


***TD 2000/D21 - Income tax: Interest Withholding Tax Exemption - for the purposes of subsection 128F(5) of the Income Tax Assessment Act 1936 , when will a company be taken to have the requisite knowledge or suspicion that the debenture or an interest in the debenture was being, or would later be, acquired by an associate?***

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This document has been finalised by TD 2001/3.



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## Draft Taxation Determination

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**Income tax: Interest Withholding Tax Exemption - for the purposes of subsection 128F(5) of the *Income Tax Assessment Act 1936* , when will a company be taken to have the requisite knowledge or suspicion that the debenture or an interest in the debenture was being, or would later be, acquired by an associate?**

### *Preamble*

*Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office. DTDs should not be relied on; only final Taxation Determinations represent authoritative statements by the Australian Taxation Office.*

1. Subsection 128F(5) provides that a debenture issued by a company will not satisfy the public offer test in section 128F if, at the time of issue, the company *knew* or had *reasonable grounds to suspect* that the debenture, or an interest in it, was being, or would later be, acquired by an “associate”. An exception applies when the associate acquires the debenture in their capacity as a dealer, manager or underwriter in relation to the placement of the issue. Associate is defined by subsection 128F(9), which adopts the meaning of associate found in section 159GZC of the *Income Tax Assessment Act ITAA 1936*, with a few exceptions not relevant to this determination.

2. Knowledge in the sense used here refers to the actual knowledge of the company, assessed at the time the debentures are issued. Suspicion needs to be looked at objectively in light of what is reasonable in the individual circumstances of the particular case. When subsection 128F(5) refers to the knowledge or suspicion of the company, this means knowledge or suspicion of the officers of the company. A company will not be regarded as knowing or suspecting that an associate would acquire debentures unless it is established that an officer or officers of the company knew or had reasonable grounds to suspect that this was the case. Neither knowledge nor suspicion are restricted to those officers of the company involved with the issue of the debentures. This means that issuing officers will need to undertake enquiries to ensure that other officers of the company do not have such knowledge or suspicion, otherwise the subsection may operate.

3. A company will be taken to have the requisite knowledge or suspicion if the company enters into an agreement, arrangement, understanding or scheme in relation to the purchase of its debentures by an associate. Such an agreement, arrangement, understanding or scheme would exist

whether it is formal or informal, express or implied, and whether or not enforceable or intended to be enforceable *and* the debenture is issued to or ultimately acquired by an associate.

4. A company will not be taken to have the requisite knowledge or suspicion if the company takes reasonable steps to ensure that its associates do not acquire its debentures. While every case has to be judged on its merits, one reasonable step would be to write to associates asking them not to acquire debentures (otherwise than in their capacity of a dealer, manager or underwriter in relation to the placement of the debenture). Another reasonable step would be for the debenture itself, and/or the prospectus, to contain a statement advising that the purchase of the debenture by associates could result in the entire issue failing the public offer test. It will be considered acceptable for a company to rely on bona fide representations from a dealer, manager or underwriter that it will not sell debentures to an associate of the issuing company, except where the company knew or had reasonable grounds to suspect that this would in fact occur. A company cannot ignore persons it knows to be associates and then use the defence that it relied on the representations of a dealer, manager or underwriter.

5. Where a company proceeds to issue debentures, despite possessing the requisite knowledge or suspicion of acquisition of those debentures by associates, as discussed above, the issue fails the public offer test and is not exempt under section 128F. Withholding tax, and the general interest charge, will then be payable on the entire issue. In addition, depending on the circumstances, the Commissioner may also apply any relevant penalty provisions. The Commissioner may also consider the application of Part IVA of the ITAA 1936 in such situations.

#### **Your comments**

6. We invite you to comment on this Draft Taxation Determination. We are allowing 4 weeks for comments before we finalise the Determination. If you want your comments considered, please provide them to us within this period.

**Comments by Date:** 15 November 2000

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#### **Commissioner of Taxation**

18 October 2000

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#### *Previous draft:*

Not previously issued in draft form

#### *Related Rulings/Determinations*

TD 1999/8; TD 1999/9; TD 1999/10; TD 1999/11; TD 1999/12; TD 1999/13; TD 1999/14; TD 1999/15; TD 1999/16; TD 1999/17; TD 1999/18; TD 1999/19; TD 1999/20; TD 1999/21; TD 1999/22; TD 1999/23; TD 1999/24; TD 1999/25; TD 1999/26;

#### *Subject references:*

- associates
- debenture issues
- interest withholding tax exemption
- public offer test

#### *Legislative references:*

- ITAA 1936 128F
- ITAA 1936 128F(5)

- ITAA 1936 159GZC
  - ITAA 1936 Part IVA
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ATO references:

NO

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