


TA 2016/11 - Restructures in response to the Multinational Anti Avoidance Law (MAAL) involving foreign partnerships

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Taxpayer Alert

TA 2016/11

Restructures in response to the Multinational Anti-Avoidance Law (MAAL) involving foreign partnerships

Alerts provide a summary of our concerns about new or emerging higher risk tax or superannuation arrangements or issues that we have under risk assessment.

While an alert describes a type of arrangement, it is not possible to cover every potential variation of the arrangement. The absence of an alert on an arrangement or a variation of an arrangement does not mean that we accept or endorse the arrangement or variation, or the underlying tax consequences.

Refer to [PS LA 2008/15](#) for more about alerts. See [Alerts](#) issued to date.

Overview

We are currently reviewing arrangements implemented by taxpayers with effect from 1 January 2016 in response to the Multinational Anti-Avoidance Law (MAAL).

Following taxpayer alerts TA 2016/2 and TA 2016/8 relating to arrangements in response to the MAAL, we have continued to work with taxpayers restructuring into arrangements that reflect their commercial and economic circumstances. We remain concerned, however, that some taxpayers are entering into artificial and contrived arrangements in attempts to avoid the application of the MAAL.

This Alert identifies another scheme we consider is artificial and contrived. We consider this scheme may not be legally effective in achieving its purpose and may potentially enliven other general anti-avoidance rules across the taxation system. This scheme is an iteration of those described in TA 2016/2 and this Alert should be read in light of our previously stated concerns and actions.

The scheme that has come to our attention involves interposing an entity described as a partnership between the foreign entity originally making supplies to Australian customers and the Australian customers. The partnership has one resident corporate partner with a minority interest in the partnership, therefore purporting to characterise the partnership as an 'Australian entity' for the purposes of the MAAL. Agreements entered into purport to make the partnership the distributor of the products or services and the foreign entity its agent. The arrangements have little, if any, commercial basis and no changes are made to the underlying functions.

By purporting to treat the partnership as an 'Australian entity', the scheme seeks to artificially circumvent the application of the MAAL by contending there is no supply being made or income being derived by a foreign entity.

Further to TA 2016/2 and TA 2016/8, we reiterate that taxpayers should work with the ATO on arrangements they are considering in response to the MAAL.

Additionally, we caution intermediaries to make sure they are not promoting a scheme to avoid tax. Again, working with the ATO on arrangements being developed can ensure this does not happen.

Description

The MAAL applies:

- to multinational entities who enter into or carry out schemes designed to avoid or reduce the attribution of income to a permanent establishment in Australia
- where the principal purpose, or one of the principal purposes, of the scheme was to obtain an Australian tax benefit or to obtain both an Australian tax benefit and reduction in a foreign tax liability.

The MAAL empowers the Commissioner of Taxation to cancel any tax benefits the foreign entity and/or its related parties derived from the scheme on or after 1 January 2016.

Further to our release of taxpayer alerts TA 2016/2 and 2016/8 we have become aware of additional restructures that have been implemented that appear artificial and are inconsistent with the policy intent of the MAAL, which is to address schemes that avoid an Australian taxable presence.

One such example is where, prior to the restructure, a multinational group fulfilled the MAAL criteria set out in paragraph 177DA(1)(a) of the *Income Tax Assessment Act 1936*¹ including making supplies of products or services to Australian customers through a foreign entity, with that foreign entity deriving ordinary and/or statutory income from the supply.

Under the restructuring arrangement:

1. The multinational group forms an entity described as a partnership. The partnership has two newly incorporated companies as partners; one Australian resident partner and a non-resident partner. The resident partner holds a minority interest in the partnership.
2. The resident partner does not have the right to be involved in the management or conduct of the business of the partnership.
3. The partnership agreement specifies all management decisions regarding the partnership will be conducted outside Australia.
4. Further complexity is introduced into the existing structure through the creation of additional entities; the transfer of legal rights and obligations; changes in contractual relationships with customers; and additional intra-group services agreements.
 - For example, the existing foreign entity that previously made supplies to, and derived income from, Australian customers enters into a distribution agreement with the partnership to transfer the right to distribute the products or services to Australian customers to the partnership, thereby purporting to attribute profit to the partnership.
 - At the same time, the partnership enters into an agency agreement that purports to authorise the existing foreign entity to continue to make supplies to Australian customers as an agent of the partnership. This is intended to give full effect to the distribution agreement.

¹ All legislative references are to this Act unless otherwise stated.

5. There is no material change to the operational activities undertaken by the group in making supplies to Australian customers.

The claimed consequences of the restructure are:

1. The MAAL is said to be technically avoided by arguing the partnership is an 'Australian entity' under subsection 177A(1) such that the entity making the supply to Australian customers is purportedly outside the scope of the 'foreign entity' definition in subsection 177A(1). The requirement in subparagraph 177DA(1)(a)(i) that there be a supply made by a foreign entity is therefore purportedly circumvented.
2. Additionally
 - only the Australian resident partner would return their share of partnership net income in Australia
 - there is no GST payable on supplies the partnership makes to Australian customers.²

What are our concerns?

We are concerned the arrangements:

- are structured in an artificial and contrived manner solely to avoid the application of the MAAL and are not aligned with the MAAL's policy intent and commercial reality
- do not involve any substantive changes to the underlying business carried on by the multinational group in Australia and the functions undertaken by its constituent entities in relation to the supplies to Australian customers pre- and post-MAAL
- are not effective in avoiding the MAAL's application.

These concerns should be read in conjunction with concerns previously outlined in TA 2016/2 regarding agency and distribution arrangements.

These arrangements will result in closer scrutiny from the ATO in conjunction with our broader examination of the MAAL's application to relevant taxpayers.

Some of the main technical issues that arise include, whether:

- the partnership is effective at law
- the transfer of legal rights and obligations is effective
- the new intercompany agreements achieve the purported outcome of the restructure and whether the parties actually act in accordance with these terms
- the enterprise has a permanent establishment in Australia
- section 177DA applies to the arrangement
- section 177D applies to the arrangement
- GST is payable on the supplies made after the restructure.

² This may depend on the type of supply being made; for example, section 9-25 of *A New Tax System (Goods and Services Tax) Act 1999* prescribes different rules for determining whether tangible and intangible supplies are connected with the indirect tax zone.

What are we doing?

We are engaging with taxpayers who have put forward these arrangements to explore the issues of concern and to ensure any restructuring arrangements do not seek to avoid the application of the MAAL in an artificial and contrived manner.

The ATO has processes in place to work collaboratively with taxpayers during the transition to MAAL-compliant structures. Information on these processes can be found at [Combating multinational tax avoidance – a targeted anti-avoidance law](#) on www.ato.gov.au.

Taxpayers and advisors who put forward these types of arrangements will be subject to increased scrutiny.

We will initiate compliance activity, if necessary, to address such arrangements and this may result in substantial penalties of up to 120% of the tax avoided being imposed.

Given the nature of the arrangements, any entity involved in the promotion of such arrangements may be considered a promoter of a tax exploitation scheme for the purposes of Division 290 of Schedule 1 to the *Taxation Administration Act 1953*. We will be allocating compliance resources to consider the effectiveness of the arrangements and the potential application of Division 290.

What should you do?

If you have entered into a similar arrangement to that described in this Alert, you may wish to seek advice as to the legal and tax consequences of the arrangement. We would also encourage you to email us at MAAL@ato.gov.au or contact the officer named in this Alert to discuss your arrangement.

Do you have information?

If you have any information about the *arrangements* described above, email us at MAAL@ato.gov.au or contact the officer named in this Alert with the relevant information or to arrange a meeting with us.

Tax agents who would like to provide information about individuals or companies potentially promoting arrangements covered by this Alert should also use the above contact details.

References

Legislative References:

Income Tax Assessment Act 1936

- [Part IVA](#)
- [Section 177A](#)
- [Section 177D](#)
- [Section 177DA](#)

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

- [Section 9-25](#)

Taxation Administration Act 1953

- [Division 290 of Schedule 1](#)

Related Practice Statements:

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

Related Rulings/Determinations:

- [LCG 2015/2](#)
- [MT 2012/3](#)

Related Taxpayer Alerts

- [TA 2016/2](#)
- [TA 2016/8](#)

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