TD 95/D1 - Income tax: are interest payments made to non-residents by an Offshore Banking Unit (OBU) on bearer debentures, where the names and addresses of the holders have not been supplied to the Commissioner of Taxation, caught by Division 11 and in particular section 126 of the Income Tax Assessment Act 1936?

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This document has been finalised by TD 95/31.

Australian Taxation Office

Taxation Determination TD 95/D1

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: are interest payments made to non-residents by an Offshore Banking Unit (OBU) on bearer debentures, where the names and addresses of the holders have not been supplied to the Commissioner of Taxation, caught by Division 11 and in particular section 126 of the *Income Tax Assessment Act 1936*?

1. No, provided the requirements of subsection 128GB(3) of the *Income Tax Assessment Act 1936* (the Act) are not satisfied.

2. Section 128GB of the Act ensures that the interest withholding tax provisions set out in Division 11A do not apply to interest paid by a person in respect of an "offshore borrowing" if when the borrowing took place the person was an OBU. In this regard, the definition of borrowing for the purposes of section 128GB includes the raising of finance by the issue of a security; (subsection 128AE(1) of the Act).

3. Section 126, which is a long-standing anti-avoidance provision, applies where a company borrower does not supply, to the Commissioner of Taxation, the names and addresses of bearer debenture holders to whom interest is paid or credited in respect of the bearer security. The section imposes a liability on the borrower to withhold tax, at a rate set by the *Income Tax (Bearer Debentures) Act 1971*, on the amount paid or credited.

4. Section 125 provides that Division 11 does not apply to certain interest payments. However, interest which is excluded from the interest withholding tax provisions by section 128GB is not specifically excluded from the application of Division 11 by section 125.

5. Having regard to the legislature's intention to provide an 'exempton' from interest withholding tax under section 128GB for interest payments on offshore borrowings by an OBU and the legislative purpose and history of section 126, Division 11 is not considered to operate where bearer debentures are issued by an OBU as part of an 'offshore borrowing'.

6. It should be noted, however, that in terms of section 121EA, the issue of a security offshore is not an offshore banking (OB) activity if the transaction is carried out as part of the company's business outside Australia at or through a permanent establishment (for example, a foreign branch of a company that is an OBU).

Commissioner of Taxation
27/1/95

FOI INDEX DETAIL: Reference No.
Related Determinations:
Related Rulings: IT2033
Subject Ref: OBUs; bearer debentures; Division 11
Legislative Ref: ITAA 121EA; ITAA 125; ITAA 126; ITAA 128AE(1); ITAA 128GB; ITAA 128GB(3); Div 11
Case Ref:
ATO Ref: NAT 94/8857-0; 95/463-2

ISSN 1038 - 8982