

TA 2008/14 - Salary Deferral Arrangements

 This cover sheet is provided for information only. It does not form part of *TA 2008/14 - Salary Deferral Arrangements*

 The ATO view on the arrangement described in TA 2008/14 is set out in TD 2010/11

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



Taxpayer Alert

TA 2008/14

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 In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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: Salary Deferral Arrangements

This Taxpayer Alert concerns arrangements where an employee defers salary and wage income. The purpose of the arrangements is to convert salary and wage income to a form that is taxed concessional or not at all, for example, a capital gain, an employment termination payment or a loan.

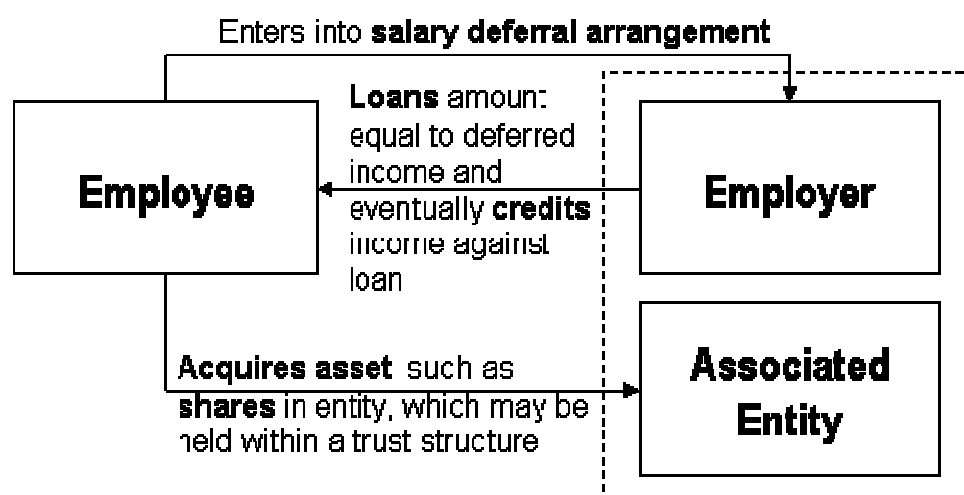
DESCRIPTION

The alert applies to arrangements having some or all of the following features.

1. The employee and employer agree to defer the entitlement or payment of salary or wages income (or a bonus). Instead, the employer provides a loan to the employee, ordinarily of an amount equal in value to the income deferred. The loan may or may not be on arm's length terms.
2. The employee uses the loan to acquire an income producing asset. The asset may be shares in the employer or an associated entity of the employer.
3. The asset may be offered as security for the loans and may be held within a trust structure.
4. After a fixed period of time, the employer applies the deferred income to the outstanding value of the loan.
5. The application of the deferred income may occur after the employee has terminated employment with the employer.

Note: Arrangements may also have additional features identified in Taxpayer Alert TA 2008/13. This Alert should be considered in conjunction with TA 2008/13.

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. Division 7A of the *Income Tax Assessment Act 1936* (ITAA 1936) applies where the employee is a shareholder of a corporate employer such that the loan is included in assessable income of the shareholder as a deemed dividend;
- e. a payment or crediting of deferred income subsequent to termination of employment is an employment termination payment for the purposes of section 82-130 of ITAA 1997;
- f. the arrangement may constitute a scheme to which the general anti

- avoidance rules in Part IVA of the ITAA 1936 apply notwithstanding that the arrangement may be a bona fide salary deferral arrangement and/or an effective salary sacrifice arrangement as described in TR 2001/10;
- g. 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 or class ruling. If you have received a private ruling or class ruling in respect of your arrangement, you can rely on that ruling. A private or class 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, a private ruling only applies to a particular entity identified and the particular scheme described in the ruling. Similarly, a class ruling only applies to a specified class of entities 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 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
Salary Deferral
Employee bonuses
Salary & wages income
Fringe Benefits Tax

Part IVA

legislative references:

Section 6-5 Income Tax Assessment Act 1997
Section 82-130 Income Tax Assessment Act 1997
Division 7A Income Tax Assessment Act 1936
Pt IVA Income Tax Assessment Act 1936
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 2008/13

Date issued:	25 June 2008
Authorised by:	Stephanie Martin Deputy Commissioner Aggressive Tax Planning
Contact Officer:	Bruce Collins
Business Line:	Aggressive Tax Planning
Section:	Technical and Case Leadership
Phone:	(02) 6216 2710
