



TA 2009/3 - Bringing forward deductions to rehabilitate a mine site

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Taxpayer Alert

TA 2009/3

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 In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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 **Bringing forward deductions to rehabilitate a mine site.**

This Taxpayer Alert describes an arrangement where an entity attempts to bring forward an income tax deduction for a future obligation to rehabilitate a mine site.

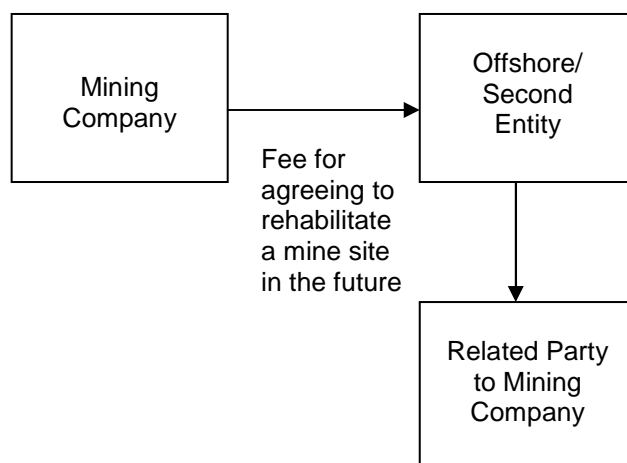
Description

This Taxpayer Alert applies to arrangements which have some or all of the following features:

1. A mining company has a future obligation to rehabilitate a mine site after mining ceases.

2. The mining company enters into an arrangement with a second entity (which may be an associate or otherwise related entity) and pays that second entity to carry out the mine site rehabilitation at a future time.
3. The mining company seeks to claim an immediate income tax deduction for the payment.
4. The second entity does not return the full payment as assessable income on revenue account for Australian income tax purposes in the income year of receipt.
5. Alternatively, an intermediary may be used and the payment channelled through the intermediary to a related party or associate.
6. The second entity and any intermediary are situated overseas, frequently in a tax haven.

Diagram of a typical arrangement



Features which concern us

The Tax Office considers that an arrangement which exhibits one or more of the features outlined above may give rise to taxation issues that include whether:

1. such an arrangement or certain steps in it may be a sham;
2. the mining company may be entitled to a deduction under section 8-1 *Income Tax Assessment Act 1997* (ITAA 1997) in respect of the payment, and the timing of any such deduction;
3. the mining company may be entitled to a deduction under section 40-735 of the ITAA 1997 in respect of the payment and the timing of any such deduction;
4. any deduction allowable to an entity under section 40-735 is a non-arm's length transaction which may be reduced under section 40-765 of the ITAA 1997;
5. the income received by the second entity may properly constitute Australian-sourced income for the purposes of section 6-5(3) of the ITAA 1997, and the timing of that inclusion;

6. a provision of subdivision H of Division 3 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) may apply to payments under the arrangement;
7. payments under the arrangement may be affected by the transfer pricing provisions of Division 13 of Part III of the ITAA 1936;
8. any articles in a relevant tax treaty between Australia and another relevant country may apply, including:
 - (a) the business profits article, or
 - (b) the associated enterprises article
9. any offshore entity may be a non-resident entity of Australia for taxation purposes, and if so whether it may be a Controlled Foreign Company under Part X of the ITAA 1936;
10. any resident taxpayers who are investors in the offshore entity may be an attributable taxpayer under Part X of the ITAA 1936 in respect of the offshore entity's income, including tainted services income (under section 448 of ITAA 1936);
11. the general anti-avoidance rules contained in Part IVA ITAA 1936 may operate to cancel a tax benefit under the arrangement, for example in relation to the interposition of the offshore entity.
12. 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*.

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 tax practitioner integrity service on 1800 639 745.*

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.*

subject references:

Arrangement
Associate
Mining Site Rehabilitation Expenses
Offshore arrangement

legislative references:

Income Tax Assessment Act 1936
Part IVA
Subdivision H of Division 3 of Part III
Section 448 of Part X
Income Tax Assessment Act 1997
Section 6-5

Section 8-1
Section 40-735
Section 40-765
Taxation Administration Act 1953
Division 290
International Tax Agreements Act 1953
Article 9

Date issued:	5 February 2009
Authorised by:	Brett Martin Acting Deputy Commissioner Aggressive Tax Planning

Contact Officer:	Bruce Collins
Business Line:	Aggressive Tax Planning
Section:	Technical & Case Leadership
Phone:	(02) 6216 2710
