

TA 2012/1 - Non disclosure of foreign source income by Australian tax residents

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Taxpayer Alert

TA 2012/1

FOI status: may be released

TITLE: Non disclosure of foreign source income by Australian tax residents

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 In these latter cases, the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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

Overview

This Taxpayer Alert describes arrangements under which Australian resident taxpayers who have derived income or other taxable amounts from foreign sources do not correctly include these amounts in their assessable income for Australian tax purposes.

The ATO's recent compliance activities indicate that many taxpayers are not aware of their Australian taxation obligations in relation to their worldwide income. However there are also some taxpayers who attempt to deliberately conceal their offshore income. The purpose of this alert is to remind both of these groups of their ongoing taxation obligations to avoid potential penalties.

Context for the arrangement

Under Australian taxation laws, a resident of Australia is generally liable to Australian income tax on their worldwide income (subject to a number of exceptions and exemptions).

The ATO guide, [Income you must declare](#) provides information on the main types of worldwide income Australian residents earn and how tax applies to that income.

The tests for whether an individual is an Australian resident for tax purposes are outlined in subsection 6(1) of the Income Tax Assessment Act 1936 (ITAA 1936).

The primary test is whether an individual resides in Australia according to ordinary concepts. There are also three other statutory tests.

[Taxation Ruling TR 98/17](#) provides the Commissioner's view on the circumstances in which individuals entering Australia, including people migrating to Australia or who are teaching or studying in Australia, will 'reside' here for tax purposes according to ordinary concepts.

Description

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

1. An individual ("the taxpayer") is a resident of Australia for tax purposes.
2. The taxpayer derives income or other taxable amounts from a foreign source ("foreign source income"). The foreign source income may include (but is not limited to):
 - a. interest accrued in an offshore bank account
 - b. income derived from a foreign investment (e.g. dividend or rental income)
 - c. income from an asset that has been inherited from an overseas source
 - d. a foreign pension or annuity
 - e. certain foreign employment income
 - f. foreign business income
 - g. foreign trust income
 - h. capital gains arising from disposal of overseas assets
 - i. attributable income from interests in offshore entities even if the income has not been distributed
3. The foreign source income is received in Australia or accumulated offshore.
4. The taxpayer does not correctly disclose their interest and/or involvement in deriving foreign source income and does not pay Australian tax on this income.
5. The non-disclosure by the taxpayer may arise through:
 - a. accumulating the income in an offshore bank account;
 - b. accumulating or reinvesting income in other assets or entities offshore;

- c. transferring funds to the taxpayer through the use of purported loan arrangements; and/or
 - d. accessing funds in an offshore bank account through the use of debit or credit cards by the taxpayer in Australia or elsewhere.
6. In some instances, another entity (for example, a promoter) may act on behalf of the taxpayer who is a beneficiary of an offshore structure or investment, to conceal the true control of the entity or the beneficial interest in the income or assets.
 7. In some arrangements, documentation supporting the above transactions is absent, incomplete or falsified.

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) the foreign source income may be assessable to the taxpayer under section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- (b) the foreign source income may be assessable to the taxpayer and/or their associates (such as an entity acting as trustee for the taxpayer) under the trust income provisions in Division 6 of Part III of the ITAA 1936;
- (c) any income accrued offshore may be attributable to the taxpayer under Australia's anti-deferral regimes within Part X, former Part XI or Division 6AAA of Part III of the ITAA 1936;
- (d) taxable capital gains may arise to the taxpayer on the disposal of offshore assets under Part 3-1 or 3-3 of the ITAA 1997;
- (e) the foreign source income is assessable to the taxpayer under another provision of the tax law;
- (f) all or any part of the arrangement (such as any purported loans) may constitute a sham at general law;
- (g) the general anti-avoidance provisions in Part IVA of the ITAA 1936 may apply to an arrangement which is entered into with the sole or dominant purpose to obtain a tax benefit; and
- (h) any taxation statements made in relation to the arrangement may be false or misleading.

The ATO is continuing to review 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 or 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 specific people or entities involved in tax evasion arrangements please phone us on 1800 060 062 or fax 1800 804 544.*

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: *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:

- Foreign source income

Legislative references:

Income Tax Assessment Act 1936

- [Subsection 6\(1\)](#)
- [Section 167](#)
- [Division 6 of Part III](#)
- [Division 6AAA of Part III](#)
- [Part IVA](#)
- [Part X](#)
- [Part XI](#)

Income Tax Assessment Act 1997

- [Section 6-5](#)
- [Part 3-1](#)
- [Part 3-3](#)

Related Practice Statements:

- [PS LA 2007/7](#)
- [PS LA 2007/24](#)
- [PS LA 2008/6](#)
- [PS LA 2008/15](#)

Related Taxpayer Alerts

- [TA 2005/5](#)
- [TA 2005/6](#)
- [TA 2005/7](#)
- [TA 2005/8](#)
- [TA 2008/2](#)
- [TA 2008/8](#)

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