


TD 2002/27 - Income tax: does a 'permitted purpose' under subsection 215-10(2) of the Income Tax Assessment Act 1997 include making equity investments in a foreign entity (including a foreign subsidiary) by an Australian authorised deposit-taking institution (ADI) through a permanent establishment out of funds raised by the permanent establishment from the issue of non-share equity interests that meet the conditions of subsection 215-10(1)?

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Taxation Determination

Income tax: Does a ‘permitted purpose’ under subsection 215-10(2) of the *Income Tax Assessment Act 1997* include making equity investments in a foreign entity (including a foreign subsidiary) by an Australian authorised deposit-taking institution (ADI) through a permanent establishment out of funds raised by the permanent establishment from the issue of non-share equity interests that meet the conditions of subsection 215-10(1)?

Preamble

*The number, subject heading, date of effect and paragraphs 1 and 3 of this Taxation Determination are a ‘public ruling’ for the purposes of Part IVAAA of the **Taxation Administration Act 1953** and are legally binding on the Commissioner. The remainder of the Determination is administratively binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain how a Determination is legally or administratively binding.*

Date of effect

This Determination applies 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).

This Determination applies to non-share dividends paid by an ADI on or after 1 July 2001, in respect of non-share equity interests that meet the conditions of subsection 215-10, that either:

- (a) were issued before 1 July 2001 and in respect of which the issuer made an election that the debt equity test amendments in Schedule 1 of the New Business Tax System (Debt and Equity) Act 2001 (Debt Equity Act) (the ‘election’) applied to that interest, or were issued on or after 1 July 2001, in which case it applies to dividends paid after 1 July 2001;*
- (b) were issued before 1 July 2001 and in respect of which:*
 - no election is made in respect of that interest;*
 - the interest is not materially altered;*
 - the interest has not been rolled over; and*
 - the term of the interest has not been extended,*

since 1 July 2001 pursuant to subitem 7 of item 118 of Part 4 of Schedule 1 of the Debt Equity Act, in which cases it applies to dividends paid from 1 July 2004; or

(c) *were issued before 1 July 2001 and in respect of which one of the following events which take place after 1 July 2001, deems the interest to have been issued after 1 July 2001:*

- *the interest is materially altered;*
- *the interest is rolled over; or*
- *the term of the interest is extended,*

in which case the Determination applies to dividends paid after the date of the event that deems the interest to have been issued.

1. Yes.

2. There is only one specific proscription of the use of funds raised by a permanent establishment from the issue of eligible non-share equity interests. This is the exclusion in paragraph 215-10(2)(a) which, broadly, disqualifies any transfer of funds for use in the Australian operations of the ADI, its subsidiaries or any connected entities. This exclusion must be read together with paragraphs 215-10(2)(b) and 215-10(2)(c) dealing with pre-existing obligations. An explanation of the provisions mentioned is contained in paragraphs 2.101 to 2.109 of the Explanatory Memorandum to the *New Business Tax System (Debt and Equity) Bill 2001* where the section was originally introduced as section 160APAAAA of the *Income Tax Assessment Act 1936*.

3. Having regard to the nature and scope of the exclusion, the business test contained in paragraph 215-10(2)(a) is not to be read down other than subject to the scope of the exclusion. The 'permitted purposes' are, subject to the exclusion, any business transactions of the ADI carried on at or through the permanent establishment. This includes the acquisition of equity in related (as well as unrelated) foreign companies or foreign entities treated as companies that are not covered by the exclusion.

4. This Taxation Determination does not restrict the operation of the anti-streaming and general anti-avoidance provisions.

Commissioner of Taxation

11 December 2002

Previous Draft:

Previously released as TD 2001/D15

- permanent establishment
- permitted purpose

Related Rulings/Determinations:

TR 92/1; TR 92/20; TR 97/16

Legislative references:

- ITAA 1936 160APAAAA
- ITAA 1997 215-10(1)
- ITAA 1997 215-10(2)
- ITAA 1997 215-10(2)(a)
- ITAA 1997 215-10(2)(b)
- ITAA 1997 215-10(2)(c)
- Debt Equity Act 2001 Sch 1

Subject references:

- ADI
- authorised deposit-taking institution
- foreign branch of Australian bank
- non-share equity interest

ATO references:

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