



TA 2009/5 - Use of an associate to obtain Goods and Services Tax ('GST') benefits on construction of residential premises for lease

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Taxpayer Alert

TA 2009/5

Note: The ATO view for the arrangement described in TA 2009/5 is set out in [GSTR 2010/1](#)

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 In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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: Use of an associate to obtain Goods and Services Tax ('GST') benefits on construction of residential premises for lease

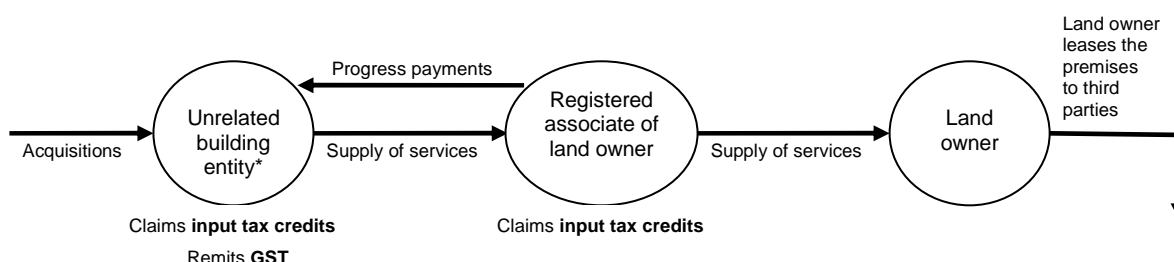
This Taxpayer Alert describes an arrangement where an entity uses an associate in an attempt to secure input tax credits on the construction of residential premises for lease and defer the corresponding GST liability, in some cases indefinitely.

DESCRIPTION

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

1. A land owner, who may or may not be registered for GST, plans to construct residential premises to lease to third parties.
2. The land owner engages its associate to construct the residential premises.

3. The associate either undertakes the construction or engages an arm's length builder, and claims input tax credits on its acquisitions.
4. The associate does not seek progress payments from, nor issues an invoice to, the land owner until the premises are ultimately sold.
5. The land owner leases the completed residential premises to third parties (an input taxed supply).
6. The associate only remits GST upon the sale of the residential premises by the land owner.
7. The basic features of this arrangement can be summarised diagrammatically as follows:



*** Note:** The registered associate may carry out the construction work itself rather than engaging an independent builder, and claim input tax credits on its acquisitions

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 associate is carrying on an enterprise under section 9-20 of the *A New Tax System (Goods and Services) Act 1999* ('GST Act');
- b. the associate is entitled to input tax credits under Division 11 of the GST Act on the acquisitions it makes in constructing, or arranging the construction of, the residential premises;
- c. any act or payment by the land owner causes the associate's GST to be attributable in accordance with section 29-5 of the GST Act to a tax period at a point earlier than the sale of the residential premises;
- d. Division 72 of the GST Act, which covers supplies to associates for no or inadequate consideration, applies to the supply by the associate to the land owner; and
- e. the anti-avoidance provisions in Division 165 of the GST Act apply, as the arrangement appears artificial and contrived in its design and execution.

The Tax Office is currently reviewing these arrangements.

Note 1: If you have received a private ruling in respect of your arrangement, please check that the application of Division 165 of the GST Act is considered in that ruling. The applicant may not have sought for us to rule on the application of Division 165 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 Division 165 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 2: Base penalties of up to 50% of the tax avoided can apply where Division 165 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 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.

subject references:

Goods and Services Tax
Creditable acquisition
Residential premises
Associate
Lease
Construction

legislative references:

A New Tax System (Goods and Services Tax) Act

[Section 9-20](#)

[Division 11](#)

[Section 29-5](#)

[Division 72](#)

[Division 165](#)

related practice statements:

[PS LA 2008/15 - Taxpayer Alerts](#)

file references:

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