TA 2008/20 - Foreign residents exploiting asset valuations to avoid capital gains tax

Australian Government
Australian Taxation Office

Taxpayer Alert TA 2008/20

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 higher risk 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 In these latter cases the Taxpayer Alert will be withdrawn and a notification published which will be referenced to that Taxpayer Alert.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 **Foreign residents exploiting asset valuations to avoid capital gains tax**

This Taxpayer Alert describes certain arrangements where foreign residents seek to avoid capital gains tax from the indirect disposal of Australian real property under Division 855 of the *Income Tax Assessment Act 1997* (ITAA 1997), circumventing the principal asset test by exploiting the valuation of non-taxable Australian real property assets (non-TARP).

Description

The alert applies to arrangements where foreign residents exploit the calculation of the market values of non-TARP assets to exceed the 50% threshold in the principal asset test when determining if they have an indirect real property interest under section 855-25.

These arrangements include the following characteristics:

1. A foreign resident vendor with an existing interest of greater than 10% in Australian real property held indirectly through a chain of interposed entities intends to dispose of some or all of that interest.

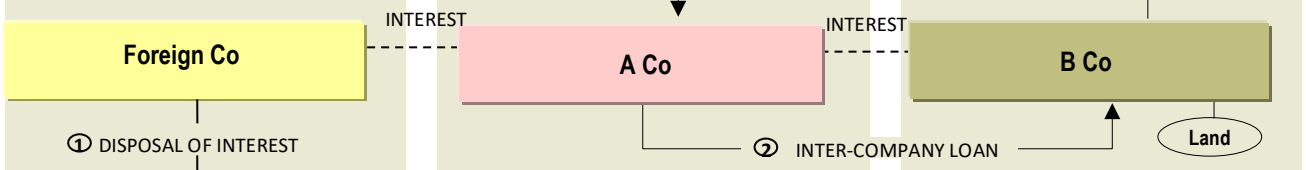
2. Prior to the disposal, the vendor attempts to change the ratio of TARP to non-TARP assets through strategies such as:

   (i) injecting non-TARP assets into the Australian entities (or those higher in the ownership chain) by:
      (a) the intermediate holding entity (test entity) investing in Redeemable Preference Shares (RPS), issued by its Australian subsidiary, which directly holds the real property,
      (b) the test entity obtaining a loan from a 3rd party and on-lending the amount to its subsidiary
      (c) an inter-company loan (arguing that both the assets injected and the inter-company asset may be counted in calculating the ratio of TARP to non-TARP assets).

   (ii) selective valuation of TARP and non-TARP assets, in circumstances where such valuations are within the control of the vendor and could be carried out on a full market value basis.

3. If the market value of TARP assets does not exceed the market value of non-TARP assets, the foreign resident vendor argues that it does not pass the principal asset test, resulting in the interest disposal in the test entity being disregarded.

Example



1

Foreign Co wishes to dispose of its interest in **A Co** without being liable to capital gains tax.
Foreign Co is liable to capital gains tax if **A Co** TARP assets market value exceeds the market value of its non-TARP assets.
Foreign Co's subsidiary (B Co) owns land ($200).

2

A Co takes out a 3rd party loan ($100) and lends it to **B Co** (inter-company loan)

- **B Co** accounts for the loan as cash ($100)
- **A Co** also accounts for the loan as Inter-company loan ($100)

A Co Assets

TARP	
B Co TARP (Land)	$200
Non-TARP	
B Co non-TARP	$150
I/C Loan	$100
Investment in RPS	$50
	$300

3

B Co issues Redeemable Preference Shares ($50) which are subscribed by **A Co**.

- **B Co** accounts for the shares as non-TARP assets (Receivable)
- **A Co** also accounts for the shares as non-TARP assets (Investments)

B Co Assets

TARP	
Land	$200
Non-TARP	
Receivable (RPS)	$50
Cash	$100
	$150

4

The market value of **A Co's** non-TARP assets are now counted as comprising: **B Co's** non-TARP assets ($150) plus the inter-company loan ($100) plus the investment in shares subscribed from **B Co** ($50) which sums to $300 and exceeds the TARP assets market value.

Features which concern us

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

(a) the arrangement, or any transaction within it, may be a sham at general law

(b) any amounts from the disposal must be included in the assessable income of the foreign resident vendor under section 6-10 of the ITAA 1997

(c) the market value of any TARP or non-TARP asset should be used in calculating whether the principal asset test in section 855-30 has been met

(d) the operation of the integrity provision in subsection 855-30(5) of the ITAA 1997 prevents the injection of assets if done for the purpose of circumventing the principal asset test

(e) any transaction may be subject to the transfer pricing provisions contained in Division 13 of the *Income Tax Assessment Act 1936* (ITAA 1936)

(f) any articles in applicable tax treaties between Australia and a relevant country may apply, especially:
  (a) the income from real property article (where applicable),
  (b) the business profits article (where applicable),
  (c) the associated enterprises article (where applicable), or
  (d) the alienation of property article (where applicable)

(g) the general anti-avoidance rule contained in Part IVA of the ITAA 1936 may be applied to cancel any tax benefit under all, or some part, of the arrangement, and

(h) any entity involved in the arrangement may be a promoter of a tax exploitation scheme for the purposes of Division 290 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953).

The Tax Office is currently reviewing these arrangements.

***Note 1**: If you have received a private ruling in respect of your arrangement, please check that the application of Part IVA of the Income Tax Assessment Act 1936 is considered in that ruling. The applicant may not have sought for us to rule on the application of Part IVA to the arrangement ruled upon, or to an associated or wider arrangement of which that arrangement is part. If you want us to rule on whether Part IVA applies to your arrangement, we will first need to obtain and consider all the relevant facts about the arrangement, including (if relevant) the manner in which it has actually been implemented.*

***Note 2**: Base penalties of up to 50% of the tax avoided can apply where Part IVA is applied. Base penalties of up to 75% of the tax avoided can apply where you make a false and misleading statement to the Commissioner. Reductions in base penalty will 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**: 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 4**: Where appropriate, section 167 of the Income Tax Assessment Act 1936 (ITAA 1936) may be used to determine the amount of taxable income upon which the taxpayer should be assessed, see Law Administration Practice Statements, PSLA 2007/7 and PSLA 2007/24.*

***Note 5**: A registered tax agent may have their registration cancelled or suspended by the Tax Agents' Board under section 251K of the Income Tax Assessment Act 1936 if they are guilty of misconduct as a tax agent or are not considered a fit and proper person to prepare income tax returns. A person under a sentence of imprisonment for a serious taxation offence is not a fit and proper person.*

Amendment history

Date	Comment
19 January 2024	Updated ATO tip-off hotline numbers

Subject References:
Aggressive tax planning
Part IVA
Capital gains tax
Arrangement
Foreign resident vendor
Australian real property
Promoters
Valuations

Legislative References:
Income Tax Assessment Act 1997
Division 855
Income Tax Assessment Act 1936
Part IVA
Taxation Administration Act 1953
Schedule 1 Div 290

Related Practice Statements:
PS LA 2008/15 - Taxpayer Alerts

Date issued:	**Stephanie Martin**
Authorised by:	Deputy Commissioner, Aggressive Tax Planning
Contact Officer:	**Bruce Collins**
Business Line:	Aggressive Tax Planning
Section:	Technical and Case Leadership
Phone:	(02) 6216 2710