



TA 2008/11 - Land Impairment Trust Arrangement

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Taxpayer Alert

TA 2008/11

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 Australian Taxation Office has under risk assessment, or where there are recurrences of arrangements that have been previously risk assessed.

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 tax planning issues. Not all potential tax planning issues that the Tax Office 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 Tax Office. In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.

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 are of concern to the Tax Office. 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 Tax Office'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.

TITLE: LAND IMPAIRMENT TRUST ARRANGEMENT

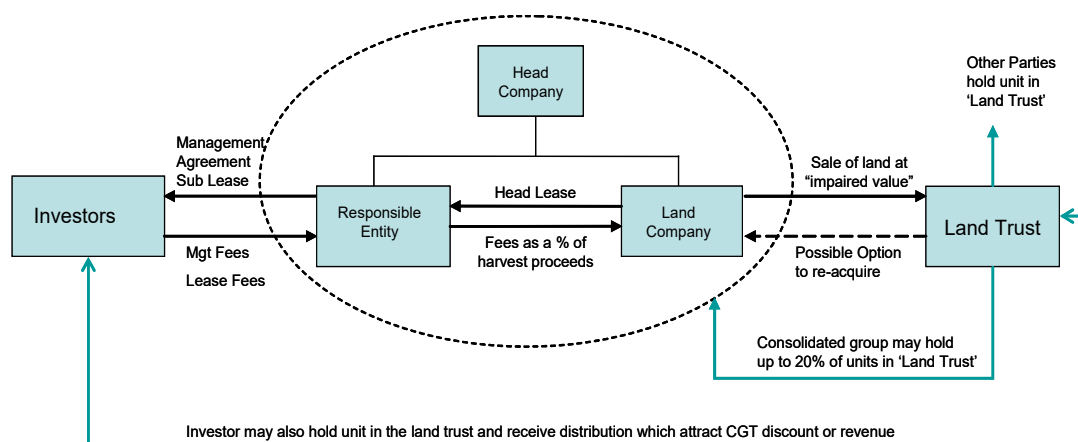
This Taxpayer Alert describes land impairment trust arrangements associated with forestry managed investment schemes (MIS). These arrangements involve the sale of land at an impaired value by a member of a group of entities that are treated as a consolidated group for income tax purposes (the group).

DESCRIPTION

The alert applies to arrangements having the following features:

1. A forestry MIS arrangement is associated with a land trust arrangement.

2. A land company within the group owns (or acquires) the land and grants a head-lease to the responsible entity (also within the group) for the land to be used in the forestry MIS.
3. The responsible entity grants a sub-lease over the land to the investors in the forestry MIS.
4. The fees payable under both the head-lease and sub-lease are usually set as a proportion of the value of distributions to be made at the end of the MIS arrangements, payable from the harvest proceeds.
5. As soon as the forestry MIS arrangement begins, the land is immediately sold by the land company to a land trust which sits outside the group.
6. This sale is said to give rise to a loss as the value of the land is impaired by the lease fees payable being lower than market value for the duration of the lease (usually more than 10 years).
7. The trustee for the land trust may be a member of the group or an associate of such a member.
8. Entities that are members of the group may hold some of the units in the land trust, frequently up to 20%.
9. The unit-holders in the land trust usually also include some or all of the investors in the forestry MIS and associates of members of the group, such as employees.
10. There may also be an option for the land company to re-acquire the land from the land trust.
11. The basic structure of the arrangement can be summarised diagrammatically as follows:



FEATURES WHICH CONCERN US

Depending upon the individual facts and circumstances, the Tax Office considers that arrangements that have the above features may give rise to taxation issues including whether:

- (a) the sale of land by the land company to the land trust is at an impaired value and, if so, whether it gives rise to a revenue or capital loss
- (b) the distributions from the land trust to unit holders (these may include growers, the forestry manager or other entities) should have a capital or revenue character
- (c) the proceeds from disposal of the units in the land trust by unit-holders should have a capital or revenue character
- (d) the forestry MIS arrangement will meet the requirements of Division 394 of the *Income Tax Assessment Act 1997* (particularly the 70% direct forestry expenditure test)
- (e) the potential application of the general anti-avoidance rule in Part IVA of the *Income Tax*

- Assessment Act 1936 to cancel a tax benefit arising from a scheme involving some or all of the transactions in this arrangement, and
- (f) whether any entity involved in the arrangement is a promoter of a tax exploitation scheme for the purposes of Division 290 of Schedule 1 to the *Taxation Administration Act 1953*.

The Australian Taxation Office is examining these arrangements.

Note 1: Where a taxpayer is an entity covered by the defined class of entities in a current forestry MIS product ruling then the tax implications outlined in the ruling will apply, provided that the forestry MIS arrangement is implemented in accordance with that ruling. Specifically, that entity's entitlement to deductions under section 8-1 of the Income Tax Assessment Act 1997 will not be affected by their entry into the land trust arrangement. However, the taxation consequences of distributions from these land trust arrangements are not covered by such product rulings.

Note 2: Penalties of up to 50% of the tax avoided may be imposed where Part IVA of the Income Tax Assessment Act 1936 applies. Base penalties for intentional disregard of the tax law are imposed at 75% of the tax avoided. Reductions in base penalty may be available if the taxpayer makes a voluntary disclosure to the Tax Office. If you have any information about the current arrangement, phone us on 1800 060 062. Tax agents wanting to provide information about people or companies who may be promoting arrangements covered by this Alert should call 13 72 68 (Fast Key Code 3 4).

Note 3: 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 4: 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 5: The Commissioner may amend an assessment at any time where he is of the opinion there has been fraud or evasion.

Amendment history

| Date | Comment |
|------------------|--|
| 3 May 2024 | Updated Tax Agent tip off hotline number |
| 20 February 2024 | Updated ATO tip-off hotline numbers |

subject references: forestry managed investment schemes, managed investment schemes, land impairment, land impairment trust, valuation of land, direct forestry expenditure, Division 394 deduction, forestry deductions

legislative references:

Division 394 of *Income Tax Assessment Act 1997*
Section 8-1 of *Income Tax Assessment Act 1997*
Part IVA of the Income Tax Assessment Act 1936
Division 290 of Schedule 1 to the *Taxation Administration Act 1953*

related taxpayer alerts:

related media releases:

file references:

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| Date issued: | 6 June 2008 |
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