TD 1999/16 - Income tax: interest withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 - does the public offer test 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?

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Taxation Determination

Income tax: interest withholding tax exemption under section 128F of the *Income Tax Assessment Act 1936* – does the public offer test 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

This Taxation Determination is a 'public ruling' for the purposes of Part IVAAA of the ***Taxation Administration Act 1953*** *and is legally binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Determination is a public ruling and how it is legally binding.*

Date of effect

This determination applies to years commencing both before and after its date of issue. However, this Determination does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

1. The public offer test 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, that 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. It further states that the details required to be included in the electronic quotation are the name of the company issuing the debentures and the name of the programme. However, it is accepted that, as a matter of practice, the principal amount and the maturity date of the debenture may be quoted instead of the name of the programme. 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 Taxation Determination TD 1999/24.

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.

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.

Commissioner of Taxation
12 May 1999

Previous draft:
TD 1999/D9

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 1999/17; 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:

Legislative references:
ITAA 128F; ITAA 128F(3)(d); TLAA (No 2) 1997

Case references:

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