


TD 93/D172 - 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)?

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This document has been finalised by TD 93/233.

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

Draft 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. 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 incurring expenditure was considered in the House of Lords case of *Lowry v Consolidated African Selection Trust Ltd* (1940) 2 All ER 545. 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.* 74 ATC 4034, at 4041, 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 was then sought by the mining company in respect of the expenditure. The mining company bore all the risks, controlled the conduct of the research and development activities and owned the project results.

The mining company is not 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

1/7/93

FOI INDEX DETAIL: Reference No.

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.* 74 ATC 4034; *Lowry v Consolidated African Selection Trust Ltd* (1940) 2 All ER 545

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