


TA 2010/4 - Australian resident entities using promoted tax schemes in Samoa to claim purported deductions and conceal income or assets

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Taxpayer Alert

TA 2010/4

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, or where there are recurrences of arrangements that have been previously risk assessed.

Taxpayer Alerts 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 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 In these latter cases, the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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 give the title of the issue (which may be a scheme, arrangement or particular transaction), briefly describe the issue and 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: Australian resident entities using promoted tax schemes in Samoa to claim purported deductions and conceal income or assets.

Overview

This Taxpayer Alert describes an arrangement where Australian resident entities use a promoted tax avoidance or evasion scheme in Samoa and/or other low tax jurisdictions to artificially create deductions for purported expenses and/or to establish structures to conceal income or assets.

Context for the arrangement

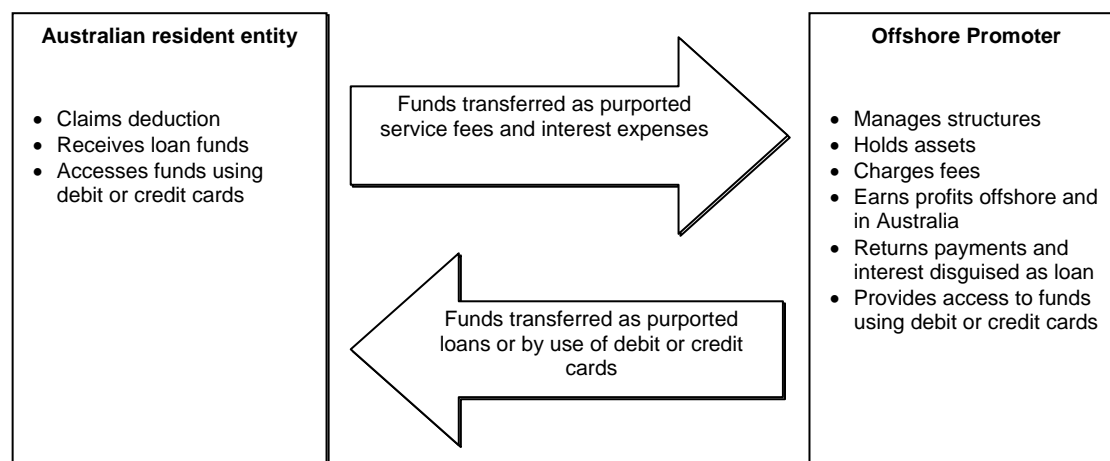
The ATO is investigating arrangements covered by this Alert as part of the whole of government Project Wickenby.

Description

This Alert applies to an arrangement with features substantially equivalent to the following:

1. An Australian resident taxpayer (the taxpayer) enters into an arrangement with a tax scheme promoter involving the use of offshore entities and structures in Samoa or other low tax jurisdictions. The arrangement involves the transfer of funds offshore as artificial expenses for services purportedly provided by the promoter or an associated offshore entity.
2. This arrangement may be used for two purposes:
 - a. To generate deductions:
 - i. The taxpayer claims a deduction (the initial deduction) for the expenditure that has purportedly been incurred.
 - ii. The promoter or an associate subsequently returns the funds to the taxpayer through the use of purported loan arrangements or the use of offshore debit or credit cards.
 - iii. The taxpayer may seek further deductions in respect of interest on the purported loan used to effectively repatriate the funds. Frequently, the payment of purported interest is returned to the taxpayer, minus a small fee, as a further advance on the loan. This has the effect of increasing the loan balance and the amount of deductions in respect of purported interest over time.
 - b. To conceal receipt of income or ownership of assets
 - i. An offshore entity may also be used to enable the taxpayer to hold assets offshore, while concealing the beneficial ownership of those assets and the income that may be generated from those assets.
 - ii. In some cases, the offshore entity may generate profits or gains offshore (for example by offshore passive investments) and/or in Australia (for example by trading in shares on the Australian Stock Exchange). These profits or gains are returned to the offshore entity or entities in Samoa or another low tax jurisdiction, and then transferred to another entity or entities in Samoa connected to the promoter.
 - iii. These funds may be held offshore indefinitely, transferred to the taxpayer through the use of purported loan arrangements, or accessed through the use of debit or credit cards.

Diagram of arrangement



Features which concern us

The ATO considers that arrangements of this type give rise to the following issues relevant to taxation laws, being **whether**:

- (a) all or any part of the arrangement (such as the purported expenses or loans) may constitute a sham at general law;
- (b) any entity within the structure, the promoter or other persons involved with the operation of the structure, its management and administration may be acting as:
 - (i) agent for the taxpayer as principal in relation to the activities of the structure; or
 - (ii) trustee (whether under an express, constructive, implied or resulting trust) for the taxpayer as beneficiary in relation to the activities of the structure;
- (c) any entity within the structure may be a resident of Australia under subsection 6(1) of the ITAA 1936;
- (d) the amounts received by the taxpayer or an associate may represent assessable income;
- (e) the amounts received under the alleged 'loans' may constitute dividends for the purposes of section 44 of the ITAA 1936;
- (f) the amounts received under the alleged 'loans' may constitute deemed dividends for the purposes of Division 7A of the ITAA 1936;
- (g) the income from the structure may be assessable to the taxpayer and their associates under the trust income provisions in Division 6 of the ITAA 1936;
- (h) the income of the structure may be attributable to the taxpayer under Australia's anti-deferral regimes within Part X, Part XI or Division 6AAA of Part III of the ITAA 1936;

- (i) offshore entities may be assessed as Australian residents under section 6-5 of the ITAA 1997 if the offshore entity is carrying on a business of 'share trading';
- (j) a deduction or reduced deduction may be allowable to the taxpayer under the provisions of the *Income Tax Assessment Act 1936* (ITAA 1936) or the *Income Tax Assessment Act 1997* (ITAA 1997);
- (k) any of the transactions may be subject to the transfer pricing provisions in Division 13 of Part III of the ITAA 1936;
- (l) the general anti-avoidance provisions in Part IVA of the ITAA 1936 may have application as:
 - (i) the arrangement seems artificial and lacks an ordinary business purpose in its design and execution; and
 - (ii) it appears that the dominant purpose of entering into the arrangement is to obtain one or more tax benefits;
- (m) any entity involved in the arrangement may be a promoter of a tax exploitation scheme for the purpose of Division 290 of Schedule 1 of the *Tax Administration Act 1953*; and
- (n) any taxation statements made in relation to the arrangement may be false or misleading;
- (o) any criminal offences may have been committed regarding the arrangement.

The message of this Taxpayer Alert

The ATO has reviewed the arrangement and considers it is ineffective because some or all of the above issues apply.

Australian residents are required to declare world wide income derived directly or indirectly from all sources in or out of Australia.

Falsifying information in an attempt to inflate deductions or to disguise asset holdings or receipt of income, including through arrangements based in Samoa and other jurisdictions, in an attempt to avoid or evade these tax obligations may attract serious penalties including criminal sanctions or confiscation of criminal assets.

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 you make a voluntary disclosure to the ATO. If you have any information about specific people or entities involved in tax evasion arrangements please phone us on **1800 060 062 or fax 1800 804 544**. Tax agents wanting to provide information about specific people or companies who may be promoting arrangements covered by this Alert should call Tax Agent Infoline - **13 72 86** Fast Key Code **3 4**.*

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: *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, PS LA 2007/7 and PS LA 2007/24.*

Note 4: *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 5: *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 PSLA 2008/6.*

References

Subject references:

- Tax havens

Legislative references:

Income Tax Assessment Act 1936

- Section 44
- Section 167
- Subsection 6(1)
- Division 6
- Division 6AAA
- Division 7A
- Division 13 of Part III
- Part IVA
- Part X
- Part XI

Income Tax Assessment Act 1997

- Section 6-5
- Section 8-1
- Part 3-1
- Part 3-95

Taxation Administration Act 1953

- Division 290

Related Practice Statements:

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

Taxpayer Alerts

- [TA 2005/5](#)

- [TA 2005/6](#)
- [TA 2005/7](#)
- [TA 2005/8](#)
- [TA 2008/2](#)
- [TA 2008/8](#)

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