



TD 93/136 - Income tax: Offshore Banking Units - if a loan entered into by a foreign branch of an Australian resident bank is assigned to the Australian OBU head office, does this constitute an OB activity?

 This cover sheet is provided for information only. It does not form part of *TD 93/136 - Income tax: Offshore Banking Units - if a loan entered into by a foreign branch of an Australian resident bank is assigned to the Australian OBU head office, does this constitute an OB activity?*

 This document has changed over time. This is a consolidated version of the ruling which was published on *13 October 2021*

This Determination, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the *Taxation Administration Act 1953*, is a public ruling for the purposes of that Part. Taxation Ruling TR 92/1 explains when a Determination is a public ruling and how it is binding on the Commissioner. Unless otherwise stated, 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 a settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 21 and 22 of Taxation Ruling TR 92/20).

[*Note: This is a consolidated version of this document. Refer to the Legal Database (www.ato.gov.au/Law) to check its currency and to view the details of all changes.*]

Taxation Determination

Income tax: Offshore Banking Units - if a loan entered into by a foreign branch of an Australian resident bank is assigned to the Australian OBU head office, does this constitute an OB activity?

1. Yes, provided the loan contract is traded in accordance with subsection 121D(4) of the *Income Tax Assessment Act 1936* (ITAA) and not merely transferred, or is a lending activity within the meaning given in subsection 121D(2).
2. Subsection 121D(4) defines trading activity to include, amongst other things, trading with offshore persons in securities issued by non-residents and trading with offshore persons in non-resident company shares which are not denominated in Australian currency. The Explanatory Memorandum states that an OBU¹ may trade on its own behalf.
3. Section 121EB of the ITAA treats the overseas permanent establishment as a separate person from the Australian part of the bank conducting offshore banking. Therefore, a loan contract may be traded in accordance with subsection 121D(4) provided any amounts payable under the loan contract are payable by non-residents and are not payable in Australian currency.
4. Accordingly, all or part of a portfolio of offshore loans can be transferred provided the transfer takes the form of a sale. The sale could entail an assignment or novation of the loan for tax purposes.
5. The definition of 'lend' in section 121C includes providing finance by the purchase of a security. It does not matter if it is on the secondary market. However, the person from whom the security was originally issued must have been an offshore person. If that person is a branch of an Australian company, the security must not be in Australian dollars. Therefore, where these criteria are met, the assignment of the loan will be an OB activity.

Example

An Australian OBU buys a portfolio of loans from its Singapore branch which is an ACU (an Asian Currency Unit which is essentially a Singaporean OBU). The sale entails an assignment for tax purposes of

¹ The OBU regime is closed to new entrants from 14 September 2021. The concessional tax treatment for existing OBUs in respect of offshore activities will be removed effective from the 2023-24 income year. Interest payments paid on or after 1 January 2024 on offshore borrowings by OBUs will no longer be exempt from withholding tax.

non-resident parties to the loan contracts and any amounts payable are not denominated in Australian dollars. The transaction would be an OB activity in terms of section 121D.

Commissioner of Taxation

8/7/93

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Related Determinations:

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