TD 1999/24 - Income tax: interest withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 - how may a company satisfy the introductory requirements in paragraphs 128F(3)(a) and 128F(3)(b) that a debenture must be offered on a 'debenture by debenture' basis?

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Taxation Determination

Income tax: interest withholding tax exemption under section 128F of the *Income Tax Assessment Act 1936* - how may a company satisfy the introductory requirements in paragraphs 128F(3)(a) and 128F(3)(b) that a debenture must be offered on a 'debenture by debenture' basis?

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 introductory words of the first and second public offer tests, in paragraphs 128F(3)(a) and 128F(3)(b), require the issue of a debenture to **result from** the debenture being offered for issue to at least 10 or 100 persons, respectively.

2. Concern has been expressed that, if a debenture is offered for issue to 10 or 100 people, and each person accepts, the company would have contracted to sell the same debenture to 10 or 100 different people.

3. For the purposes of the introductory words of paragraphs 128F(3)(a) and 128F(3)(b), 'offered' is not limited to meaning 'offer' in the context of a contractual offer. Rather, the word includes invitations or inducements to potential investors to make offers. For example, the placement of an advertisement that the company wishes to issue debentures, is an attempt to induce offers from potential investors rather than an offer itself (in other words, it is an 'invitation to treat').

4. Therefore, the introductory words are satisfied where the debentures are advertised for issue or other invitations or inducements are made in accordance with their respective public offer test, giving potential investors the opportunity to make an offer to the company for the acquisition of the debenture/s.

5. However, where the advertisements, invitations or inducements are not genuine, the Commissioner will consider the application of Part IVA to the arrangement.

6. Further, the reference to debenture in the opening words of paragraphs 128F(3)(a) and 128F(3)(b) includes a tranche of debentures, which includes the debentures as well as interests in a debenture in global form (as to which see Taxation Determination TD 1999/10).

Commissioner of Taxation
12 May 1999

Previous draft:

TD 1999/D17

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 1999/25; TD 1999/269

Subject references:

Legislative references:

ITAA 128F; ITAA 128F(3)(a); ITAA 128F(3)(b); ITAA Pt IVA

Case references:

ATO references:
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