



TA 2009/19 - Uncommercial offshore superannuation trusts

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Taxpayer Alert

TA 2009/19

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 In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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 Uncommercial offshore superannuation trusts

This Taxpayer Alert describes arrangements that use offshore trust structures (purported to be superannuation funds) in an attempt to shift funds into Australia in a concessionally taxed manner or substantially defer the time at which such amounts are subject to tax in Australia.

Description

This Taxpayer Alert applies to arrangements with features substantially equivalent to the following:

Arrangement 1

1. An individual living overseas establishes an offshore trust fund ('offshore trust fund'). This offshore trust fund purports to be a superannuation fund and its trustee is usually resident in a tax haven.
2. In preparation for movement of contributions into the offshore trust fund, the individual establishes a purported employer entity ('the employer entity'), located in a tax haven.

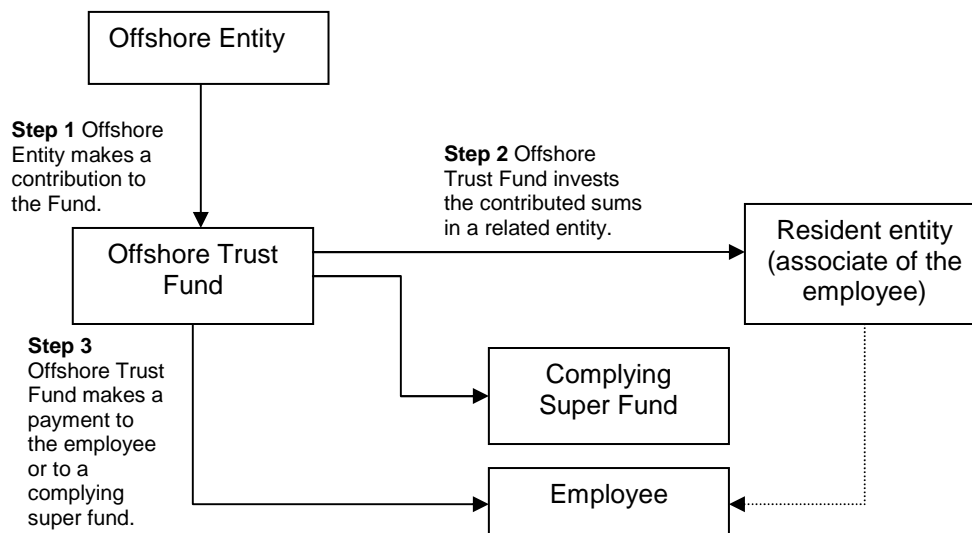
The employer entity does not perform any business functions, does not usually have any arm's length employees and in some circumstances, does not establish a bank account. The individual becomes a director and primary shareholder of the employer entity.
3. The offshore trust fund receives contributions from the employer entity and/or an associate of the individual just prior to and/or in anticipation of the individual becoming a resident of Australia. Such an associate may be a related individual, a partner, a trustee, a company or a non-common law ownership structure, such as a stichting, stiftung, anstalt, foundation, etc.
4. The offshore trust fund may invest contributions that it receives in an unrelated entity or an entity owned or controlled by the individual. The offshore trust fund ordinarily derives earnings from this investment which are accumulated in that fund.
5. After a period of time (often many years), both the capital amounts and the earnings may be moved to Australia in the form of purported retirement benefits or contributions to a complying superannuation fund.
6. Prior to this point, the individual will not pay tax in Australia on the amounts of accrued income held in the offshore trust fund under Australia's foreign source income attribution regimes.

Arrangement 2

1. An individual, who is a resident of Australia for taxation purposes, establishes an offshore trust fund ('offshore trust fund'). This offshore trust fund purports to be a superannuation fund and its trustee is usually a resident in a tax haven.
2. The individual performs arm's length work or services offshore for a non-resident service entity. Contributions are paid to the offshore trust fund purportedly as superannuation contributions by the non-resident service entity in respect of work performed by the individual while overseas.
3. The offshore trust fund invests contributions it receives by making loans on less than commercial terms to related resident entities of the individual or by making direct investment by way of acquisition of shares or units in resident entities owned and controlled by the individual.

Some of the units or shares in the related resident entity receiving the loans might be owned by a complying superannuation fund which may be a self managed superannuation fund (SMSF).
4. After a period of time (often many years), both the capital amounts and the earnings may be moved to Australia in the form of purported retirement payments.
5. Prior to this point, the individual will not pay tax in Australia on the amounts of accrued income held in the offshore trust fund under Australia's foreign source income attribution regimes.

Diagram of typical arrangement



Features which concern us

The Tax Office is considering the following issues for arrangements of this type:

Superannuation regulatory issues

The arrangements may involve entities that are regulated under the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and the *Superannuation Industry (Supervision) Regulations*. For those entities, arrangements of this type give rise to issues about whether there may be a breach of the:

1. in-house asset provisions, and/or
2. the sole purpose test under section 62 of the SIS Act.

Taxation issues

The Tax Office considers that arrangements of this type give rise to the following issues under taxation laws about whether:

3. any amounts received by any entity associated with the arrangement may be assessable income under section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
4. such offshore trust funds may be superannuation funds as defined in section 995-1 of the ITAA 1997 and/or subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
5. contributions may have been made by the employer entity to the offshore trust fund;
6. contributions to the offshore trust funds in these circumstances may be deductible to employer entities under section 290-60 of the ITAA 1997;
7. contributions to the offshore trust funds may be excluded from being fringe benefits as defined in subsection 136(1) of the *Fringe Benefits Tax Assessment Act 1986*;
8. contributions to complying superannuation funds may exceed the concessional/non-concessional caps and attract excess contributions tax under Division 292 of the ITAA

1997;

9. amounts applied by the offshore trust funds for the benefit of employees may be subject to section 99B of the ITAA 1936;
10. liability to withholding tax may apply to interest amounts under section 128B of the ITAA 1936;
11. the trustee of the offshore trust fund or complying superannuation fund may be liable to pay tax under subsection 295-5(2) of the ITAA 1997;
12. lump sum payments may be non assessable and non exempt under sections 305-60 and 305-65 of the ITAA 1997;
13. payments received may be 'applicable fund earnings' and assessable under section 305-70 of the ITAA 1997;
14. the income of the offshore entity structure may be attributable to the employee under Australia's anti-deferral regime for controlled foreign companies contained in Part X of the ITAA 1936;
15. the income of the offshore entity structure may be attributable to the employee under Australia's anti-deferral regime for transferor trusts contained in Division 6AAA of Part III of the ITAA 1936;
16. the income of the offshore entity structure may be attributable to the employee under Australia's anti-deferral regime for foreign investment funds in Part XI of the ITAA 1936;
17. the arrangement may constitute a scheme to which the general anti avoidance rules in Part IVA of the ITAA 1936 apply; and
18. any amounts received by any entity marketing or otherwise encouraging the arrangement may be assessable income in Australia under section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
19. 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 *Taxation Administration Act 1953*.

The Tax Office is currently reviewing these arrangements.

Note 1: *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 1800 060 062 or report information online at www.ato.gov.au/reportevasion.*

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 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 3: *Where appropriate, section 167 of the ITAA 1936 may be used to determine the amount of taxable income upon which the taxpayer should be assessed, see Law Administration Practice Statements, PSLA 2007/7 and PSLA 2007/24.*

subject references:
offshore trust fund
complying superannuation fund
in house asset
anti avoidance
controlled foreign company
foreign investment fund
assessable income

legislative references:
Income Tax Assessment Act 1936
Section 6(1)
Section 99B
Division 6AAA of Part III
Section 128B
Part IVA
Part XI

Income Tax Assessment Act 1997
Section 290-60
Division 292
Section 295-5
Section 305-60
Section 305-65
Section 305-70
Section 995-1
Fringe Benefits Tax Assessment Act 1986
Subsection 136(1)

Taxation Administration Act 1953
Schedule 1 Division 290

Superannuation Industry Supervision Act 1993
Section 62

Superannuation Industry (Supervision) Regulations

Related Practice Statements
PSLA 2007/7
PSLA 2007/24

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