

TA 2008/13 - Employee Savings Plans

⚠ This cover sheet is provided for information only. It does not form part of *TA 2008/13 - Employee Savings Plans*

⚠ The ATO view on the arrangement described in TA 2008/13 is set out in TD 2010/10.

⚠ This document has changed over time. This version was published on *25 June 2008*



Taxpayer Alert

TA 2008/13

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 Australian Tax Office 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 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 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 Tax Office. In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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 Tax Office. 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 Tax Office'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.

TITLE: Employee Savings Plans

This Taxpayer Alert describes arrangements involving employee benefit trust structures that attempt to convert salary or wages income into a capital gain.

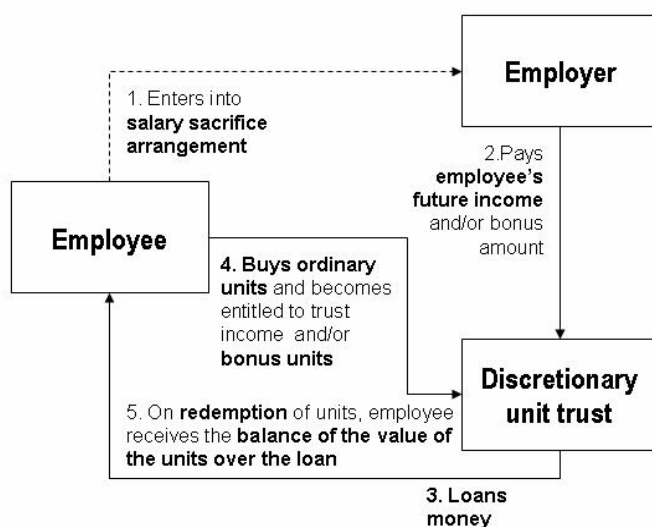
DESCRIPTION

The alert applies to arrangements having the following features.

1. Under a salary sacrifice arrangement an employee directs or requests that future salary or wages or bonus income otherwise payable by the employer to the employee be paid to a unit trust which is discretionary in nature.
2. An amount equivalent to the salary sacrificed is contributed to the trust and ordinarily held by the trustee as an unallocated capital contribution.
3. On receipt of the contribution or shortly thereafter, the trustee makes a loan to the employee. The loan amount is equal to the amount previously contributed to the trust. The loan is ordinarily interest free and of a limited recourse nature.
4. The employee uses the loan monies to purchase ordinary units in the unit trust.
5. As a unit holder in the trust the employee may be entitled to trust income and may be issued bonus units at the trustee's discretion. The value of the bonus units issued to the employee will typically equal the salary previously sacrificed by the employee.
6. The employee may have to satisfy minimum holding periods and/or employment related performance hurdles before the units can be redeemed.
7. When the holding period has expired and the performance hurdles are met, the employee may ask the trustee to redeem the employee's units.
8. Upon redemption, the trustee will:
 - (a) calculate the value of the ordinary and bonus units issued to the employee;
 - (b) offset that amount against the employee's outstanding loan balance; and
 - (c) pay to the employee the balance of the proceeds.
9. The value of the bonus units will usually equal the outstanding loan balance, and therefore extinguish the loan. The employee will also redeem their ordinary units which will usually equal the previously sacrificed salary plus any capital appreciation.

Arrangements may also have additional features identified in Taxpayer Alert TA 2008/14. This Alert should be considered in conjunction with TA 2008/14.

DIAGRAM OF A TYPICAL ARRANGEMENT



FEATURES WHICH CONCERN US

The Tax Office considers that an arrangement of this type gives rise to taxation issues that include whether:

- (a) the arrangement is a bona fide salary deferral arrangement;
- (b) the arrangement is an effective salary sacrifice arrangement and taxed as described in Taxation Ruling TR 2001/10;
- (c) subsection 6-5(4) of the *Income Tax Assessment Act 1997* (ITAA 1997) applies to include the deferred salary as assessable income of the employee;
- (d) the receipt of bonus units is in relation to employment and is a derivation of ordinary income by the employee;
- (e) the cash payment on redemption of the units by the employee is in relation to employment and is a derivation of ordinary income by the employee;
- (f) the arrangement may constitute a scheme to which the general anti avoidance rules in Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) apply;
- (g) the arrangement may result in the provision of fringe benefits for the purposes of the *Fringe Benefits Tax Assessment Act 1986*;
- (h) 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*.

The Tax Office is currently reviewing these arrangements.

Note 1: *You may have already sought advice from the Tax Office 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 *Income Tax Assessment Act 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 Tax Office. 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 agent integrity service on 1800 639 745.*

Note 4: 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.

subject references:

Arrangement
Anti Avoidance
Salary Sacrifice
Unit Trust
Bonus Units
Employee bonuses
Salary & wages income
Fringe Benefits Tax
Part IVA

legislative references:

Section 6-5 *Income Tax Assessment Act 1997*
Pt IVA *Income Tax Assessment Act 1936*
Section 136 *Fringe Benefits Tax Assessment Act 1986*
Division 290 Schedule 1 *Taxation Administration Act 1953*

ATO View references:

Taxation Ruling TR 2001/10 Income tax: fringe benefits tax and superannuation guarantee: salary sacrifice arrangements

related taxpayer alerts: TA 2008/14

related practice statements: Law Administration Practice Statement PS LA 2005/13

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