TD 93/132 - Income tax: Offshore Banking Units - if an entity is registered as an OBU and that entity conducts both offshore banking activities and domestic banking activities, can the OBU trade in foreign currency with the domestic part of the bank (the 'domestic part')?

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This document has changed over time. This is a consolidated version of the ruling which was published on *13 October 2021*

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Australian Taxation Office

Taxation Determination **TD 93/132**

This Determination, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the *Taxation Administration Act 1953*, is a public ruling for the purposes of that Part . Taxation Ruling TR 92/1 explains when a Determination is a public ruling and how it is binding on the Commissioner. Unless otherwise stated, 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 a settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

*[**Note:** This is a consolidated version of this document. Refer to the Legal Database (www.ato.gov.au/Law) to check its currency and to view the details of all changes.]*

Taxation Determination

Income tax: Offshore Banking Units - if an entity is registered as an OBU and that entity conducts both offshore banking activities and domestic banking activities, can the OBU trade in foreign currency with the domestic part of the bank (the 'domestic part')?

1. Yes, provided that the transaction does not involve the sale, purchase or exchange of a foreign currency for Australian currency.

2. Section 121EB of the *Income Tax Assessment Act 1936* (ITAA) provides that branches of one entity are treated as separate entities for the purposes of sections 121D to 121EA (inclusive). Where an entity that is registered as an offshore banking unit (OBU) [1] consists of one or more permanent establishments (PEs) in Australia carrying on offshore banking (OB) activities and other PEs either in or out of Australia, the Australian part or parts of the business that conduct the OB activities (the 'OB part') are treated as one person while the other PEs are treated as separate persons.

3. Section 6(1) of the ITAA defines 'permanent establishment', in a general way, to mean 'a place at or through which the person carries on any business'. There are some specific inclusions and exclusions that are not presently relevant. A branch that is run as a separate profit centre is a common example of a PE.

4. Income derived from OB activities is taxed at the concessional rate of 10 per cent. Trading in currency, options or rights in respect of currency, with any person other than in Australian currency, is one such activity.

5. Trading between the 'domestic part' and the 'OB part', other than in Australian currency, would be allowed because section 121EB treats different PEs - which are not carrying on OB activities - as separate persons from the part of business that conducts the OB activities.

[1] The OBU regime is closed to new entrants from 14 September 2021. The concessional tax treatment for existing OBUs in respect of offshore activities will be removed effective from the 2023-24 income year. Interest payments paid on or after 1 January 2024 on offshore borrowings by OBUs will no longer be exempt from withholding tax.

6. Documentation is required to substantiate these transactions in accordance with subsection 262A(1A). This subsection states that separate accounts must be kept as if the bank were conducting banking activities with another person.

7. Where the company registered as an OBU is carrying on domestic banking and offshore banking, the company is taken to be operating through two permanent establishments, even though the two businesses may operate on the same premises and use the same staff. It is not necessary that the premises be used solely for one business activity.

8. This does not mean, however, that the 'OB part' can transact with the 'domestic part' so as to translate 'positions' back to Australian dollars. The definition of 'trading activity' in subsection 121D(4) excludes any trading in Australian currency.

9. Where the transaction made by the 'OB part' satisfies the requirements of subsection 121D(4) and the 'domestic part' then translates the currency into Australian dollars, the OB leg of the transaction involving the exchange of one foreign currency for another will be treated as an OB activity. It is expected that any such dealings would be at arm's length in view of the operation of Part IVA.

Example 1:

The 'domestic part' sells Australian dollars to the 'OB part' in exchange for US dollars. The 'OB part' then sells US dollars to a third party for pounds sterling at prevailing market rates available to banks generally. The first leg of the transaction is not an OB activity but the second leg will be accepted as an OB activity.

Example 2:

The 'OB part', dealing with a third party, sells pounds sterling for yen which it then sells for US dollars. The 'domestic part' then buys the US dollars from the 'OB part' for Australian dollars. The transactions of the 'OB part' in pounds sterling, yen and US dollars will be treated as OB activities.

Example 3:

The 'domestic part' sells Australian dollars to a third party in exchange for US dollars. In an unrelated transaction, the 'domestic part' sells US dollars to the 'OB part' for Deutsch marks at prevailing market rates available to banks generally. The transaction in US dollars and Deutsch marks will be accepted as an OB activity of the 'OB part'.

Commissioner of Taxation
8/7/93

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