TD 1999/D2 - Income tax: interest withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 - if a debenture is executed and delivered outside Australia, will it be taken to have been 'issued' outside Australia for the purposes of paragraph 128F(1)(c)

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This document has been finalised by TD 1999/9.

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Draft Taxation Determination

Income tax: interest withholding tax exemption under section 128F of the *Income Tax Assessment Act 1936* – if a debenture is executed and delivered outside Australia, will it be taken to have been 'issued' outside Australia for the purposes of paragraph 128F(1)(c)

Preamble

Draft Taxation Determinations (DTDs) present the preliminary, though considered, views of the Australian Taxation Office (ATO). DTDs may not be relied on; only final TDs are authoritative statements of the ATO.

1. Concern has been expressed that, because of the way the market operates, a debenture may be considered not to have been issued outside Australia for the purposes of paragraph 128F(1)(c), even though the relevant debenture is executed and delivered outside Australia. This could occur, for example, where a document in connection with the issue of a debenture, other than the debenture itself, has been signed in Australia.

2. The term 'issue' was discussed in IT 2652 in relation to the withholding tax exemption previously available for debentures under the old section 128F which operated prior to 1 January 1996. That Ruling, which dealt with debentures issued outside Australia by a non-resident agent, pointed out that the term 'issue' was not defined for the purposes of the withholding tax provisions and, therefore, its ordinary meaning must be adopted. This is still the position.

3. In discussing an agreement to issue debentures in *Levy v. Abercorris Slate and Slab Company* (1887) 37 Ch 260, Chitty J of the Chancery Division stated at 264:

> ' "issued" is not a technical term, it is a mercantile term well understood; "issue" here means the delivery over by the company to the person who has the charge".

4. The ordinary meaning of the word 'issue' according to *The Macquarie Dictionary* is 'to put out: deliver for use, sale, etc.; put into circulation'. To put out or deliver debentures to subscribers in an offshore market, is to 'issue' the debentures for the purposes of paragraph 128F(1)(c) irrespective of where supporting documentation may have been signed.

5. Accordingly, provided the relevant debenture is, in the case of a bearer debenture, executed and delivered outside Australia or, in the case of a registered debenture, registered on a register outside Australia, a company is taken to have issued a debenture for the purpose of paragraph 128F(1)(c).

6. It should be noted that this Determination will no longer have application if the changes to section 128F proposed in Taxation Laws Amendment Bill (No 4) 1998 become law.

Your comments

7. If you wish to comment on this draft Determination, please send your comments promptly by Friday 26 February 1999 to:

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Commissioner of Taxation
27 January 1999

Previous draft:
Not previously issued in draft form

Related Rulings/Determinations:

TD 1999/D1; TD 1999/D3; TD 1999/D4; TD 1999/D5: TD 1999/D6; TD 1999/D7; TD 1999/D8; TD 1999/D9; TD 1999/D10; TD 1999/D11; TD 1999/D12; TD 1999/D13; TD 1999/D14; TD 1999/D15; TD 1999/D16; TD 1999/D17; TD 1999/D18; TD 1999/D19; IT 2652

Subject references:

Legislative references:

ITAA 128F; ITAA 128F(1)(c)

Case references:

Levy v. Abercorris Slate and Slab Company (1887) 37 Ch 260

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