



TD 93/233 - Income tax: is the allotment of shares as consideration for services performed by another party on research and development activities expenditure incurred under section 73B of the Income Tax Assessment Act 1936 (ITAA)?

 This cover sheet is provided for information only. It does not form part of *TD 93/233 - Income tax: is the allotment of shares as consideration for services performed by another party on research and development activities expenditure incurred under section 73B of the Income Tax Assessment Act 1936 (ITAA)?*

 This document has changed over time. This is a consolidated version of the ruling which was published on *9 December 1993*

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).

Taxation Determination

Income tax: is the allotment of shares as consideration for services performed by another party on research and development activities expenditure incurred under section 73B of the *Income Tax Assessment Act 1936* (ITAA)?

1. No. The allotment of shares by a company from its own share capital as consideration for services performed on research and development activities is not expenditure incurred by the company. Accordingly, a deduction is not allowable to the company under section 73B for the value of the shares allotted.

2. The question of whether an issue of shares constitutes the incurring of expenditure was considered in the House of Lords case of *Lowry v Consolidated African Selection Trust Ltd* (1940) 23TD 259 at 285, (1940) AC 648 at 662. According to Viscount Maugham at 553-554:

'The company has not lost, or parted with, any asset. It has a fewer number of shares remaining for issue, but, of course it can create as many more as it pleases. There is here, in my opinion, no transaction of trade at all, nor an item of any kind, which ought to be carried to either side of the profit and loss account. The issue of shares by a company, whether at par or over, does not affect the profits or gains of the company for the purposes of income tax.'

3. In the High Court case of *Ord Forrest Pty Ltd v F.C. of T.* (1974) 130 CLR 124 at 148, Gibbs J stated (with similar sentiments also being expressed by Barwick CJ):

'An allotment of shares cannot be described as a disposition of property in the ordinary meaning of that expression. When a share is allotted, nothing is transferred or conveyed from the company to the shareholder.'

4. Accordingly, it cannot be said that a company incurs research and development expenditure when it issues shares. The other shareholders of the company may suffer a dilution of the value of the shares which they hold in the company but this would only occur where the value of the services performed by the third party prove to be valueless. It may be the case that the services performed by the third party greatly increase the value of the company hence the value of the other shareholders' shares.

Example:

A mining company issues shares from its own share capital as consideration for research and development activities undertaken by another company under the contract (the contractor). A deduction under section 73B is then sought by the mining company in respect of the expenditure. The mining company bears all the risks, controls the conduct of the research and development activities and owns the project results.

The mining company will not be entitled to a deduction under section 73B for the value of the shares issued to the contractor carrying out research and development activities.

Commissioner of Taxation

9/12/93

FOI INDEX DETAIL: Reference No. I 1216702

Previously issued as Draft TD 93/D172

Related Determinations:

Related Rulings:

Subject Ref: issue of shares; expenditure incurred; research and development

Legislative Ref: ITAA 73B

Case Ref: *Ord Forrest Pty Ltd v F.C. of T.* (1974) 130 CLR 124 at 148; *Lowry v Consolidated African Selection Trust Ltd* (1940) 23 TD 259 at 285; (1940) AC 648 at 662

ATO Ref: NAT 88/4630-8

ISSN 1038 - 8982