TD 93/D32 - Income tax: Offshore Banking Units - if an entity which is registered as an OBU conducts both offshore banking and domestic banking activities, can the OBU trade in foreign currency with its domestic division or unit (DBU)?

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This document has been finalised by TD 93/132.

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: Offshore Banking Units - if an entity which is registered as an OBU conducts both offshore banking and domestic banking activities, can the OBU trade in foreign currency with its domestic division or unit (DBU)?

1. Yes, provided that the transaction viewed as a whole does not involve the sale, purchase or exchange of a foreign currency for Australian currency.

2. Section 121EB of the *Income Tax Assessment Act 1936* (ITAA) provides that branches of one entity are treated as separate entities for the purposes of sections 121D to 121EA (inclusive). Where an offshore banking unit (OBU) consists of one or more permanent establishments (PEs) in Australia carrying on offshore banking (OB) activities and other PEs either in or out of Australia, the Australian OBUs are treated as one person while the other PEs are treated as separate persons.

3. Section 6(1) of the ITAA defines 'permanent establishment' to mean 'a place at or through which the person carries on any business'. A branch that is run as a separate profit centre is a common example.

4. The concept is used in Australia's Double Tax Agreements and the OECD Model Commentary on Article 5 states that 'the term "place of business" covers any premises, facilities or installations used for carrying on the business of the enterprise whether or not they are used exclusively for that purpose'.

5. Income derived from OB activities is taxed at the concessional rate of 10 per cent. Trading in currency, or options or rights in respect of currency, with any person, in non-Australian dollars is one such activity.

6. Trading between the domestic banking unit (DBU) and the OBU in non-Australian dollars would be allowed because section 121EB treats different PEs - which are not carrying on OB activities - as separate persons from the part of business that conducts the OB activities.

7. For example, where the company registered as an OBU is carrying on domestic banking and offshore banking, the company is taken to be operating through two permanent establishments, even though the two businesses may operate on the same premises and use the same staff. As stated in the OECD Commentary, it is not necessary that the premises be used solely for one business activity.

8. This does not mean, however, that an OBU can transact with the domestic part of the bank so as to translate 'positions' back to Australian dollars.

Commissioner of Taxation
18/2/93

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