



Taxpayer Alert

TA 2011/2

FOI status: May be released

TITLE: Certain labour hire arrangements utilising a discretionary trust to split income

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 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 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 In these latter cases, the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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 give the title of the issue (which may be a scheme, arrangement or particular transaction), briefly describe the issue and 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 tax officer named in the Taxpayer Alert and/or obtain their own advice.

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

Overview

This Taxpayer Alert describes an arrangement where a labour hire firm makes a discretionary trust structure available for the use of individual taxpayers for the purpose of alienating income from personal services and splitting it between the individual taxpayers who perform the services and their associates.

This arrangement attempts to circumvent the personal services income (PSI) regime of Part 2-42 of the *Income Tax Assessment Act 1997* (ITAA 1997), as well as other income tax and superannuation obligations such as the Pay As You Go (Withholding) (PAYG(W)) system and the Superannuation Guarantee, but may be ineffective under these provisions or the general anti-avoidance rules.

Context for the arrangement

The income in question is that which results from the provision of services (or would if it was the income of the individual who provided the services rather than that of a Personal Services Entity). If the PSI regime applies to the income of a Personal Services Entity, then that income is included in the assessable income of the individual whose personal efforts or skills generated it. The measures may also result in certain deductions not being allowed and a personal service entity having additional withholding obligations. If though, the PSI is earned in the course of conducting a *personal services business*, then the PSI regime may not apply in this way.

The term 'alienation of income' refers to a situation where income that would otherwise be assessable to an individual taxpayer becomes the income of a different entity.

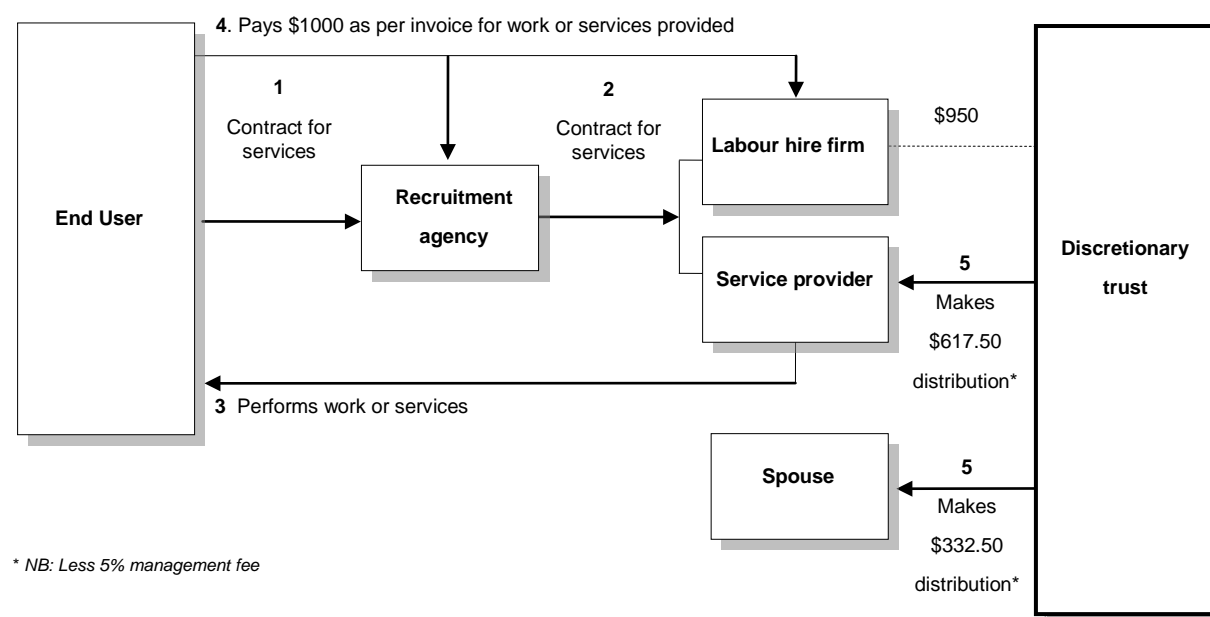
DESCRIPTION

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

1. A firm (the labour hire firm) offers remuneration structures for individuals who perform work or provide services (the service provider).
2. The service provider enters into an agreement to become a beneficiary of a discretionary trust (discretionary trust) which is associated with the labour hire firm. This agreement also identifies additional beneficiaries (e.g. the service provider's spouse) and the basis on which the trustee will allocate discretionary distributions. No assets are transferred to or held by the trust.
3. The service provider or the labour hire firm enters into a contract to provide services for a client of the labour hire firm (the end user).
4. In some cases, the end user may use a recruitment agency (the recruitment agency) as an intermediary to contract with the service provider via the labour hire firm to provide services to the end user.
5. In either situation, the labour hire firm may either enter into contracts in its own capacity or in its capacity as trustee of the discretionary trust.
6. The service provider then performs work or services for the end user.
7. Once work is performed or services provided, the labour hire firm invoices either the recruitment agency or the end user.
8. Payment for work performed or services provided are paid by the labour hire firm via the discretionary trust. Although the service provider is not guaranteed to receive any distributions from the discretionary trust, the discretionary trust makes payments on a regular basis to any one of, or a combination of, the following:
 - a. the service provider, or
 - b. an associate or associates of the service provider, typically a spouse or partner.
9. Although distributions are purportedly discretionary, in reality, the total amount of the payments are consistent with the service provider's set rate of remuneration less the management fees deducted by the labour hire firm.
10. There is limited economic rationale for the use of the arrangement, aside from the attempted avoidance of taxation or superannuation guarantee obligations.

Diagram of arrangement

The basic structure of the arrangement can be summarised diagrammatically as follows:



FEATURES WHICH CONCERN US

The ATO considers that arrangements of this type give rise to the following issues relevant to taxation laws, being whether:

- (a) the arrangement, or certain steps within it, may constitute a sham at general law;
- (b) there may be an agency relationship between any of the entities involved;
- (c) any entity may be considered an employer;
- (d) the service provider is an employee or independent contractor either at general or statutory law;
- (e) the alienation of personal services income regime in Part 2-42 of the ITAA 1997 may apply;
- (f) any income that has been alienated may be income of the service provider under section 6-5 of the ITAA 1997;
- (g) any expenses incurred may be deductible under section 8-1 of the ITAA 1997;
- (h) the arrangement may constitute a scheme to which the general anti-avoidance rules in Part IVA of ITAA 1936 may apply;
- (i) amounts should be withheld under the PAYG(W) rules in Part 2-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA);
- (j) a minimum level of superannuation support may be required under the *Superannuation Guarantee (Administration) Act 1992*;
- (k) the arrangement may constitute an arrangement which avoids payment of the superannuation guarantee charge to which section 30 of the *Superannuation Guarantee (Administration) Act 1992* may apply;

- (l) any entity involved in the arrangement may be a promoter of a tax exploitation scheme for the purposes of Division 290 of Schedule 1 to the TAA.

The ATO is currently reviewing these arrangements.

Our view on what is the meaning of personal services income is contained in *Taxation Ruling TR 2001/7: Income tax: the meaning of personal services income* and the meaning of personal services business is contained in *Taxation Ruling TR 2001/8: Income tax: what is a personal services business*. Taxation Ruling TR 2001/8 also considers the application of Part IVA, as do Taxation Rulings IT 2121, IT 2330 and IT 2639 in the case of situations that fall outside the PSI regime.

Note 1: *You may have already sought advice from the ATO in respect of your arrangement by way of a private ruling. If you have received a private ruling in respect of your arrangement, you can rely on that private ruling. A private ruling is legally binding on the Commissioner who will be bound to act in the way set out in the ruling, even if the private ruling is later found to be incorrect. However, a private ruling only applies to the particular entity identified and 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 private ruling will not be legally binding on the Commissioner. Also, other entities cannot rely on a private ruling issued in respect of a different entity.*

Note 2: *If you have received a private ruling in respect of your arrangement, please check that the application of Part IVA of the ITAA 1936 is considered in that ruling. The applicant may not have sought for us to rule on the application of Part IVA to the arrangement ruled upon, or to an associated or wider arrangement of which that arrangement is part. If you want us to rule on whether Part IVA applies to your arrangement, we will first need to obtain and consider all the relevant facts about the arrangement, including (if relevant) the manner in which it has actually been implemented.*

Note 3: *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 also call **1800 177 006**.*

Note 4: *Penalties and charges can apply to employers that fail to comply with their PAYGW obligations under Part 2-5 of Schedule 1 to the Taxation Administration Act 1953 (TAA), and their superannuation obligations under the Superannuation Guarantee (Administration) Act 1992.*

Note 5: *Penalties of up to 5,000 penalty units for individuals, 25,000 penalty units for bodies corporate or up to twice the amount of consideration received or receivable may apply to promoters of tax exploitation schemes under Division 290 of Schedule 1 to the Taxation Administration Act 1953. The Commissioner can also apply to the Federal Court of Australia for restraining and performance injunctions against promoters where prohibited conduct has occurred, is occurring or is proposed.*

Note 6: *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 7: *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, PS LA 2007/7 and PS LA 2007/24.*

Note 8: *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.*

References

Subject references:

- Alienation of personal services income
- Anti-avoidance
- Arrangement
- Employee
- Income splitting
- Independent contractor
- Labour hire
- Pay As You Go Withholding
- Part IVA
- Superannuation guarantee

Legislative references:

Income Tax Assessment Act 1936

- [Part IVA](#)
- [Section 167](#)

Income Tax Assessment Act 1997

- [Section 6-5](#)
- [Section 8-1](#)
- [Part 2-42](#)

Taxation Administration Act 1953

- [Division 290](#)
- [Part 2-5](#)

Superannuation Guarantee (Administration) Act 1992

- [Section 30](#)

Related Practice Statements:

- [PS LA 2007/7](#)
- [PS LA 2007/24](#)
- [PS LA 2008/6](#)
- [PS LA 2008/15](#)

Rulings

- [TR 2001/7](#)
- [TR 2001/8](#)

- [TR 2003/6](#)
- [TR 2003/10](#)
- [IT 2121](#)
- [IT 2330](#)
- [IT 2639](#)

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