

TD 1999/9 - 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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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

*This Taxation Determination is a ‘public ruling’ for the purposes of Part IVAAA of the **Taxation Administration Act 1953** and is legally binding on the Commissioner. Taxation Rulings TR 92/1 and TR 97/16 together explain when a Determination is a public ruling and how it is legally binding.*

Date of effect

This determination applies to years commencing both before and after its date of issue. However, this Determination does not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

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 Taxation Ruling 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 and, in the case of a registered debenture, executed and delivered outside Australia and 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 2) 1999 become law.

Commissioner of Taxation

12 May 1999

Previous draft:

TD 1999/D2

Related Rulings/Determinations:

TD 1999/8; TD 1999/10; TD 1999/11; TD 1999/12; TD 1999/13; TD 1999/14; TD 1999/15; TD 1999/16;
TD 1999/17; TD 1999/18; TD 1999/19; TD 1999/20; TD 1999/21; TD 1999/22; TD 1999/23; TD 1999/24;
TD 1999/25; TD 1999/26; 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

ATO references:

NO 97/6464-0; 99/658-1

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