



TA 2011/5 - FBT Avoidance through an arrangement where an employer repays an employee's loan from a purported employee share trust

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Taxpayer Alert

TA 2011/5

FOI status: May be released

TITLE: FBT Avoidance through an arrangement where an employer repays an employee's loan from a purported employee share trust

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 In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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

Overview

This Taxpayer Alert describes an arrangement where an employer establishes an employee benefit arrangement for employees to acquire share units in a purported employee share trust (EST). The acquisition of share units by employees is funded by way of a loan from the trustee and that loan is repaid by the employer paying amounts which have been salary sacrificed by the employees. That is the employees have agreed to forego part of their total remuneration that they would otherwise have expected to receive as salary or wages (salary sacrificed amounts).

The arrangement may be an attempt by the employer to provide a benefit to employees without regard to the application of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA) as the taxable value of benefits provided is not included as part of the employer's fringe benefits tax (FBT) liability.

Context for the arrangement

An employee can enter into a salary sacrifice arrangement (SSA) with their employer, to forego part of their future remuneration that they would otherwise expect to receive as salary or wages, in return for a benefit of similar value. The ATO view on what constitutes an effective SSA is explained in Taxation Ruling TR 2001/10.

FBT is payable by an employer in respect of fringe benefits provided by an employer (or their associate) to employees (or their associates). A fringe benefit can include an expense payment fringe benefit, for instance, where an employer pays a liability owed by an employee to a third party. However FBT does not apply to money or property acquired by a EST, as the employee is taxed on their employee share scheme interests in the EST pursuant to Division 83A and Subdivision 130-D of the *Income Tax Assessment Act 1997* (ITAA 1997).

ATO Interpretive Decision ATO ID 2010/108, sets out the Commissioner's view on what constitutes a valid EST within the meaning of subsection 130-85(4) of the ITAA 1997.

DESCRIPTION

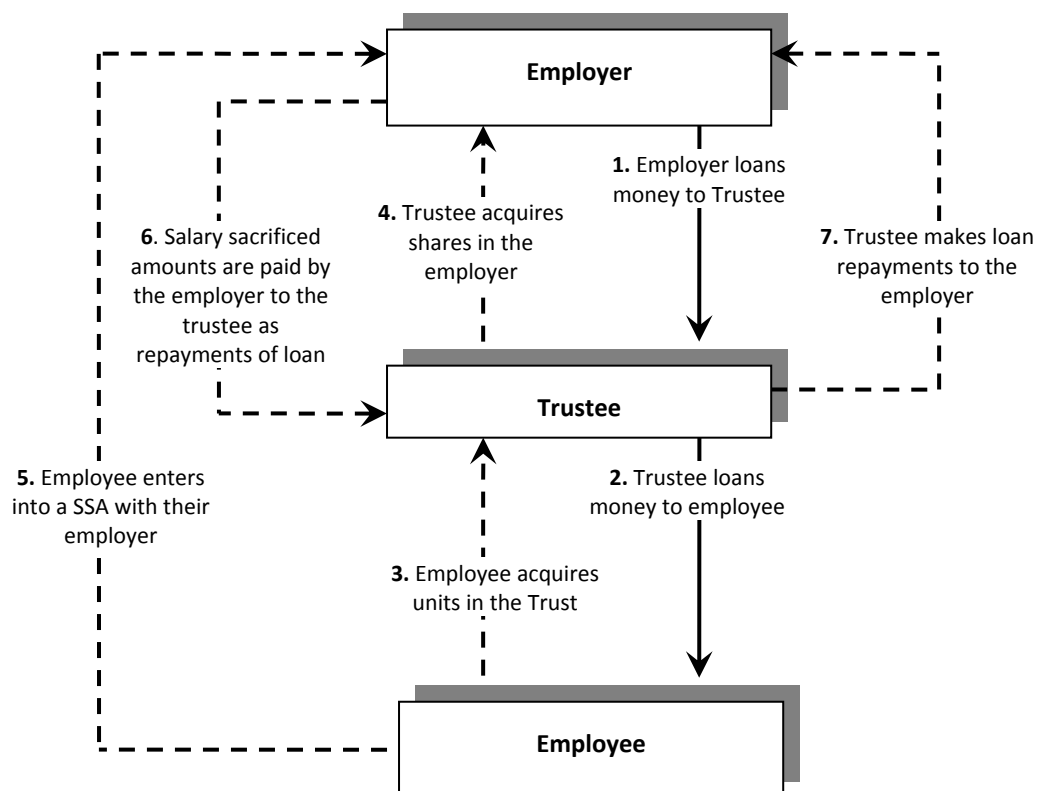
The alert applies to arrangements with features substantially equivalent to the following:

1. An advisory firm promotes, recommends or offers an arrangement to an employer intending to provide an effective after tax benefit to employees.
2. The employer makes contact with the advisory firm to implement this arrangement.
3. The employer establishes an employee benefit arrangement which operates through a trust.
4. The employer makes a loan contribution to the trust.
5. The trustee of the trust uses the funds to provide an interest free loan to one or more employees.
6. The employees use the funds borrowed from the trustee of the trust to acquire units in the trust.
7. The trustee invests in the employer by acquiring shares and notionally allocates those shares to the units.

8. The employees enter into an effective SSA with the employer.
9. The employer provides a benefit to employees, by paying salary sacrificed amounts to the trustee as repayments of the employee loans.
10. The employee loan is reduced by the amount of the repayment.
11. The trustee makes loan repayments to the employer.
12. The employer does not appear to include the taxable value of the benefit provided in its FBT liability.

Diagram of arrangement

The basic structure of the arrangement can be summarised diagrammatically as follows:



FEATURES WHICH CONCERN US

The ATO considers that an arrangement of the type described above gives rise to taxation issues that include **whether**:

- (a) the trust can be a valid EST for the purposes of the ITAA 1997 where it engages in activities which are not merely incidental to the activities set out in the definition of EST in subsection 130-85(4) of the ITAA 1997 (see ATO ID 2010/108),
- (b) an effective salary sacrifice arrangement has been entered into in accordance with TR 2001/10,
- (c) repayments made by the employer to the trustee, are an expense payment fringe benefit under section 20 of the FBTAA,
- (d) section 24 of the FBTAA applies to reduce the taxable value to nil under the otherwise deductible rule,
- (e) the employer is required to include the taxable value of an expense payment fringe benefit in their fringe benefits taxable amount for the purpose of determining the employer's fringe benefits tax liability under section 66 of the FBTAA,
- (f) the anti-avoidance provision in section 67 of the FBTAA may apply to the arrangement, and
- (g) any entity, including the advisory firms involved in promoting, recommending or offering the arrangement, may be a promoter of a tax exploitation scheme for the purposes of Division 290 of Schedule 1 to the *Tax Administration Act* 1953.

The ATO is currently reviewing these arrangements. *Note the ATO has issued ATO ID 2011/54 in respect of Expense payment fringe benefit: employee loan from a trust repaid by employer.*

Note 1: *You may have already sought advice from the Tax Office in respect of your arrangement by way of a private ruling. If you have received a private ruling in respect of your arrangement, you can rely on that private ruling. A private ruling is legally binding on the Commissioner who will be bound to act in the way set out in the ruling, even if the private ruling is later found to be incorrect. However, a private ruling only applies to the particular entity identified and the particular scheme described in the ruling. If there is a material difference between the scheme described in the ruling, and the scheme that was actually implemented, the private ruling will not be legally binding on the Commissioner. Also, other entities cannot rely on a private ruling issued in respect of a different entity.*

Note 2: *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 ATO. 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 also call **1800 177 006**.*

- 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.
- Note 4:** A registered tax agent may have their registration cancelled or suspended by the Tax Practitioners Board under the Tax Agent Services Act 2009 for breach of a condition of registration including being penalised for being a promoter of a tax exploitation scheme.
- Note 5:** The Commissioner may amend an assessment at any time where he is of the opinion there has been fraud or evasion. (Paragraphs 74(3)(a) to (c) of the FBTAA must also be satisfied for the Commissioner to amend an FBT assessment). See Law Administration Practice Statement PSLA 2008/6.
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References

Subject references:

- Fringe benefits tax
- Employee benefit arrangement
- Employee share trust
- Expense payment fringe benefit
- Otherwise deductible rule
- Effective salary sacrifice arrangement

Legislative references:

- Fringe Benefits Tax Assessment Act 1986
 - [Section 20](#)
 - [Section 24](#)
 - [Section 66](#)
 - [Section 67](#)
 - [Subparagraphs 74\(3\)\(a\) to \(c\)](#)
- Taxation Administration Act 1953
 - [Division 290 of Schedule 1](#)
- Income Tax Assessment Act 1997
 - [Division 83A](#)
 - [Subdivision 130-D](#)
 - [Subsection 130-85\(4\)](#)

Related Practice Statements:

- [PS LA 2008/6](#)
- [PS LA 2008/15](#)

Related Rulings/ Determinations:

- [ATO ID 2011/54](#)
- [ATO ID 2010/108](#)
- [TR 2001/10](#)

Date issued:	27 June 2011
Authorised by:	Tim Dyce Deputy Commissioner
Contact Officer:	Bruce Collins
Business Line:	Aggressive Tax Planning
Section:	Promoter & Participant Compliance
Phone:	(02) 6216 2710
