

TD 93/D282 (Withdrawn) - Income tax: is there a withholding tax liability if interest payable by a resident to a non-resident lender is paid to a third party?

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⚠ This document has been Withdrawn.

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 there a withholding tax liability if interest payable by a resident to a non-resident lender is paid to a third party?

1. Yes, except where the interest is incurred in carrying on a business at or through a permanent establishment outside Australia. Where there is a right under a loan agreement for the non-resident lender to receive interest from the borrower, that interest is derived by the non-resident lender when it falls due for payment. This is so even if the payment is made to a third party.
2. We consider that the non-resident lender is deemed to have been paid the interest as it has been dealt with on behalf of the non-resident or as the non-resident directs. The interest is deemed under subsection 128A(2) of the *Income Tax Assessment Act 1936* to have been paid to the non-resident although it is not actually paid over to that person but is reinvested, accumulated, capitalized, carried to any reserve, sinking fund or insurance fund however designated, or otherwise dealt with on behalf of that person or as that person directs.
3. The requirements in subsection 128B(2) are satisfied and create a withholding tax liability.
4. The collection provision, subsection 221YK(3) mirrors subsection 128A(2) and deems the interest to have been paid or payable to a non-resident. Consequently there is a requirement for withholding tax to be deducted in terms of subsections 221YL(2A) and 221YL(2B). The requirement to withhold tax from interest does not require an actual payment of the interest to the non-resident lender. It is enough if the interest liability arises and any of the actions outlined in subsection 221YK(3) occurs.

Example:

The resident borrower borrowed \$1m at an interest rate of 10% pa from a non-resident lender. Interest is payable at the end of 12 months. The borrower issues to the non-resident a promissory note with a face value of \$100,000 to evidence its future interest liability at the end of the 12 months. The non-resident lender then endorses the note to a third party. The resident borrower pays the third party on presentation of the promissory note on maturity.

We consider that the non-resident lender has derived \$100,000 in interest income. The endorsement of the note by the non-resident to the third party and the payment on presentation of that note falls within subsection 128A(2). Interest is deemed to have been paid to the non-resident.

There is a requirement to deduct withholding tax as the payment falls within the operation of subsections 221YL(2A) and 221YL(2B).

Commissioner of Taxation

2/12/93

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