



# Taxpayer Alert

**TA 2009/13**

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**FOI status: may be released**

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*Taxpayer Alerts are intended to be an 'early warning' of significant new and emerging higher risk tax planning issues or arrangements that the Australian Taxation Office (ATO) has under risk assessment, or where there are recurrences of arrangements that have been previously risk assessed.*

*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 of new and emerging higher risk tax planning issues. Not all potential tax planning issues that the ATO has under risk assessment will be the 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. In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.*

*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 are of concern to the ATO. These issues will generally require more detailed analysis to provide the 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 (noting 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 ATO named in the Taxpayer Alert and/or obtain their own advice.*

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

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**Title:       Managed Investment Schemes: Purported partnership participation**

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This Taxpayer Alert describes an arrangement where a purported partnership is inserted into an investment in an afforestation, agricultural or horticultural Managed Investment Scheme (MIS) in order to generate deductions for the newly inserted partners. In addition to other taxation issues, because of the inserted partnership, the implementation of the arrangement is likely to be materially different from that described in any relevant product rulings for the underlying MIS.

Schemes of the type described in this alert are not covered by Tax Office product rulings or other tax clearances.

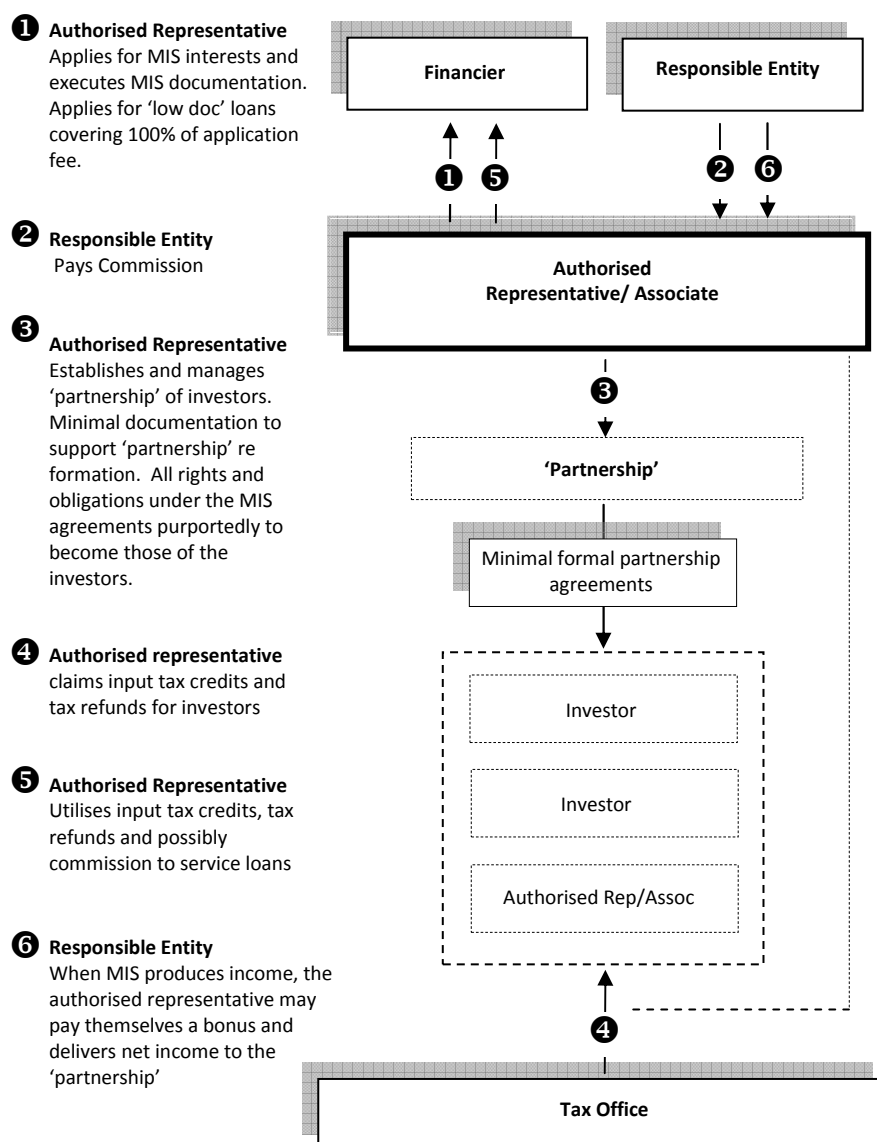
## Description

The alert applies to arrangements with features substantially equivalent to the following:

1. A person (the representative) becomes an authorised representative of a financial services licensee to market and sell specific Managed Investment Scheme (MIS) interests.
2. The representative, or their associate, executes the MIS documentation in their own name to create a MIS interest. The representative, or their associate, does not indicate in any of this documentation that they are acting on behalf of other parties, i.e. any partnership.
3. To fund the cost of acquiring the MIS interests the representative, or their associate, applies for loans covering 100% of the initial subscription price from a finance entity associated with the MIS. The loan is provided by the finance entity for 100% of the initial subscription costs, subject to security over the relevant MIS interest and is made on a "low-doc" basis.
4. The representative receives commissions from the MIS manager or financial services licensee for the sale of the relevant MIS interest.
5. Subsequently, the representative organises groups of individual investors, to invest in these MIS interests on the basis that they will purportedly be partners in a partnership (the 'partnership'). The representative advises these investors that they will be covered by relevant Product Rulings for the particular MIS.
6. There is limited or no documentation supporting the formation of the 'partnership' or the ongoing obligations and rights of investors. In some cases, investors are allegedly admitted to the 'partnership' later, even after the income year in which the expenditure is incurred.
7. The investors do not execute any MIS documentation themselves, nor are their details provided to the Responsible Entity for the relevant MIS.
8. The representative may be the tax agent for the investors and may administer the 'partnership'.
9. Repayments on the loan to acquire the MIS interest are initially planned to be met by:
  - a. tax refunds from investors claiming deductions for:
    - (i) a share of the loss from the 'partnership' arising from the initial subscription, and
    - (ii) subsequent year interest claims for the loan to acquire the MIS interest,
  - b. the input tax credits claimed in respect of the initial subscription price,
  - c. purportedly assigned commissions received by the representative for selling the MIS interests, and
  - d. returns from investment of the tax refunds, input tax credits and commissions received before the periodic repayments of loan and interest.

There may be no other mechanism to repay the balance of the loan or meet interest commitments.
10. The representative may retain a bonus or other fee from the income earned from the investments of the above funds or from the MIS interest itself, prior to applying the balance in repayment of the loan.
11. The representative may seek to assign the 'partnership' interests to other entities before the MIS produces income.
12. Subsequently, the 'partnership' defaults on loan repayments; the financier follows collection procedures and may ultimately take ownership of the MIS interest to mitigate losses, including recovery of the outstanding loan balance.
13. Due to the above features, investors in the 'partnership' may not have either a legal liability for the loans or a legal entitlement to any income from the MIS interests.

## Diagram of a typical arrangement



## Features which concern us

The ATO considers that arrangements substantially of this type give rise to taxation issues, including whether:

1. such an arrangement, or certain steps within it, may be a sham;
2. there is any 'partnership' under general or taxation law, either in the first year of income or at any later time;
3. interests in the MIS have been taken up by or on behalf of any such 'partnership';
4. investors are entitled to deductions under section 8-1 of the *Income Tax Assessment Act 1997* (ITAA 1997) or under section 92 of the *Income Tax Assessment Act 1936* (ITAA 1936) in respect of losses;
5. investors are entitled to offset losses from investment in the MIS against other assessable income as governed by Division 35 of the ITAA 1997;
6. investors are entitled to a share of the income from the MIS which is assessable under section 6-5 of the ITAA 1997;
7. the tax treatment of any disposal of an MIS interest is subject to sections 82KZMGA or 82KZMGB of the ITAA 1936;

8. commission fees received by the representative are assessable under section 6-5 of the ITAA 1997;
9. the representative is entitled to deductions under section 8-1 of the ITAA 1997 for amounts contributed to the 'partnership';
10. the arrangement constitutes a scheme to which the general anti-avoidance rules in Part IVA of the ITAA 1936 may apply;
11. investors or the representative are entitled to input tax credits under section 11-20 of the *A New Tax System (Goods and Services Tax) Act 1999* (GST Act);
12. any entity involved in the arrangement is a promoter of a tax exploitation scheme for the purposes of Division 290 of Schedule 1 to the *Taxation Administration Act, 1953* (TAA);
13. any entity involved in the arrangement has implemented a product ruling scheme in a materially different way for the purposes of Division 290 of Schedule 1 to the TAA;
14. any criminal offences have been committed by investors, the representative or any associates in relation to the arrangement; and
15. a registered tax agent involved in the arrangement may have their registration suspended or cancelled by the Tax Agents' Board under section 251K of the ITAA 1936.

Indeed we have seen cases where there appears to have been backdating of the documents, and we are considering criminal prosecution action.

**The ATO is currently reviewing these arrangements.**

**Note 1:** *You may have already received advice from the ATO in respect of your arrangement by way of a product ruling. A product ruling is legally binding on the Commissioner who will be bound to act in the way set out in the ruling, even if the ruling is later found to be incorrect. However, the product ruling does not cover the commercial viability of the scheme. Also a product ruling only applies to a class of entities identified within the product ruling and to the particular scheme described in the ruling. If there is a material difference between the scheme described in the ruling, and the scheme that was actually implemented, the ruling will not be legally binding on the Commissioner.*

**Note 2:** *Base penalties of up to 50% of the tax avoided can apply where Part IVA is applied. Base penalties of up to 75% of the tax avoided can apply where you make a false and misleading statement to the Commissioner. Reductions in base penalty will be available if the taxpayer makes a voluntary disclosure to the ATO. If you have any information about the current arrangement, phone us on 1800 177 006. Tax agents wanting to provide information about people or companies who may be promoting arrangements covered by this alert should call the tax practitioner integrity service on 1800 639 745.*

**Note 3:** *In appropriate cases possible sanctions under criminal law may also apply. Where a taxpayer makes 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 by the taxpayer*
- *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 4:** *A registered tax agent may have their registration cancelled or suspended by the Tax Agents' Board under section 251K of the Income Tax Assessment Act 1936 if they are guilty of misconduct as a tax agent or are not considered a fit and proper person*

*to prepare income tax returns. A person under a sentence of imprisonment for a serious taxation offence is not a fit and proper person.*

**Note 5:** *The Commissioner may amend an assessment at any time where he is of the opinion there has been fraud or evasion. See Law Administration Practice Statement PSLA 2008/6.*

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<i>subject references:</i>	partnership losses, managed investment schemes
<i>legislative references:</i>	<i>Income Tax Assessment Act 1997</i> Section 6-5 Section 8-1 Division 35  <i>Income Tax Assessment Act 1936</i> Part IVA Section 82KZMGA Section 82KZMGB Section 92 Section 251K  <i>Tax Administration Act 1953</i> Schedule 1 Div 290  <i>A New Tax System (Goods and Services Tax) Act 1999</i> Section 11-20
<i>related Practice Statements</i>	PS LA 2008/6 PS LA 2008/15

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