

TA 2004/4 - New Zealand Foreign Trust

 This cover sheet is provided for information only. It does not form part of *TA 2004/4 - New Zealand Foreign Trust*

 This Alert contains references to Schedule 4 of the *International Tax Agreements Act 1953*, which is now found in the *Convention Between Australia And New Zealand For The Avoidance Of Double Taxation With Respect To Taxes On Income And Fringe Benefits And The Prevention Of Fiscal Evasion* [2010] ATS 10.



Taxpayer Alert

TA 2004/4

The Tax Office view on the arrangement is set out in Taxation Ruling TR 2005/14.

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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 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.

TITLE: New Zealand Foreign Trust

This Taxpayer Alert describes an arrangement where a New Zealand based foreign discretionary trust provides services, at a mark up, to an Australian resident business. A New Zealand foreign trust is one that is established by a settlor who is not a resident of New Zealand or Australia and whose beneficiaries are not resident of New Zealand. The promoter argues that tax is not payable in New Zealand on the service fees and that no income is attributable to the Australian beneficiaries.

DESCRIPTION

This alert applies to arrangements having the following features:

1. A New Zealand foreign discretionary trust (the trust) is created by a New Zealand based promoter with a settlor which is a company that is not a resident of either New Zealand or Australia. The trust has a New Zealand corporate trustee controlled by the promoter.

2. The trust is represented in Australia by an Australian resident who is associated with the New Zealand promoter. The Australian representative has been given a power of attorney for the trust.
3. The trust and an Australian business enter into a service agreement where the trust provides staff and services such as administration, business equipment and the provision of a motor vehicle to that business.
4. The Australian business is located and operating in Australia. The owner of the Australian business is closely associated with the controller of the foreign settlor of the trust.
5. The Australian business claims a deduction for the cost of staff and services plus the mark up.
6. The fees paid by the Australian business are deposited into an Australian bank account controlled by the Australian representative of the trust.
7. The owner of the Australian business appears to have access to the funds in the Australian bank account.

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 whether:

- a) The trust has a permanent establishment in Australia.
- b) The transferor trust provisions in Division 6AAA of Part III of the *Income Tax Assessment Act 1936 (ITAA)* apply.
- c) The transfer pricing provisions in Division 13 of Part III of the ITAA have application.
- d) The trust is a resident of New Zealand for the purposes of the Australia/New Zealand Double Tax Agreement.
- e) The general anti-avoidance provisions in Part IVA of the ITAA 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 a tax benefit.
- f) The arrangement is a sham.

The Australian Taxation Office is examining these arrangements.

<i>subject references:</i>	Trusts, source, Double Tax Agreements.
<i>legislative references:</i>	ITAA 1936 subsection 6(1) ITAA 1936 Part IVA ITAA 1936 Division 13 ITAA 1936 Division 6AAA ITAA 1936 Division 6 ITAA 1997 Section 8-1 <i>International Tax Agreements Act 1953</i> Schedule 4 (repealed)
<i>related tax rulings:</i>	
<i>related practice statements:</i>	PS LA 2008/15
<i>related media releases:</i>	
<i>file references:</i>	
<i>other references:</i>	<i>Convention Between Australia And New Zealand For The Avoidance Of Double Taxation With Respect To Taxes On Income And Fringe Benefits And The Prevention Of Fiscal Evasion</i> [2010] ATS 10 (Australia/New Zealand Double Tax Agreement)
Date issued:	10 February 2004
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