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QC 100174

Areas of focus – financial products

How to review materials to know the tax treatment of financial products before investing.

Last updated 13 September 2016

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Managing tax uncertainty

Investors should carefully review any materials, such as product disclosure statements, that describe the tax treatment of financial products before deciding whether to invest in the product.

The majority of financial products offered to retail investors are simple and do not concern us. However, we have had concerns with a small number of products that promise to provide investors with tax benefits where those benefits may not be available to some or all investors who invest in the product.

Issues that concern us include advice that:

- suggests investors draw certain conclusions about positive tax outcomes from investing in certain products that most taxpayers would not receive in their individual circumstances – for example, statements like 'generally, deductions will be available, however for certain taxpayers a deduction will not be available'
- includes inappropriate caveats, such as when discussing the possible application of the anti-avoidance provisions to the arrangement, stating that 'no economic alternative to this transaction exists' – simply making this comment does not make it true, as many investments offer economic benefits that could be delivered in a variety of other ways.

We recommend that investors seek independent tax or legal advice about the tax consequences of investing in complex financial products from an adviser who is not involved in selling the product. Such tax advice should be separate from advice from a licensed financial planner about the benefits or risks of making the investment. Advice may include whether we have issued an ATO product ruling that states that a tax benefit is available.

Whether interest and borrowing costs can be claimed as a tax deduction

We have come across issues about the correct treatment of certain financial products and product features. An important question for such products is whether investors can claim tax deductions for

interest and borrowing costs that they have incurred in order to fund their investment. Investors should not assume that they will be entitled to claim such expenses, even if the issuer of the product suggests that the costs are deductible for all or some investors – this is especially the case where the arrangement is highly complex and is not covered by an ATO product ruling that would provide certainty about the tax outcomes.

Depending on the investment product, there are several possible tax outcomes which depend upon the relevant product and its features. These tax outcomes include:

- The investment is subject to capital gains tax (CGT) – interest and borrowing expenses will be included in the cost base of the investment and, as a result, the interest incurred cannot be deducted. If that is the outcome then the interest and borrowing expenses will reduce any capital gain that arises when the investment matures.
- The investment is subject to both CGT and income tax under the ordinary rules. Dividends, distributions, coupons or any other income received during the life of the investment are subject to income tax under the ordinary rules, and any gain at maturity is subject to CGT. Deductions for interest or borrowing expenses may be limited to the amount of income received each year, especially where it can be shown that an investor could not reasonably expect to receive income (over the life of their investment) that exceeds the expenses incurred.
- An investment in a longer-term financial product that involves a profit-making scheme should be accounted for at maturity on a net basis as a profit-making scheme or undertaking. Investors in such products do not account for amounts that are received or paid during the life of their investment – instead, these amounts are netted off against one another when the investment ends. If amounts received are greater than amounts paid, then this amount will be reported as taxable income on the investor's tax return. If amounts received are less than amounts paid, then this amount can be deducted on the investor's tax return.
- An investment that generates income in excess of outgoings, or is reasonably expected to do so, means that interest and borrowing costs are fully deductible on revenue account in the relevant income year.

Deferred purchase agreements

A deferred purchase agreement (DPA) is an agreement where an investor agrees to purchase an asset (usually shares) at a future point in time. This is called the deliverable asset. The value of that asset at that future point in time is calculated by reference to another asset called a reference asset. An example reference asset is the ASX 200 index.

Certain DPA features may impact on the tax treatment of specific DPA products and arrangements if it is an attempt to exploit the revenue/capital distinction. Such features provide an indication – and may therefore support a conclusion – that an investment in such product will be accounted for as either a:

- capital investment and subject to CGT
- revenue investment and taxed accordingly.

Investors in DPAs that contain certain features that concern us may be subject to general anti-avoidance provisions in the tax laws.

Examples of the features in question

Capital gains tax (CGT)

Features that indicate that an investment in a DPA is subject to CGT are:

- The payment of distributions (coupons) where the coupon appears simply to be a return of an investor's initial investment – such as where the investment itself does not appear capable of generating any periodic return, even though coupon payments are guaranteed to be made to the investor.
- The remote possibility of investors receiving contingent coupons – especially when coupons are theoretically generated by extremely risky investments that are never likely to be realised – in order to attempt to justify deductions for interest and borrowing costs.
- Guaranteed coupon payments that are less than the interest that is paid by an investor in order to fund their investment. The question is whether interest on such products can only be deducted up to the amount of coupons that are paid to the investor.

For information about other features indicating a DPA is subject to CGT, see TD 2008/22 *Income tax: capital gains: does CGT event C2*

happen as a result of the satisfaction of an investor's rights under a Deferred Purchase Agreement warrant, an investment product offered by financial institutions, by the delivery of the Delivery Assets?

Revenue asset

A feature that indicates that an investment is a DPA should be accounted for as a revenue asset is that the DPA has a term that is equal to or less than 12 months.

Anti-avoidance rules

DPA features of concern that may result in anti-avoidance rules applying to cancel tax benefits for investors are:

- reference assets that are the same as delivery assets – where such assets are shares that are expected to pay dividends – if this feature is designed to support an argument that the investment in the DPA is on revenue account
- coupon payments that appear to be a return of an investor's capital – such as where the underlying investment does not appear capable of generating any income, even though coupon payments are guaranteed. This feature would be a concern when it is concluded that its sole purpose is to support an argument that the investment is held on revenue account.
- the possibility of receiving contingent coupons, particularly when coupons are generated by extremely risky investments, and it is concluded that its sole purpose is to support an argument that the investment is held on revenue account
- for compulsory loans (limited or full recourse), whether the interest expense on such products can be deducted, particularly where the DPA in question also contains any of the above features
- whether the tax treatment of a DPA changes depending on the type of reference assets that determine the investor's return – again, on the basis that a change in reference assets is used to support a view that the DPA is held on revenue account. In all such cases, concerns arise when the investor would ordinarily hold a DPA that did not contain the feature, or features of concern, on capital account.

Commoditised products

Another area of focus is certain types of investments that would ordinarily be subject to CGT being bundled up in an investment structure using a trust in order to change the tax treatment of the investment. An example of such arrangements would be an investment in a unit trust where the trust itself invests in options.

For an ordinary investor, an investment in options will be subject to CGT. We have concerns when an issuer bundles up an investment in options into a unit trust and argues that the investment is on revenue account.

These products concern us because an investment in such products is often financed from borrowed funds. This gives rise to questions about whether interest and borrowing costs that an investor incurs to invest in such products are deductible or not, as well as potential application of the anti-avoidance rules of the tax law.

Products designed to circumvent franking credit trading provisions

We have had concerns about a small number of products and product features that appear to be designed to provide investors with the benefit of franking credits. The features of such products indicate that there is more than a merely incidental purpose of enabling the investor to obtain the benefit of franking credits from their investment. Specific concerns include:

- features (and products) that are structured to meet the minimum requirements of the holding period rules, yet otherwise affect (or change) an investor's risk of loss or opportunity for gain
- features where an investor transfers (including by way of a swap) their return on the equity interest that they hold and which generated the imputation benefit for a return that is based on a different (possibly non-equity) investment.

Investors are entitled to franking credits where they are exposed to a sufficient risk of loss or opportunities for gain when they invest in shares, as franking credits are generated from at-risk investments in equity. However, when taxpayers have invested in products that are specifically designed to reduce that risk, or when the investor has a more than incidental purpose of gaining the benefit of franking credits when they invest in a financial product, then franking credits may not be available under the law. In such circumstances the Commissioner of

Taxation can cancel such franking credits under the anti-avoidance rules.

We have issued a taxpayer alert about these sorts of arrangements – TA 2012/3 *Structured financial products that exploit franking credits and other tax benefits*.

Tax treatment of early exit or walk away features and product failures

Certain tax issues may arise where a financial product fails, is wound up prematurely, or an investor withdraws their investment before maturity. Many tax benefits that are available to investors in financial products arise because an investor's purpose of investing in such products is to hold their investment until maturity. However, where this purpose is not present, such tax benefits (such as deductions for interest) that investors believe they are entitled to may not be available. Examples include when:

- a product has been designed with the objective intention of it being wound up before maturity. If an investor did not have a purpose of holding their investment till maturity, then the relevant tax benefits may no longer be available under either the ordinary tax law provisions or the anti-avoidance rules.
- an issuer fails to undertake critical steps or transactions in implementing a product. If it is clear that these steps or transactions have not been undertaken, then the relevant tax benefits may not be available under either the ordinary tax law or the anti-avoidance rules.

These situations should be contrasted with those where an investment product fails because of the insolvency of an entity responsible for implementing the product.

Capital protected and capital guaranteed financial products that use notional finance

In some cases, advisers and product manufacturers may have encouraged retail investors to claim tax deductions on internally geared products that do not have an ATO product ruling. When the

main economic rationale for a product or product feature appears to be tax deductibility, there is a risk that we may view the product as a tax avoidance scheme, particularly if investors could achieve a similar benefit (apart from the tax deduction) by purchasing other financial instruments such as call options.

On 1 May 2013, the Australian Securities & Investment Commission (ASIC) released its Report 340 *'Capital protected' and 'capital guaranteed' retail structured products*. We share the concerns ASIC has raised in this report and state that tax deductions may not be available for investors who invest in certain products referred to in the report.

An example of these concerns is capital guaranteed products that are bundled together with a notional loan where it is argued that the investment is funded from this notional loan. Potential risks arise in products where it appears no actual finance or financial accommodation is provided to investors who invest in these products. In these cases, deductions may not be available for the notional interest expense that the investor has incurred in order to invest in such products. Such expenses would form part of the cost base of the investment.

Investors in products that promote the availability of tax benefits of the type referred to above should ask the product issuer, or the entity who is marketing the product, whether the ATO has issued a product ruling that states that the tax benefit in question is available. If no such ruling has been obtained then an investor should consider whether the investment in question is suitable for their needs.

Implementation issues

We have had concerns about certain financial products that appear to have been implemented in a manner that is inconsistent with relevant documentation, including product disclosure statements where these are required by law. Examples include arrangements:

- where the substance of the transaction differs from its legal form
- that are accounted for in a manner that is inconsistent with transaction documents.

Where arrangements are not implemented in a manner that is consistent with relevant documentation, or are implemented incorrectly, issues that will arise include whether:

- the tax benefits that the product promised to investors are available at law
- all, or part, of the purported arrangements or transactions are a sham
- promoter penalty law applies to entities that promoted the arrangement where the tax benefits are not reasonably arguable under the law
- promoter penalty law applies to entities involved in implementing an arrangement that is marketed on the basis of conformance with an ATO product ruling even though the arrangement is materially different to that described in the product ruling.

QC 26266

Employee benefit arrangements of concern

The employee benefit arrangements designed to avoid tax that we're concerned about.

Last updated 2 July 2025

On this page

Names of employer benefit arrangements

Employee benefit arrangements may also be called a number of names, including:

- employee bonus arrangements
- employee share trusts
- employee investment trust/plans
- employee incentive trust/plans
- employee savings plans
- employee entitlement funds
- employee reward schemes.

They do **not** include:

- complying employee share schemes, which are covered by former Division 13A of the *Income Tax Assessment Act 1936* or Division 83A of the *Income Tax Assessment Act 1997*
- employer contributions to complying super funds
- **approved worker entitlement funds** (an endorsed approved worker entitlement fund or entity is registered on the Australian Business Registrar).

Employee benefit trust arrangements

A typical employee benefits trust arrangement has the following features:

- An employer entity sets up an employee benefits trust.
- The employee may enter into an agreement to direct salary to be paid to the trust.
- The entity contributes to the trust for employees or other people nominated by the employees. Often this contribution is financed through a loan or overdraft.
- The trust invests these contributions on behalf of the employees or their nominees, often by loaning an amount equal to the contributions back to the employer entity or an associate of the employer entity or purchasing shares in the employer or associated entities.

- A selected employee or person may be invited to acquire an interest (for example, by taking up ordinary units) in the trust. This is generally financed by money borrowed from the trust.
- The holders of ordinary units are generally entitled to distributions of income in proportion to their holding.

Our concerns with employee benefit trusts

These arrangements are designed to defer or avoid tax on the employer company's profits. They are structured to purportedly provide a large tax deduction to the employer and avoid fringe benefits tax liability.

Our concerns are:

- the deduction claimed under section 8-1 of the *Income Tax Assessment Act 1997* for the contribution to the trust may be disallowed
- Part IVA of the *Income Tax Assessment Act 1936* may apply to cancel the deduction
- the amount contributed on behalf of employees may be assessable to the employee under section 6-5 of the *Income Tax Assessment Act 1997*
- Part IVA of the *Income Tax Assessment Act 1936* may apply to include the income that has been directed by the employee, as assessable income in the same income year the contribution is made to the trust
- where the contribution is made to benefit a specific employee, fringe benefit tax may be payable on the employer's contribution
- fringe benefits tax may apply to loans provided by the trustee of the employee benefits trust.

Employee share or incentive plans

An employee share or incentive plan scheme has the following characteristics:

- The employer entity establishes a special purpose company.

- Shares or membership interests are allocated to selected employees for a nominal amount in the special purpose company.
- The employer contributes a sum of money to the special purpose company, increasing the value of the employees' shares or membership interests.
- The special purpose company invests the contribution amounts on behalf of the employees, often lending the contribution back to the employer entity or their associate.
- Employee share or incentive arrangements are designed to provide the employer with an effective incentive plan for employees. However, the only employees who generally participate in such plans are the controllers of the employer's business.

Our concerns with employee share or incentive plans

These arrangements are designed to defer or avoid tax on the employer company's profits. They are structured to purportedly provide a large tax deduction to the employer and avoid a fringe benefits tax liability.

Our concerns are:

- the deduction claimed under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the contribution to the company may be disallowed
- Part IVA of the *Income Tax Assessment Act 1936* may apply to cancel the deduction
- the amount contributed on behalf of employees may be assessable to the employee under section 6-5 of the *Income Tax Assessment Act 1997*
- Part IVA of the *Income Tax Assessment Act 1936* may apply to include the income that has been directed by the employee, as assessable income in the same income year the contribution is made to the trust
- where the contribution is made to benefit a specific employee, fringe benefit tax may be payable on the employer's contribution

- the deduction claimed under section 8-1 of the *Income Tax Assessment Act 1997* in respect of the value of the employer entity's contribution to the special purpose company may be disallowed
- deductions under section 8-1 of *Income Tax Assessment Act 1997* for adviser's fees may not be allowable.

Employee remuneration trusts

An employee remuneration trust (ERT) is an arrangement that has the following essential elements:

- it is established by an employer or an adviser of the employer for the purpose of providing remuneration or incentives to Australian resident employees
- it involves the establishment of a trust by or at the instruction of the employer
- the trustee of the trust
  - receives money or assets from the employer (or the employer's associate)
  - provides benefits to the employees (or their associates).

Our concerns with ERTs

In Taxation Ruling **TR 2018/7** *Income tax: employee remuneration trusts* we have established the view of the tax treatment of ERTs which will depend on the way the arrangement is implemented.

- If you are an employer, contributions you make to the trustee of an ERT are generally deductible if you have a genuine purpose for it being applied within a relatively short period towards remunerating employees (to the extent that the contribution is not capital or of a capital nature).
- As an employer, if you made a contribution to an ERT at the direction of, or on behalf of, your employee and that contribution is remuneration, you are required to withhold an amount from the contribution as a pay as you go withholding amount.
- Fringe benefits tax can apply to contributions made by an employer to the trustee of an ERT, to benefits provided by the trustee of the

ERT and on loans provided by the trustee of the ERT to employees.

- Ongoing maintenance and management fees for running an ERT may be deductible.
- If you are an employee and you receive a benefit from the ERT, the benefit will be assessable to you if it is your remuneration and is not a fringe benefit. In some cases, a contribution may be made on your behalf to the trustee of an ERT as part of your remuneration (and not as a fringe benefit) – in these cases, that contribution will be assessable to you.

If a contribution is made by an employer to a trustee of an ERT, and that trustee is already a shareholder of the employer, the contribution may in some circumstances be deemed to be a dividend.

Tax consequences for an employer

As an employer, you should consider:

- your intention when making a contribution to an ERT
- your understanding of how it will be used by the trustee of the ERT.

Deductibility of contributions to an ERT

The following checklists will help you decide whether a contribution made to the trustee of an ERT is deductible.

Indicators that a contribution is deductible are that you:

- carry on a business
- make a contribution to the trustee of the ERT
- understand that the trustee of the ERT intends to use your payment to provide benefits directly to employees over a short period of time as a reward for their work.

Indicators that a contribution is **not** deductible are that:

- you are not carrying on a business or you don't have any employees
- you make a contribution to the trustee of an ERT and the people who are most likely to benefit from that contribution are the business owners, controllers or shareholders, not employees
- you understand that the trustee of the ERT is going to hold your contribution for a significant period of time (in excess of five years)

before applying it to pay employees, if at all

- your contribution is going to be used primarily to provide loans or financing to your employees that will remain outstanding for a significant period of time (in excess of five years)
- your contribution is going to be used by the trust to buy the business' shares, options or other interests in the business without those interests then being transferred within a short period of time (within five years) to employees to hold for their own benefit
- your contribution is not going to be used to provide benefits to your employees as a reward for their work.

Purpose of making a contribution

Sometimes you will contribute money to an ERT and you understand and intend that the money will be used by the trustee of the ERT to do more than one thing. The trustee of the ERT may use the contribution to:

- make loans or provide other finance to your employees (financial advantage) and/or for the trustee of an ERT to acquire shares, options or securities in you (capital advantage)
- provide direct remuneration to your employees.

Where this is the case, the contribution will only be deductible to the extent it is used primarily to pay employees a reward for the work they have done or will do for you. The contribution should be apportioned on a fair and reasonable basis.

You may be entitled to a deduction even where you obtain a financial or capital advantage if your main purpose in making a contribution is to pay employees a reward for their work within a relatively short period, for example, if:

- contributions made to the ERT can be lent to your employees, but when the loan is repaid the funds are to be used to remunerate those employees, all within a relatively short period (generally within five years) from when the contribution was made
- any shares in you (as the employer company) acquired by the trustee of the ERT are to be transferred to your employees within a relatively short period, to be held by them.

Other benefits

Fringe benefits tax may apply to benefits that are provided by the trustee of an ERT to your employees. This may occur where the trustee of the ERT delivers non-cash benefits to the employee. For example, benefits such as shares in a company or units in a trust are provided to the employee in respect of employment.

Fringe benefits tax will apply where you, as an employer, pays amounts which have been salary sacrificed by an employee to the ERT as repayments of principal on an interest-free loan.

PAYG withholding

Where a contribution is made by you as an employer to the trustee of an ERT, you will be required to withhold an amount from that contribution where the contribution constitutes remuneration that is paid to an employee, or is applied or dealt with on the employee's behalf or as the employee directs. For more information, see PAYG withholding.

Interest expenses

If you are an employer and a contribution to an ERT is deductible to you, you are also likely to be entitled to a deduction for interest expenses incurred on borrowings to fund that contribution.

Your purpose in borrowing is the key factor in determining whether a deduction is allowable for the interest expense incurred regarding that borrowing. This purpose will be determined on an objective basis in consideration of all the facts of your particular case.

Taxation Ruling IT 2606 *Income tax: deduction for interest on borrowings to fund share acquisitions* provides guidance about what you need to consider when determining whether your interest expense is deductible to you. IT 2606 states that you need to consider whether there is a connection between the interest expense and the activities of your business or the earning of assessable income.

You may need to apportion your interest expense in line with Taxation Ruling TR 95/33 *Income tax: subsection 51(1) – relevance of subjective purpose, motive or intention in determining the deductibility of losses and outgoings* where your interest expense is much greater than the assessable income you earn in relation to that expense. This will be relevant where the interest expense is explained by reference to a purpose other than to earn assessable income.

Establishment fees

As an employer, you may need to pay fees to establish the ERT arrangement. These fees may be calculated according to a percentage of the contribution amount that is made to the ERT. These are usually paid to set up and establish the ERT arrangement. These fees are considered to be capital in nature and not deductible to you.

Ongoing maintenance fees

As an employer, ongoing maintenance and management fees that you incur in the upkeep of the ERT arrangement may be deductible to you.

These fees usually have the following features:

- smaller than the establishment fees
- set fees, calculated in relation to the services provided and not to the contribution size that you make to the ERT arrangement
- usually in respect of management or administration of the trust
- payable by you periodically – that is, annually, monthly.

Taxpayer alerts

You should check to see whether your employee benefit arrangement has features which are subject to a taxpayer alert. Taxpayer alerts are intended to be an early warning of our concerns about significant or emerging aggressive tax planning issues or arrangements.

Relevant taxpayer alerts include:

- TA 2007/2 *Employee Entitlement Fund*
- TA 2008/13 *Employee Savings Plan*
- TA 2008/14 *Salary Deferral Arrangements*
- TA 2009/18 *Discretionary Option Arrangement*
- TA 2011/5 *FBT Avoidance through an arrangement where an employer repays an employee's loan from a purported employee share trust*

More information

If you need more information about employee benefit arrangements, you can:

- speak to your tax adviser

- phone us on **1800 060 062**
- write to us at:
  Australian Taxation Office
  Locked Bag 9000
  ALBURY NSW 2640

You can also apply to us for a private ruling by:

- visiting Applying for a private ruling
- phoning us on **1800 060 062**.

QC 50095

Agribusiness managed investment schemes

Find out about identifying and managing issues related to agribusiness managed investment schemes.

Last updated 13 September 2016

Managed investment schemes (MIS) are generally mass-marketed arrangements for investment in primary industry.

Arrangements usually relate to activities such as forestry, agriculture, horticulture and aquaculture and are for a fixed number of years depending on the nature of the activity.

While fee structures for MIS vary, often the investor pays an upfront fee for initial services and may also pay for ongoing services in later years. The upfront fee is typically a large amount and may be financed by a loan, sometimes offered by the MIS provider or a related entity.

While many MIS arrangements don't constitute a tax scheme, investors should be careful if the arrangement doesn't have an ATO product ruling confirming the intended tax benefits.

Even if a ruling has been issued, it's important to be aware that having a product ruling isn't a guarantee of commercial success and that the ATO may withdraw or amend it.

This could happen if something changes in the way the arrangement is carried out or the arrangement is terminated or wound up early. In this situation, the promised tax benefits may no longer be available.

See also

- Collapse and restructure of agribusiness managed investment schemes

QC 50096

Lump sum payments received by healthcare practitioners

See how to fix common mistakes if you're a healthcare practitioner receiving a lump sum payment from a medical centre.

Last updated 2 July 2025

On this page

If you are a healthcare practitioner (such as a doctor, dentist, physical therapist, radiologist or pharmacist) and you get a lump sum payment from a healthcare centre operator, it's probably not a capital gain. It's more likely to be ordinary income.

Most healthcare practitioners try to do the right thing and pay the correct amount of tax. We want to help you by providing guidance on what to look out for and where to go for help.

Lump sum arrangements

In the healthcare services industry, it is now common for some practitioners to operate from healthcare centres run by third parties. This frequently occurs without any stated partnership or employment relationship between the third party and the practitioner.

The third parties that run these centres generally encourage practitioners to start work or continue to work from their centres. They may offer lump sum payments for this purpose and there is nothing wrong with that. Our concerns relate to the tax treatment of the lump sum payments by the practitioner.

Our concerns may affect you if your arrangements have most or all of the following features:

- A healthcare centre operator provides you with fully equipped consulting rooms, administrative services, clerical staff and facilities as necessary for you to provide healthcare services. The agreements entered into typically state that there is no employment relationship between you and the operator.
- In return for these facilities and services, you are required to pay the operator an agreed percentage of the receipts for the healthcare services you provide.
- You are required to provide healthcare services from the healthcare centre for an agreed minimum period of time, minimum weekly working hours and working patterns.
- You are required to use your best endeavours to grow and promote the interests of the healthcare centre.
- The operator pays you a lump sum payment. The payment is:
  - described as being consideration for a restraint imposed, for goodwill, or for other terms or conditions, or for a combination of the three
  - ordinarily made when you enter into the agreement or start to provide healthcare services to patients from the healthcare centre (whichever is the later) or whenever the agreements relating to the provision of healthcare services are renewed.

Whilst these are common features, any other arrangements that relate to a lump sum payment for your ongoing provision of healthcare services from a medical centre may still be of concern to us.

Our concerns

We are concerned that you may treat this lump sum payment incorrectly for tax purposes.

We have seen some practitioners who have received these lump sums mistakenly treating the payments as a capital gain. They have then applied the small business CGT concessions to reduce the capital gain, in many instances reducing it to nil.

We are of the view that generally these lump sum payments are not capital receipts but are income. The lump sum will typically be ordinary income of the practitioner for providing services to their patients from the healthcare centre. The result is that practitioners are required to include the full amount of the lump sum payment in their assessable income. This is in accordance with section 6-5 of the *Income Tax Assessment Act 1997*.

We formed our view because:

- the lump sum payment is an inducement for the practitioner to enter into the agreements to provide healthcare services from the healthcare centre
- the lump sum is fundamentally connected to the practitioner's provision of those services
- in the alternative, the lump sum payment represents a profit or gain from an isolated transaction in the course of the practitioner providing healthcare services
- the mere fact the payment is a one-off lump sum, or expressed to be principally consideration for the restraint imposed, for the goodwill or for the other terms or conditions, does not define it as having the character of a capital receipt
- there is no transfer of goodwill as
  - the third party operating the healthcare centre does not acquire the right to provide healthcare services from the practitioner
  - the practitioner does not cease to provide healthcare services.

The whole of the lump sum payment is assessable as ordinary income in the hands of the practitioner.

What you need to do

If you are considering any arrangements that relate to a lump sum payment for commencing or providing ongoing healthcare services, you should note that we:

- have concerns with those payments being mistakenly treated as capital gains
- are looking closely at these arrangements to determine if they are compliant with income tax laws and whether the anti-avoidance provisions may apply.

We are aware that some practitioners are using a private ruling that was issued to another taxpayer:

- You can only rely on a private ruling if **you** applied for it.
- From 2013, we have consistently issued private rulings on these or similar arrangements treating the whole of the lump sum payment as assessable ordinary income.

What we are doing

We are working to protect practitioners from treating these payments incorrectly and facing a later tax adjustment.

If you have already treated these lump sum payments as something other than ordinary income, we are offering to help you ensure you are in, or that that you get into, the correct tax position.

We:

- will continue to identify, examine and understand the types of payment arrangements being used in the industry by further engaging with healthcare centre operators. This may include obtaining details of which practitioners have received payment from the healthcare centre operators.
- have started targeted activities and examinations of healthcare practitioners who may have incorrectly treated these lump sum payments as capital gains
- are working to provide further advice and guidance to health practitioners to help them either self-identify these and emerging arrangements that concern us, or as an early warning for those who may be considering them.

Example: A new doctor joins the practice

Dr Lee has recently been approached by Medical Centre Z, a medical centre operator, with an offer to join a well-established healthcare centre.

Medical Centre Z's offer includes the payment of a lump sum connected to an agreement where Dr Lee is required to work 40 hours a week, Monday to Friday, providing healthcare services to patients attending the medical centre.

The medical centre provides Dr Lee with the use of their facilities and all the support services needed to run the practice so she can focus solely on what she loves best, working with patients. For the use of these facilities and services, the medical centre takes a percentage of her billable receipts.

Dr Lee is unsure how this payment will be treated for tax purposes. A friend suggests that the payment is a capital gain and she would be able to apply for CGT concessions. This doesn't seem quite right to her so she decides to talk to her accountant about the payment.

Her accountant confirms her thoughts; the payment is not a capital gain as it is essentially made for her agreeing to provide her healthcare services at the medical centre. Dr Lee needs to treat the payment as ordinary income and report it and pay tax on it accordingly. Her accountant advises her that had she tried to include the payment as a capital gain she would have underpaid her tax and been exposed to tax adjustments and potential penalties.

Where to go for help

If you have entered, or are planning to enter, into an arrangement of this type we encourage you to:

- seek independent professional advice
- ask us for a private ruling about your specific circumstances
- make a voluntary disclosure if you believe our concerns apply to you, which may reduce any penalties.

QC 51513

Unit trust arrangements and unpaid present entitlements

Learn about our concerns with arrangements involving unit trusts and unpaid present entitlements under Division 7A.

Last updated 8 December 2022

On this page

Unpaid present entitlement unitisation arrangements

We currently have concerns about a number of arrangements involving unpaid present entitlements (UPEs) and unit trusts that may have implications under **Division 7A** of the *Income Tax Assessment Act 1936* (ITAA 1936).

We have identified cases where a private group seeks to extinguish unpaid present entitlements or avoid obligations under Division 7A by implementing an arrangement where a private company subscribes for units in a unit trust. The unit trust may then provide payments or loans to other entities within the private group.

These arrangements have attracted our attention, as they may give rise to various income tax consequences, such as the application of:

- Division 7A of the ITAA 1936
- Section 100A of the ITAA 1936
- Part IVA of the ITAA 1936.

Unpaid present entitlements

Division 7A may apply where there is a UPE – for example, where a private company is a beneficiary of a trust and is made presently entitled to income of the trust, but does not receive payment of the distribution.

The following arrangements or situations are attracting our attention:

- Private companies include assessable trust distributions, but do not receive payment of the distribution from the trust before the earlier of the due date for lodgment or the lodgment date of the trust's tax return for the year in which the loan was made
- A complying loan agreement has not been put in place
- Failure to put the funds on a sub-trust for the sole benefit of the private company beneficiary
- Failure to repay loans or sub-trust investments at the conclusion of the term specified in the original agreement
- Arrangements purporting to extinguish the UPE of the private company beneficiary
- Non-lodgment of returns and activity statements.

If you have entered into, or are considering, such an arrangement, we recommend you phone the ATO Tip-off hotline on **1800 060 062** to discuss the arrangement.

For more information and legal guidance, see:

- **Private company benefits – Trust entitlements**
- TR 2010/3 *Income tax: Division 7A loans: trust entitlements* (withdrawn)
- PS LA 2010/4 *Division 7A: trust entitlements* (withdrawn)
- TD 2022/11 *Income tax: Division 7A: when will an unpaid present entitlement or amount held on sub-trust become the provision of 'financial accommodation'?*
- TR 2022/4 *Income tax: section 100A reimbursement agreements*
- PCG 2022/2 *Section 100A reimbursement agreements – ATO compliance approach*.

QC 54321

Our commitment to you

We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.

If you follow our information and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we will take that into account when determining what action, if any, we should take.

Some of the information on this website applies to a specific financial year. This is clearly marked. Make sure you have the information for the right year before making decisions based on that information.

If you feel that our information does not fully cover your circumstances, or you are unsure how it applies to you, contact us or seek professional advice.

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