TD 92/160 - Income tax: must a loan which is evidenced, acknowledged or created by a convertible note have a specified maturity date for the note to come within section 82SA of the Income Tax Assessment Act 1936?

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Generated on: 5 June 2026, 01:24:34 AM

Australian Taxation Office

Taxation Determination TD 92/160

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).

Taxation Determination

Income tax: must a loan which is evidence, acknowledge or created by a convertible note have a specified maturity date for the note to come within section 82SA of the Income Tax Assessment Act 1936?

1. No. Subparagraph 82SA(1)(d)(v) specifies a time limit for the exercise of an option to convert a note to company shares. The time limit is either no later than the maturity date of the loan or, if the date of offer to subscribe to the loan is more than 10 years earlier than the maturity date of the loan, within 10 years from the date of offer.

2. It is not necessary that a particular date be specified for the maturity of a loan, provided that the loan will mature on the occurrence of a specific event, e.g. the winding-up of the company. In such a case, the note will fall within section 82SA if the latest date for the exercise of the option to convert is a date within 10 years from the first day on which persons were invited to subscribe to the loan.

3. Support for this view is found in the Explanatory Memorandum to the *Income Tax Assessment Amendment Bill 1976* where it was stated that the option to convert cannot be '... exercisable after the earlier of the maturity date of the loan and the date occurring 10 years after the notes are offered for subscription'.

Example

4. *Bigcorp Pty Ltd invites Richcorp Pty Ltd on 1 July 1992 to subscribe to a 50 million dollar loan. Richcorp accepts the offer. The loan is created by 50 million one dollar notes. The notes are convertible, one for one, at any time between 1 October 1993 and 30 June 1997. The notes are redeemable only at the option of Bigcorp, or on winding-up. These notes come within section 82SA, even though no maturity date is specified, because the latest date for the exercise of the option to convert (i.e., 30 June 1997) is a date within 10 years from the date of the offer (i.e., 1 July 1992).*

5. Of course, it will still be necessary for the company issuing the convertible notes to demonstrate that the interest expense is deductible under subsection 51(1) (and that the other requirements of Division 3A of Part III are met) before a deduction for the interest would be available. Additionally, Part IVA may need to be considered in particular cases.

Commissioner of Taxation
1/10/92

FOI INDEX DETAIL: Reference No. I1213320 Previously issued as Draft 92/12
Related Determinations:
Related Rulings:
Subject Ref: convertible notes; notes; maturity date
Legislative Ref: ITAA 82SA; ITAA 82SA(1)(d)(v)
Case Ref:
ATO Ref: 88/8448-0

ISSN 1038 - 8982