TD 1999/D15 - Income tax: interest withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 - is subsection 128F(10) the only method by which a global bond may satisfy the public offer test?

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This document has been finalised by TD 1999/22.

Draft Taxation Determination

Income tax: interest withholding tax exemption under section 128F of the *Income Tax Assessment Act 1936* - is subsection 128F(10) the only method by which a global bond may satisfy the public offer test?

Preamble

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

1. No. There are two methods by which a global bond may satisfy the public offer test. If the global bond satisfies the requirements of subsection 128F(10), subsection 128F(4) deems the debenture to satisfy the public offer test. Alternatively, if the global bond satisfies one of the public offer tests in subsection 128F(3), it is not necessary for the global bond to satisfy the requirements of subsection 128F(10).

2. With this latter alternative in mind, it is important to note that Draft Taxation Determination TD 1999/D3 states that individual shares or interests in a debenture are debentures for the purposes of section 128F, and the public offer test under subsection 128F(3) is to be applied in respect of the interests which constitute that debenture and not that debenture itself.

3. Questions have also arisen regarding the requirements of satisfying subsection 128F(10).

4. Subsection 128F(10) provides an exhaustive definition of 'global bond' for the purposes of satisfying the public offer test in subsection 128F(3). A debenture issued by a company is a 'global bond' where the debenture describes itself as a global bond or a global note or otherwise has the features of a global bond or a global note (regardless of what it is called). The object of the definition is to reflect actual market practice in regard to the issue of global bonds and it would, therefore, be inconsistent with the purpose of the legislation to take an overly restrictive approach.

5. The definition describes what are usually referred to as global notes or global bonds. These are a single instrument evidencing the indebtedness of the issuing company arising from a loan raised in a particular currency with usually a particular maturity date. It is intended that paragraph 128F(10)(a) applies to any debenture that takes the form of a debenture in global form.

6. Before the issue of the global bond or global note, the company or a dealer, manager or underwriter acting in respect of the debenture must have announced that contractual or other rights would be created in relation to the global bond or global note. This announcement comprises the offer for issue in accordance with any paragraph of section 128F(3) of interests in a debenture pursuant to the creation of a right of the type referred to in section 128F(10)(c).

7. Paragraph 128F(10)(f) needs to be read in such a way as to take account of the rapid technological changes that are occurring in the markets. Permanent global bonds are fast becoming the norm because of the wide use of paperless bonds and the expenses and storage difficulties inherent with traditional bonds and debentures in definitive form.

8. Paragraph 128F(10)(f) is, therefore, satisfied in circumstances where the debenture becomes void in whole or in part in accordance with its terms and in such an event each holder acquires rights against the company, as set out under a deed of covenant, instrument or other form of deed poll; or where under the terms of the debenture (commonly known as a temporary global note or global bond), interest in the debenture is exchangeable for either another debenture (commonly known as a permanent global note or global bond) or for another debenture in definitive form.

9. It should also be noted that although subsection 128F(10) applies to a debenture in global registered form, subparagraph 128F(10)(f) is taken to be satisfied if, under the terms of the instrument creating the debenture, interests in the debenture exist by virtue of registration on a register maintained by or on behalf of the company.

Your comments

10. If you wish to comment on this draft Determination, please send your comments promptly by Friday 26 February 1999 to:

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Related Rulings/Determinations:

TD 1999/D1; TD 1999/D2; TD 1999/D3; TD 1999/D4; TD 1999/D5; TD 1999/D6; TD 1999/D7; TD 1999/D8; TD 1999/D9; TD 1999/D10; TD 1999/D11; TD 1999/D12; TD 1999/D13; TD 1999/D14; TD 1999/D16; TD 1999/D17; TD 1999/D18; TD 1999/D19

Subject references:

Legislative references:

ITAA 128F; ITAA 128F(3); ITAA 128F(4); ITAA 128F(10); ITAA 128F(10)(f)

Case references:

ATO References:
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