Australian Government
Australian Taxation Office

Taxpayer Alert

TA 2008/2

FOI status: may be released

Taxpayer Alerts are intended to be an "early warning" of significant new and emerging higher risk tax planning issues or arrangements that the Tax Office 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 tax officers of new and emerging higher risk tax planning issues. Not all potential tax planning issues that the Tax Office 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 Tax Office.

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 Tax Office considers give rise to taxation issues. These issues will generally require more detailed analysis to provide the Tax Office 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. (It should be noted that the Taxation Administration Act 1953 sets out circumstances where the Commissioner may decline to issue such a ruling). Such taxpayers might also contact the tax officer named in the Alert and/or obtain their own advice.

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

TITLE: Use of certain legal structures established in Liechtenstein to attempt to avoid or evade Australian tax obligations

This Taxpayer Alert describes an arrangement under which an Australian resident uses legal structures established under the laws of Liechtenstein to attempt to avoid or evade Australian tax obligations.

DESCRIPTION

This alert applies to Liechtenstein-based arrangements generally marketed to wealthy individuals that exhibit some or all of the following features:

1. An Australian resident taxpayer establishes a Liechtenstein legal structure (the structure), or uses an existing structure, usually with the assistance of a promoter. The promoter may provide a 'paper trail' of documents that do not reflect the substance of these transactions and the taxpayer's interest in, or involvement with, the structure.

2. The structure involved will typically include:

a. An Establishment (Anstalt),
b. A Foundation (Stiftung), and/or
c. Other legal structures, such as Liechtenstein corporations

3. Under the by-laws and other constituent documents (such as agency agreements), the promoter operates the structure on behalf of the taxpayer and acts as the structure's representative.

4. The taxpayer directly or indirectly transfers assets to the structure, although such transfers may be revocable by the taxpayer. The assets may include cash and investments in term deposits, bonds or equities, which may themselves consist of undisclosed income or gains, and the actual transfer of the assets may give rise to undisclosed income or gains.

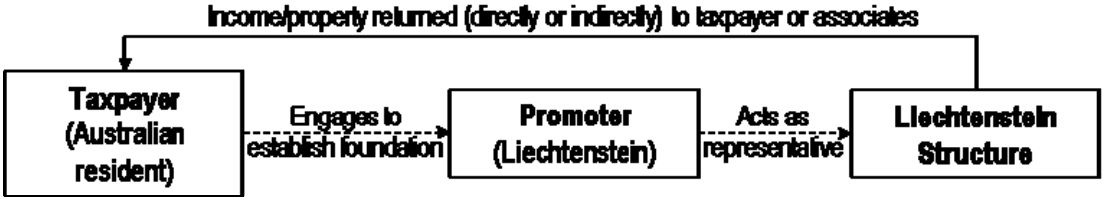
5. The structure then uses the assets to generate passive income, which is retained by the structure. The taxpayer and/or their associates ultimately reap the economic benefits from the structure, often in a disguised form.

6. The structure may be used as a holding company for other entities in which the taxpayer has an interest.

7. The taxpayer does not disclose their involvement with the structure and does not report for Australian tax purposes the income or gains generated by the structure from the use of the assets or when they access that income.

8. The documentation supporting the above transactions may be absent, inconsistent, incomplete or contain false information. In addition, such documents may not disclose the taxpayer's interest in, or involvement with, the structure. In many cases, the documentation lodged with the relevant authorities does not accurately reflect the involvement of the taxpayer with the structure (e.g. control, ownership or beneficial interest).

DIAGRAM OF A TYPICAL ARRANGEMENT



FEATURES WHICH CONCERN US

Australian residents have tax obligations in respect of their world wide income. This covers income from both Australian and foreign sources and includes income held in offshore structures.

In particular, the Tax Office considers that an arrangement of this type gives rise to taxation issues that include whether:

a) Such an arrangement or certain steps within it may be a sham;

b) Any steps within the arrangement may give rise to capital gains assessable to the taxpayer under Part 3 of the ITAA 1997

c) Any of the transactions may be subject to Division 13 of the ITAA 1936;

d) Any entity within the structure may be a resident of Australia under subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);

e) Any entity within the structure, the promoter or other persons involved with the operation of the structure, its management and administration may be acting as:

   i. agents for the taxpayer as principal in relation to the activities of the structure
   ii. trustees (whether under an express, constructive, implied or resulting trust) for the taxpayer as beneficiary in relation to the activities of the structure;

f) Income from the structure may be assessable to the taxpayer and their associates under the trust income provisions in Division 6 of the ITAA 1936;

g) The income of the structure may be attributable to the taxpayer under Australia's anti-deferral regimes within Part X, Part XI or Division 6AAA of Part III of the ITAA 1936;

h) The income of the structure may be assessable to the taxpayer under another provision of the tax law;

i) The general anti-avoidance provisions in Part IVA of the ITAA 1936 may have application as:

   i. The arrangement seems artificial and lacks an ordinary business purpose in its design and execution; and
   ii. It appears that the dominant purpose of entering into the arrangement is to obtain one or more tax benefits.

Hiding assets or income, including by the use of legal structures in Lichtenstein, in an attempt to avoid or evade these tax obligations may attract serious penalties including criminal sanctions or confiscation of criminal assets.

Note 1: Up to 50% penalties can apply to underpaid tax where Part IVA is applied. Base penalties for intentional disregard for the tax law start at 75% of the tax unpaid. Reductions in base penalty may be available if the taxpayer makes a voluntary disclosure to the Tax Office Voluntary disclosures before a review is commenced can be made under the Offshore Voluntary Disclosure Initiative and may receive a reduced shortfall penalty. Phone us on 1300 132 346 or complete the Offshore voluntary disclosure statement (NAT 71149)*. For more information, visit www.ato.gov.au.*

Note 2: In appropriate cases possible sanctions under criminal law may also apply. Where taxpayers make a voluntary disclosure and that disclosure indicates possible criminal offences, the Commonwealth Director of Public Prosecutions has indicated that favourable consideration will be given to granting an indemnity from criminal prosecution in relation to the taxpayer's involvement in the scheme where:

- *the case does not exhibit a significant degree of criminality*
- *the taxpayer provides information about how the arrangements worked, including the role and identity of the promoter, and*
- *the taxpayer co-operates with the investigation and consequential proceedings*

Note 3: Where appropriate, section 167 of the ITAA 1936 may be used to determine the amount of taxable income upon which the taxpayer should be assessed, see Law Administration Practice Statements, PSLA 2007/7 and PSLA 2007/24.

The Tax Office has reviewed this arrangement and has determined that it is not effective because of some or all of the features set out above.

Subject References:
tax havens

Legislative References:
Income Tax Assessment Act 1997
Part 3-1

Income Tax Assessment Act 1936
Subsection 6(1)
Division 6
Division 6AAA
Division 13
Part X
Part XI
Part IVA
Section 167

Related Publications
Tax Havens and Tax Administration, NAT 10567

Related Law Administration Practice Statements
PS LA 2007/7: The use of the Commissioner's power to make default assessments of taxable income in respect of attributable income
PS LA 2007/24: Making default assessments: secton 167 of the Income Tax Assessment Act 1936 and other similar provisions

Related Taxpayer Alerts:
TA 2005/5
TA 2005/6
TA 2005/7
TA 2005/8

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