TD 1999/D7 - Income tax: interest withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 - when is it reasonable for a company to regard the person to whom a debenture is offered as either 'having acquired debentures in the past' or 'being likely to be interested in acquiring debentures' for the purposes of the public offer test in paragraph 128F(3)(b)?

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This document has been finalised by TD 1999/14.

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Draft Taxation Determination

Income tax: interest withholding tax exemption under section 128F of the *Income Tax Assessment Act 1936* - when is it reasonable for a company to regard the person to whom a debenture is offered as either 'having acquired debentures in the past' or 'being likely to be interested in acquiring debentures' for the purposes of the public offer test in paragraph 128F(3)(b)?

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. The public offer test in paragraph 128F(3)(b) (the second public offer test) is directed at individual investors and businesses operating in retail capital markets. It requires a company offering debentures for issue, to offer them to at least one hundred persons, whom the company may *reasonably* regard as either having 'acquired debentures in the past' or being 'likely to be interested in acquiring debentures'.

2. What is *reasonable* always depend on the individual facts and circumstances of the case. The explanatory memorandum accompanying the legislation provides some guidance as to when it is reasonable for a company to be satisfied the second public offer test has been met. The following situations clearly satisfy the criteria:

- where a company sends letters to persons whom it may reasonably regard as having acquired debentures from time to time; or
- where offers are made to one hundred customers of a bank, financial institution, broker or other financial intermediary who have previously purchased debentures; or
- where the bank, financial institution, broker or other financial intermediary has reason to believe those customers may be interested in acquiring debentures or other securities; or
- where an agent on behalf of a company approaches such customers with an offer of the debentures for issue.

3. On the other hand, the second public offer test is not satisfied where 100 persons receive an offer of debentures for issue who have not previously acquired debentures and in respect of whom the issuer has no reasonable basis for believing they may be interested in acquiring debentures.

4. It is not necessary for the company issuing the debentures to require a written undertaking or representation by either the persons to whom the debentures are offered or by a dealer, manager or underwriter who makes the offer on behalf of the company, that the terms of the second public offer test have been met. However, the company offering the debentures for sale may generally rely on a written undertaking or representation given by either the person to whom the debentures are offered or by a dealer, underwriter or manager who makes the offer on behalf of the company that it is acting or has acted in connection with the issue of the debentures in accordance with paragraph 128F(3)(b), unless the company is actually aware at the time of the issue of the debentures of any facts that may disqualify the issue.

Your comments

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

Contact officer: George Montanez
Email: George.Montanez@ato.gov.au
Telephone: (02) 6216 1582
Facsimile: (02) 6216 1509

Address: Mr George Montanez
International Tax Division
Australian Taxation Office
P O Box 900
Civic Square ACT 2608.

Commissioner of Taxation
27 January 1999

Previous draft:
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Related Rulings/Determinations:

TD 1999/D1; TD 1999/D2; TD 1999/D3; TD 1999/D4: TD 1999/D5; TD 1999/D6; 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

Subject references:

Legislative references:

ITAA 128F; ITAA 128F(3)(b)

Case references:

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