



TA 2008/16 - Liquidation of entities to avoid the payment of tax liability

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Taxpayer Alert

TA 2008/16

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 Taxation 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 In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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: Liquidation of entities to avoid the payment of tax liability

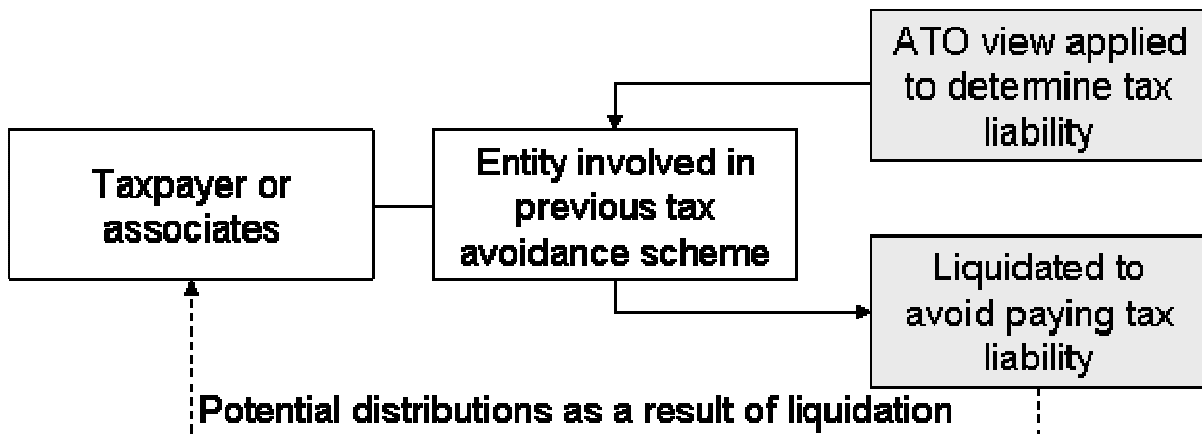
This Taxpayer Alert describes arrangements whereby taxpayers involved in a previous tax avoidance scheme (for example such as those described in TD 2005/34 and TA 2008/15) enter into an arrangement to avoid the payment of the tax liability arising from that scheme by liquidating entities.

These arrangements include Phoenix arrangements where the business and assets are transferred to a new entity and then the existing entity is liquidated. This has the effect of defeating creditors of the original entity including the Tax Office.

DESCRIPTION

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

1. A taxpayer is involved in a tax avoidance scheme that involves the creation or utilisation of various entities (for example arrangements of the type described in Taxpayer Alerts TA 2005/1 and TA 2008/15 and Taxation Determination TD 2005/34).
2. To avoid the adverse consequences arising from the application of the Tax Office view (for example, as outlined in TD 2005/34 in relation to the arrangement in TA 2005/1), the taxpayer, with the help of another entity (for example, a tax agent, a solicitor, a business recovery consultant, an insolvency administrator or a liquidator) engages in a set of transactions that lead to liquidation of one or more of the entities. This has the effect of defeating the creditors of those entities which include the Tax Office. The taxation liability remains, but due to the liquidation there is an inability to pay. In Phoenix arrangements a new entity is set up to carry on the original business.
3. These transactions will result in distributions to different parties, which may include the taxpayer or their associates.
4. The basic features of this arrangement can be summarised diagrammatically as follows:



FEATURES WHICH CONCERN US

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

- a. The surrounding circumstances, including the creation of a new entity and its subsequent liquidation, indicate that the previous tax avoidance scheme is a sham under general law;
- b. The correct taxpayers have been assessed in respect of ordinary or statutory income arising from this structure;
- c. Any steps within the arrangement may give rise to capital gains assessable to the taxpayer under Part 3 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- d. Part IVA of the *Income Tax Assessment Act 1936* (ITAA 1936) may apply to cancel any tax benefits obtained under previous tax avoidance scheme, taking into account the liquidation as part of the scheme; and
- e. 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.

Liquidating an entity to secure an inability to pay future income tax liability may attract criminal sanctions under the *Criminal Code* including defraud contrary to s135.1 of the *Criminal Code* or conspiracy to defraud under s135.4 of the *Criminal Code*, or alternatively the *Crimes (Taxation Offences) Act 1980*, including penalties of 1000 penalty units and/or 10 years imprisonment.

As the promotion of these types of arrangements is a serious matter, information on such activities will be referred to the Commonwealth Director of Public Prosecutions, the Australian Securities and Investment Commission and the Tax Agents' Board as appropriate for action.

Note 1: *Base penalties of up to 50% of the tax avoided may be imposed where Part IVA applies. Base penalties for intentional disregard of the tax law are imposed at 75% of the tax avoided. 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 Taxpayer Alert should call the tax agent integrity service on 1800 639 745.*

Note 2: *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 3: *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 4: *Liquidating entities in order to avoid the payment of liabilities may contravene the Corporations Act 2001, which is administered by the Australian Securities and Investments Commission. The Tax Office will refer instances of such conduct to ASIC for their consideration of appropriate courses of action.*

Note 5: *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 6: *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 2008/6.*

Subject references

Losses
Hybrid trusts
Trust distributions
Liquidation

Legislative References

Income Tax Assessment Act 1936

Section 100A

Part IVA

Section 251K

Section 251BC

Income Tax Assessment Act 1997

Part 3

Division 165

Taxation Administration Act 1953

Division 290 of Schedule 1

Related Taxpayer Alerts

TA 2005/1

TA 2008/15

Related Rulings/Determinations

TD 2005/34

Related Practice Statements:

[PS LA 2005/13](#)

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