TD 1999/14 - Income tax: interest withholding tax exemption under section 128F of the Income Tax Assessment Act 1936 - when is it reasonable for a company to regard the person to whom a debenture is offered as either 'having acquired debentures in the past' or 'being likely to be interested in acquiring debentures' for the purposes of the public offer test in paragraph 128F(3)(b)?

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Taxation Determination

Income tax: interest withholding tax exemption under section 128F of the *Income Tax Assessment Act 1936* - when is it reasonable for a company to regard the person to whom a debenture is offered as either 'having acquired debentures in the past' or 'being likely to be interested in acquiring debentures' for the purposes of the public offer test in paragraph 128F(3)(b)?

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. The public offer test in paragraph 128F(3)(b) (the second public offer test) is directed at individual investors and businesses operating in retail capital markets. It requires a company offering debentures for issue, to offer them to at least one hundred persons, whom the company may **reasonably** regard as either having 'acquired debentures in the past' or being 'likely to be interested in acquiring debentures'.

2. What is **reasonable** always depend on the individual facts and circumstances of the case. The explanatory memorandum accompanying the legislation provides some guidance as to when it is reasonable for a company to be satisfied the second public offer test has been met. The following situations clearly satisfy the criteria:

- where a company sends letters to persons whom it may reasonably regard as having acquired debentures from time to time; or
- where offers are made to one hundred customers of a bank, financial institution, broker or other financial intermediary who have previously purchased debentures; or
- where the bank, financial institution, broker or other financial intermediary has reason to believe those customers may be interested in acquiring debentures or other securities; or

- where an agent on behalf of a company approaches such customers with an offer of the debentures for issue.

3. On the other hand, the second public offer test is not satisfied where 100 persons receive an offer of debentures for issue, who have not previously acquired debentures and in respect of whom the issuer has no reasonable basis for believing they may be interested in acquiring debentures.

4. It is not necessary for the company issuing the debentures to require a written undertaking or representation by either the persons to whom the debentures are offered or by a dealer, manager or underwriter who makes the offer on behalf of the company, that the terms of the second public offer test have been met. However, the company offering the debentures for sale may rely on a written undertaking or representation given by either the person to whom the debentures are offered or by a dealer, underwriter or manager who makes the offer on behalf of the company that it is acting or has acted in connection with the issue of the debentures in accordance with paragraph 128F(3)(b), unless the company is actually aware at the time of the issue of the debentures of any facts that may disqualify the issue.

Commissioner of Taxation
12 May 1999

Previous draft:
TD 1999/D7

Related Rulings/Determinations:
TD 1999/8; TD 1999/9; TD 1999/10; TD 1999/11; TD 1999/12; TD 1999/13; 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

Subject references:

Legislative references:
ITAA 128F; ITAA 128F(3)(b)

Case references:

ATO references:
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