

TA 2007/2 - Employee Entitlement Fund



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Taxpayer Alert

TA 2007/2

FOI status: may be released

Taxpayer Alerts are intended to be an 'early warning' of significant new and emerging higher risk tax planning issues or arrangements that the Tax Office has under risk assessment.

Taxpayer Alerts will 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 Tax Office has under risk assessment will be 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 Tax Office.

Taxpayer Alerts will give the title of the issue (which may be a scheme, arrangement or particular transaction), briefly describe the issue and will highlight the features which the Tax Office considers give rise to taxation issues. These issues will generally require more detailed analysis to provide the Tax Office 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. (It should be noted 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 Alert and/or obtain their own advice.

This Taxpayer Alert is issued under the authority of the Commissioner.

TITLE: Employee Entitlement Fund

This Taxpayer Alert describes an arrangement where an employer seeks to obtain a deduction for contributions purportedly made to an Employee Entitlement Fund (entitlement fund) on the basis that the contributions are to meet entitlements that may arise in the future for employees. The entitlement fund is established for that employer, in Australia or in a foreign country, and is controlled by those who market the arrangement. The contributed funds may be returned to the employer, or put under the employer's control, via associates.

DESCRIPTION

The Alert applies to arrangements having the following features:

1. The employer agrees to participate in a domestic or offshore entitlement fund, controlled by a trustee associated with those who market the arrangement.
2. The employer purportedly pays contributions to the entitlement fund on the basis that the contributions are to be set aside to meet entitlements that may arise in the future for employees.
3. The arrangement may be marketed with the claim that the contributions are financed through a promissory note or loan, or that there may be cash or in-specie payments.
4. The entitlement fund purportedly invests the contributions on behalf of the employees, or their nominees, for the purpose of meeting entitlements that may arise in the future.
5. The arrangement may be marketed with the claim that the contributions to the entitlement fund are to be invested in tax-free offshore life insurance bonds. In practice an employer's contribution may be returned to the employer via associates.

FEATURES WHICH THE TAX OFFICE CONSIDERS GIVE RISE TO TAXATION ISSUES

The Tax Office considers that the arrangements outlined above give rise to taxation issues which include whether:

- (a) any legal relations purportedly created reflect the intentions of the parties entering into any and all parts of the arrangement(s);
- (b) amounts said to be for the cost of establishing and running the entitlement fund, interest claimed in respect of any purported borrowings to fund contributions and the contributions to the entitlement fund are deductible to the employer under section 8-1 of the *Income Tax Assessment Act 1997*;
- (c) the funds committed to the arrangement are commensurate with the income tax deductions claimed;
- (d) arm's length employees are provided for under these arrangements;
- (e) the general anti-avoidance provisions of Part IVA of the *Income Tax Assessment Act 1936* apply.

The Australian Taxation Office is examining these and similar arrangements.

<i>subject references:</i>	Employee Entitlement Fund Employee Benefit Arrangements
<i>legislative references:</i>	ITAA 1997 section 8-1 ITAA 1936 Part IVA
<i>related taxation rulings:</i>	TR 2004/3 (paragraphs 14 and 15, and 19 to 22)
<i>related practice statements:</i>	PS LA 2005/13 – Taxpayer Alerts
<i>case law:</i>	<i>Cameron Brae Pty Ltd v FCT</i> 2006 ATC 4433 <i>Walstern v FCT</i> 2003 ATC 5076 <i>Kajewski & Others v FCT</i> 2003 ATC 4375 <i>Essenbourne v FCT</i> 2002 ATC 5201 <i>Spotlight Stores Pty Ltd & Ano v FCT</i> 2004 ATC 4674
<i>related media releases:</i>	
<i>file references:</i>	
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