


TA 2012/5 - Acquisition of intangible right for inflated consideration which is financed by supplier

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Taxpayer Alert

TA 2012/5

FOI status: may be released

TITLE: Acquisition of intangible right for inflated consideration which is financed by supplier

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 In these latter cases, the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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 an arrangement where an entity claims an input tax credit on a purported acquisition (on non-commercial terms) of an intangible right from a GST-registered supplier, with the provision of vendor finance under which payments are contingent on a future event.

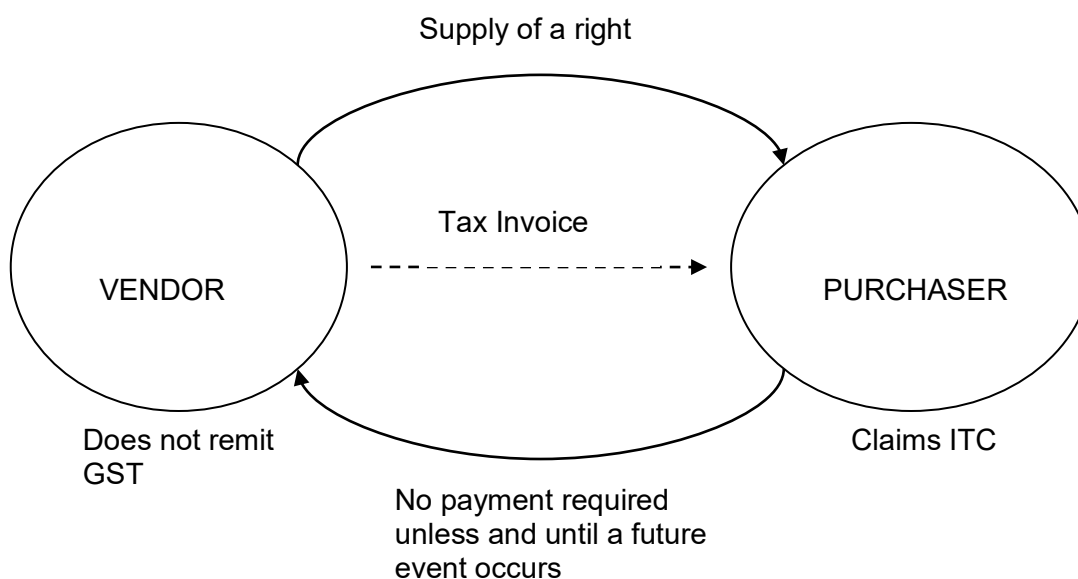
Description

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

1. A GST registered vendor purports to make a supply of an intangible right to a GST registered purchaser.
2. The stated price appears to be inflated and commercially unrealistic. The price is either substantially or wholly subject to vendor finance.
3. The terms of the purported vendor finance are such that any payment is contingent. In some cases, the purchaser is not obliged to pay anything unless and until the purchaser makes profits from exploiting the right. Any payments (including interest) are limited to a proportion of the profits.
4. The vendor issues a tax invoice to the purchaser for the stated purchase price stipulated under the agreement, irrespective of whether the conditions for requiring the purchaser to make payment have been met at that time.
5. The purchaser contends that it is entitled to an input tax credit on the acquisition in the tax period in which the tax invoice is received, either on the basis that an invoice has been issued to them or that consideration has been provided.
6. The vendor accounts on a cash basis and does not remit the GST.

Diagram of core arrangement

The basic structure of the core arrangement can be summarised diagrammatically as follows. Not all of the features shown in the following Diagram will necessarily exist in practice.



Features which concern us

The ATO considers that arrangements outlined above give rise to taxation issues that include whether:

- (a) the purchaser has made a creditable acquisition at all – there would not be a creditable acquisition if there is no taxable supply by the supplier; if the acquisition by the purchaser is not made in carrying on an enterprise; or if the purchaser does not provide, and is not liable to provide, consideration;

- (b) the purchaser is entitled to attribute any input tax credits before the contingency for payment is satisfied;
- (c) the anti-avoidance provisions of Division 165 of the *A New Tax System (Goods and Services Tax) Act 1999* ('GST Act') apply to the arrangement, as it appears artificial and contrived in its design and execution; and
- (d) the arrangement, or certain steps within it, may constitute a sham at general law.

The ATO is currently reviewing these arrangements.

The ATO will also consider the income tax and GST implications for the vendor.

Note 1: *An 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 2: *You may have already sought advice from the ATO in respect of your arrangement by way of a private ruling or class ruling. If you have received a private ruling or class ruling in respect of your arrangement, you can rely on that ruling. A private or class ruling is legally binding on the Commissioner who will be bound to act in the way set out in the ruling, even if the ruling is later found to be incorrect. However, a private ruling only applies to a particular entity identified and the particular scheme described in the ruling. Similarly, a class ruling only applies to a specified class of entities 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 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 3: *If you have received a private ruling in respect of your arrangement, please check whether the application of Division 165 of the GST Act is considered in that ruling. You may not have asked 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 4: *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 you make a voluntary disclosure to the ATO. If you have any information about the current arrangement or about people or companies who may be promoting these or similar arrangements, please call us on **1800 060 062**.*

Note 5: *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 6: *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 7: *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.*

Amendment history

Date	Comment
19 January 2024	Updated ATO tip-off hotline number

References

Subject references:

- Goods and Services Tax
- Input tax credit
- Intangibles
- Consideration

Legislative references:

A New Tax System (Goods and Services Tax) Act 1999

- [Section 9-5](#)
- [Section 11-5](#)
- [Section 11-15](#)
- [Division 29](#)
- [Division 165](#)

Taxation Administration Act 1953

- [Division 290 of Schedule 1](#)

Related Practice Statements:

- [PS LA 2008/15](#)

Related Taxpayer Alerts:

- [TA 2004/1](#)

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