

TA 2009/14 - Artificially creating capital losses through default beneficiary arrangement to offset capital gains

- ! This cover sheet is provided for information only. It does not form part of *TA 2009/14 - Artificially creating capital losses through default beneficiary arrangement to offset capital gains*
- ! The ATO view on the arrangement described in TA 2009/14 is set out in [TD 2009/19](#).
- ! This document has changed over time. This version was published on 3 May 2024



Taxpayer Alert

TA 2009/14

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 Taxation Office (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 tax officers of new and emerging 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 In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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 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 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.

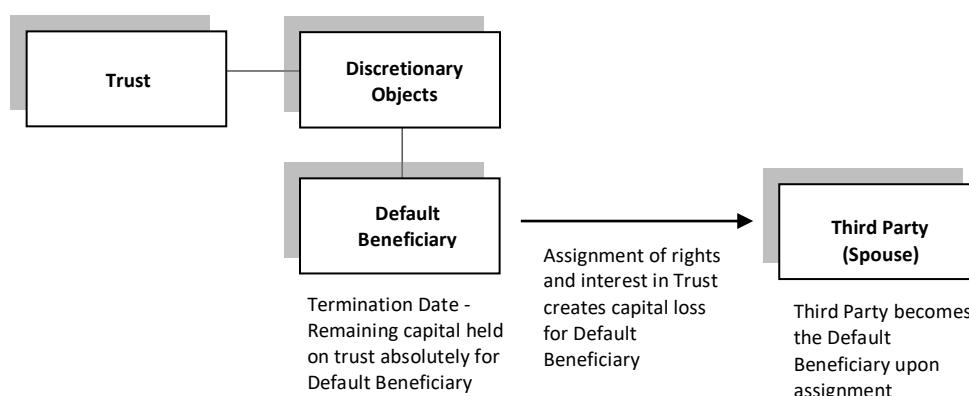
TITLE: Artificially creating capital losses through default beneficiary arrangement to offset capital gains

This Taxpayer Alert describes arrangements where a taxpayer with a current or future capital gain attempts to artificially create an offsetting capital loss by becoming a default beneficiary for a discretionary trust (for no consideration) and then transferring their interest in that trust (for no consideration).

<HDR>DESCRIPTION

The alert applies to arrangements having features that are substantially equivalent to the following:

1. A trust is established for the benefit of discretionary objects.
2. The deed for that trust confers discretionary powers of appointment of income and capital on the trustee or a third party appointor.
3. The trust has a named default beneficiary who on the termination date will take any trust capital that has not been appointed.
4. The default beneficiary may also be one of the discretionary objects.
5. The default beneficiary does not give any money or property to acquire the interest in the trust capital.
6. The default beneficiary assigns all their interests (default and discretionary interests) in the trust to a third party (for example, a spouse).
7. The assignment of rights to trust capital is said to produce entitlement to a capital loss for the default beneficiary (under CGT event E8).
8. The basic features of the arrangement can be summarised diagrammatically as follows:



<HDR>Features which concern us

The Tax Office considers that the arrangement outlined above gives rise to taxation issues which includes whether:

- (i) a valid trust has been created at general law;
- (ii) any subsequent purported assignment is valid at general law;
- (iii) the assignment of a default interest in the capital of a trust will result in either CGT event E8 or CGT event A1 happening to the holder of the interest and the calculations associated with such an event;
- (iv) a default interest in the capital of a trust constitutes an 'interest in the trust capital' for the purposes of CGT event E8 and the appropriate valuation of such an interest;
- (v) the arrangement may constitute a scheme to which the general anti-avoidance rules in Part IVA of the <HP1>*Income Tax Assessment Act 1936*</HP1> (ITAA 1936) may be applied to cancel a relevant tax benefit;

and

- (vi) 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 <HP1>Taxation Administration Act 1953</HP1>.

Indeed we have seen cases where there appears to have been backdating of the documents, and we are considering criminal prosecution action.

The Australian Taxation Office is currently reviewing these arrangements.

Note 1: 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 may 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 060 062. Tax agents wanting to provide information about people or companies who may be promoting arrangements covered by this Alert should call 13 72 86 (Fast Key Code 3 4).

Note 2: 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. 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 3: The Commissioner may amend an assessment at any time where he is of the opinion there has been fraud or evasion.

Amendment history

Date	Comment
3 May 2024	Updated Tax Agent tip off hotline number
19 January 2024	Updated ATO tip-off hotline numbers

Subject references:

Trusts
Taker In default
Default interest
Assignment of interest
Capital Gains Tax

Legislative references:

Income Tax Assessment Act 1936
Part IVA

Income Tax Assessment Act 1997
Division 104

Tax Administration Act 1953
Schedule 1 Div 290

Related Practice Statements:

PS LA 2008/15

Date issued: **21 May 2009**
Authorised by: **Stephanie Martin**
Deputy Commissioner
Contact Officer: **Bruce Collins**
Business Line: **Aggressive Tax Planning**
Section: **Technical & Case Leadership**
Phone: **(02) 6216 2710**
