


TA 2016/4 - Cross-border leasing arrangements involving mobile assets

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Taxpayer Alert

TA 2016/4

Cross-border leasing arrangements involving mobile assets

This Alert provides a summary of our concerns about a significant, emerging or recurring higher risk tax issue that we currently 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.

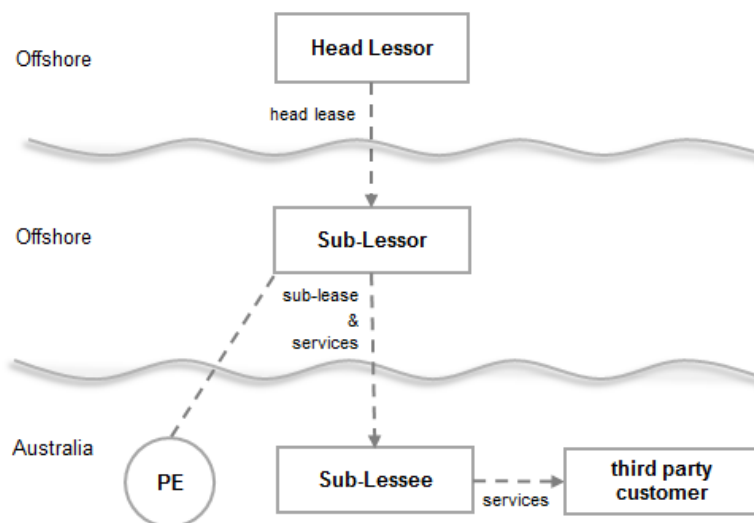
Refer to [PS LA 2008/15](#) for more about alerts. See [Alerts](#) issued to date.

Description

We are currently reviewing various cross-border leasing arrangements involving mobile assets, for example vessels. Multinational enterprises (MNEs) currently use a wide range of legal arrangements for bringing assets into Australia for commercial purposes. Often related legal entities are interposed to lease an asset from a foreign owner to an Australian operator. Our concerns relate, firstly, to whether the inter-positioned company has been put there for the purpose of gaining favourable tax treaty treatment. Anti-avoidance rules in our tax laws may apply if this is the case. Secondly, we are concerned about whether the amount brought to tax is consistent with the contribution made by the Australian operations, including the use of the mobile asset, and whether this meets the arm's length requirements of the transfer pricing provisions of our tax laws.

Example

The diagram below illustrates one of these arrangements, commonly referred to as a lease-in lease-out (LILO) arrangement.



This LILO arrangement has the following features:

- The Head Lessor, a foreign resident, legally owns an asset and leases the asset to the Sub-Lessor, also a foreign resident, who sub-leases the asset to the Sub-Lessee.
- The Australian Sub-Lessee provides services to an Australian third party customer in relation to the asset.
- The asset is substantial equipment.
- The use of the asset in Australia under the sub-lease results in the Sub-Lessor having a permanent establishment (PE) in Australia under the relevant tax treaty.
- The Sub-Lessee is responsible for operating the asset, sourcing the crew and dealing with the third party customer.
- The Sub-Lessor provides services to the Sub-Lessee in relation to the operation of the asset.

What are our concerns?

We are concerned with the following:

- The use of transfer pricing and profit attribution approaches that result in lower taxable profits in Australia which are not consistent with an arm's length leasing arrangement and do not reflect the true economic contribution of the Australian operations.
- Withholding tax may apply to the lease payments depending on the specific circumstances.
- The Head Lessor may be liable to tax because the relevant tax treaty deems the head lease payments to have an Australian source for the purposes of Australia's domestic tax law provisions.
- The Sub-Lessor has limited commercial activities or there are limited sound commercial reasons for its position in the leasing arrangement. Part IVA of the *Income Tax Assessment Act 1936* may apply if the inclusion of the sub-lease is for the dominant purpose of obtaining a tax benefit.

What are we doing?

We are currently reviewing these arrangements and have been consulting with taxpayers and representatives to develop our commercial understanding and tax technical views. We are developing guidance on the transfer pricing and profit attribution issues associated with common cross-border leasing arrangements.

What should you do?

If you have entered into, or are contemplating entering into, an arrangement of this type we recommend that you seek independent advice, review your arrangement or discuss your situation with us by emailing PGIAdvice@ato.gov.au

References

Subject References:

- Cross-border leasing
- Substantial equipment
- Transfer pricing
- Arm's length conditions
- Permanent establishment attribution
- Part IVA

Related Rulings:

- [TR 2001/13](#)
- [TR 2002/5](#)
- [TR 2008/8](#)
- [TR 2007/10](#)
- [TR 2007/11](#)
- [TR 2014/2](#)
- [TR 2014/3](#)
- [TR 2014/8](#)

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