



Taxpayer Alert

TA 2003/1

The Taxation Office view on this arrangement is set out in ATO Interpretative Decision 2003/230.

FOI status: may be released

Taxpayer Alerts are intended to be an "early warning" of significant new and emerging tax planning issues or arrangements that the ATO has under risk assessment.

Taxpayer Alerts will provide information that is in the interests of an open tax administration to taxpayers. Taxpayer Alerts are written principally for taxpayers and their advisers and they also serve to inform ATO officers of new and emerging higher risk tax planning issues. Not all potential tax planning issues that the ATO has under risk assessment will be subject of a Taxpayer Alert, and some arrangements that are the subject of a Taxpayer Alert may on further examination be found not to be of concern to the ATO.

Taxpayer Alerts will give the title of the issue (which may be a scheme, arrangement or particular transaction), briefly describe the issue and will highlight the features which the ATO considers give rise to taxation issues. These issues will generally require more detailed analysis to provide an ATO view to taxpayers

Taxpayers who have entered into or are contemplating entering into an arrangement similar to that described in this Taxpayer Alert can seek a formal determination of the ATO's position through a Private Ruling. Such taxpayers might also contact the ATO officer named in the Alert and/or obtain their own advice.

This Taxpayer Alert is issued under the authority of the Commissioner.

Distribution to Superannuation Fund from Interposed Fixed Trust

This Taxpayer Alert describes an arrangement where a taxpayer establishes a fixed trust to distribute business profits to the taxpayer's superannuation fund. This is done in an attempt to access the concessional tax rate of 15% on the distribution and at the same time avoid the age based deduction limits and superannuation surcharge.

DESCRIPTION

The alert applies to arrangements having the following features.

1. An existing business is operated under a trust, partnership or company structure, or a new business is established within a trust structure.
2. For an existing business, modifications are made to the trust deed and a fixed trust is established as a beneficiary of the trust. Alternatively, the partnership or corporate business structure is replaced so that the business is now operated through a trust.
3. A fixed trust is also then established as a beneficiary.
4. The operating trust distributes a substantial amount of income to the fixed trust.

5. The fixed trust then makes an equivalent distribution to a superannuation fund.
6. The superannuation fund is purported to be taxed at the concessional rate of 15% on the distribution from the fixed trust.
7. The members of the superannuation fund are the owners of the business and other family members.

FEATURES WHICH THE ATO CONSIDERS GIVE RISE TO TAXATION ISSUES

The ATO considers that the arrangement outlined above gives rise to taxation issues which include:

- (a) Whether the arrangement circumvents the anti-avoidance provisions of subsection 273(7) of the *Income Tax Assessment Act 1936* ('ITAA 1936') which deals with special income of superannuation funds.
- (b) The opportunity to arbitrage tax rates between the concessional 15% tax rate for superannuation funds and the marginal tax rate on the business income (either at company or individual tax rates).
- (c) Circumventing the age based deduction limits.
- (d) Avoiding the superannuation surcharge.

Note 1. The income of complying superannuation funds may be taxed at 47% if it is special income (section 273 of the ITAA 1936)

Note 2. If the fund holds a fixed entitlement and derives income under an arrangement or has acquired the fixed entitlement under an 'arrangement' and the parties were not dealing with each other at arms length in relation to the 'arrangement', and the amount of income is greater than might have been expected if they were dealing at arm's length then the trust distribution from a fixed entitlement will be regarded as special income.

The Australian Taxation Office is examining these arrangements.

subject references:

superannuation, fixed trusts

legislative references:

Section 273 of the ITAA 1936
Section 82AAC of the ITAA 1936
Section 82AAT of the ITAA 1936
Part 2 of *Superannuation Contributions Tax (Assessment & Collection) Act 1997*

related taxpayer alerts:

related practice statements: PS 2001/15 – Taxpayer Alerts

related media releases: 2003/06

file references:

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