to rely on a representation by a person to whom the debenture is offered that it is carrying on business as required by the legislation. Where a dealer, manager or underwriter offers the debentures on behalf of the company under paragraph 128F(3)(e), a company may also rely on a representation or undertaking by the dealer, manager or underwriter, that it offered, or it will offer, the debenture for sale in compliance with paragraph 128F(3)(a). A company may also rely on an undertaking to offer debentures to QIBs if given by a dealer, underwriter or manager in respect of any offer of a debenture in the United States of America.

7. Therefore, a detailed examination of offerees is not required by the company offering debentures for issue.

8. Subparagraph 128F(3)(a)(ii) further requires the persons to whom the debentures are offered are not known or suspected by the company offering the debentures, to be associates of one another. 'Knowledge' in this sense refers to the actual knowledge of the company, assessed at the time the debentures are offered for issue. Suspicion needs to be looked at objectively in the light of what is reasonable in the individual circumstances of a particular case. A company is not generally regarded as knowing or suspecting persons are associates unless it is established that officers of the company knew or had reasonable grounds to suspect otherwise.

9. 'Associate' is defined in subsection 128F(9) to have the meaning given in Division 16F (disregarding subparagraphs 159GZC(1)(a)(ii), (1)(b)(i) and (1)(d)(i)). Division 16F defines associate widely.

10. As pointed out in the explanatory memorandum that accompanied the legislation, a company offering debentures for issue is not required to undertake a detailed examination into the relationship between persons it offers debentures to. However, it cannot ignore companies that are generally known to be associates.

Your comments

11. 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

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Related Rulings/Determinations:

TD 1999/D1; TD 1999/D2; TD 1999/D3; TD 1999/D4: TD 1999/D5; 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(3)(a),: ITAA 128F(3)(a)(i): ITAA 128F(3)(a)(ii): ITAA 128F(3)(e); ITAA 128F(9); ITAA Div 16F; ITAA 159GZC(1)(a)(ii); ITAA 159GZC(1)(b)(i); ITAA1 59GZC(1)(d)(i); USSA 1933 Rule 144A

Case references:

ATO References:
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