TD 1999/D9 - Income tax: interest withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 - does the public offer test set out in paragraph 128F(3)(d) require a company to demonstrate that negotiations in respect of a particular debenture actually resulted from negotiations being initiated publicly in electronic form?

This cover sheet is provided for information only. It does not form part of *TD 1999/D9 - Income tax: interest withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 - does the public offer test set out in paragraph 128F(3)(d) require a company to demonstrate that negotiations in respect of a particular debenture actually resulted from negotiations being initiated publicly in electronic form?*

This document has been finalised by TD 1999/16.

Draft Taxation Determination

Income tax: interest withholding tax exemption under section 128F of the *Income Tax Assessment Act 1936* – does the public offer test set out in paragraph 128F(3)(d) require a company to demonstrate that negotiations in respect of a particular debenture actually resulted from negotiations being initiated publicly in electronic form?

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 set out in paragraph 128F(3)(d) (the fourth public offer test) requires the issue of a debenture to result from the debenture being offered for issue as a result of *negotiations being initiated publicly in electronic form, or in another form, that was used by financial markets for dealing in debentures.*

2. The explanatory material accompanying the *Taxation Laws Amendment Act (No 2) 1997*, which inserted the provision, provides guidance on its interpretation. It states, in relation to electronic quotation, the public offer test is satisfied if the Australian company's offer of debentures for issue is quoted on an electronic financial information source such as Reuter financial services or Bloomberg. The name of the company issuing the debentures and the name of the programme must be included in the electronic quotation. The quotation may also include the names of the dealers or managers, but need not do so. In this Determination, references to 'offer' must be interpreted in accordance with paragraph 3 of Draft Taxation Determination TD 1999/D17.

3. The explanatory memorandum also makes it clear the fourth public offer test is met where negotiations between an investor and the issuing company concerned commenced because the investor became aware of the company's intention to raise funds through seeing an offering circular, brochure, prospectus or information memorandum or other similar document prepared by or on behalf of the company in respect of the debenture or the programme ('Marketing Document'). The Marketing Document must be available for inspection on an electronic information source of the type described in paragraph 2 above or be available for collection from a stock exchange or an agent, dealer, manager or underwriter, trustee or other representative of the company in any financial centre in the world.

4. In relation to 'hard copy' publications, the explanatory material provides the public offer test is satisfied where the debenture offer is published in a publication monitored by financial markets as a source of information. For instance, an offer of debentures published in a leading

financial newspaper in London or New York satisfies the test, as does a prospectus or offering circular that is publicly available in capital markets. The test, however, is not satisfied if the debenture offer is published in a source not used by financial markets for dealing in debentures.

5. It is not considered necessary for investors to confirm with the issuing company that they acquired the debentures as a result of having seen the publicity initiated by the issuer. The publicity itself, in the manner described above, constitutes satisfaction of this aspect of the public offer test.

Your comments

6. 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:
Not previously issued in draft form

Related Rulings/Determinations:

TD 1999/D1; TD 1999/2; TD 1999/D3; TD 1999/D4: TD 1999/D5; TD 1999/D6; TD 1999/D7; TD 1999/D8; 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)(d); TLAA (No.2) 1997

Case references:

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