

TD 2005/34A1 - Addendum - Income tax: what are the results for income tax purposes of entering into a profit washing arrangement as described in Taxpayer Alert TA 2005/1?

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Addendum

Taxation Determination

Income tax: what are the results for income tax purposes of entering into a profit washing arrangement as described in Taxpayer Alert TA 2005/1?

This Addendum amends Taxation Determination TD 2005/34 to take account of the High Court's decision in *Raftland Pty Ltd as trustee of the Raftland Trust v. Commissioner of Taxation* [2008] HCA 21.

TD 2005/34 is amended as follows:

1. Paragraph 5

Omit the heading; substitute 'The distribution of income to the promoter trust – intention of the parties'.

2. Paragraph 6

Omit the paragraph; substitute:

5A. However sham is only one of various situations in which a court may take an agreement or other instrument, such as a settlement on trust, as not disclosing, or disclosing fully, the legal rights and entitlements for which it provides on its face (that is, by way of exception to the parol evidence rule).

6. The High Court in *Raftland Pty Ltd as trustee of the Raftland Trust v. Commissioner of Taxation* [2008] HCA 21 explained that:^{1A}

[33] ...The apparent discrepancy between the entitlements appearing on the face of the documents and the way in which the funds were applied gave rise to a question whether the documents were to be taken at face value. In various situations, the court may take an agreement or other instrument, such as a settlement on trust, as not fully disclosing the legal rights and entitlements for which it provides on its face...

^{1A} Per Gleeson CJ, Gummow and Crennan JJ. Kirby J in separate reasons likewise concluded purported trust distributions may be a sham. See also the Decision Impact Statement relating to *Raftland* dated 24 October 2008 and AAT cases *Case 10,796* (1996) 96 ATC 296; (1996) 32 ATR 1168, *Case 11,115* (1996) 96 ATC 443; (1996) 33 ATR 1128 and *Case 11,125* (1996) 96 ATC 453; (1996) 33 ATR 1140.

[34] One such case is where other evidence of the intentions of the relevant actors shows that the document was brought into existence 'as a mere piece of machinery' for serving some purpose other than that of constituting the whole of the arrangement. That, in essence, is the respondent's case with respect to the alleged existence of the 'present entitlement' of the trustee of the E & M Unit Trust to the income of the Raftland Trust. [footnotes deleted]

3. Paragraph 8

Omit 'a sham and'.

4. Paragraph 10

Omit 'not to be a sham'; substitute 'to have legal effect'.

5. Paragraph 15

Omit 'not a sham'; substitute 'having legal effect'.

6. Case references

Insert:

- Raftland Pty Ltd as trustee of the Raftland Trust v. Commissioner of Taxation [2008] HCA 21

7. Other references

Insert:

- Decision Impact Statement B39/2007: Raftland Pty Ltd as trustee of the Raftland Trust v. Commissioner of Taxation

This Addendum applies on and from 22 May 2008.

Commissioner of Taxation

29 July 2009

ATO references

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ATOlaw topic: Income Tax ~~ Tax integrity measures ~~ schemes