

ATO Crackdown Announced

A Taxpayer Alert (TA 2017/1) has been issued by the Australian Taxation Office (ATO) warning taxpayers of a crackdown on arrangements involving common trust and company structures. The ATO is concerned that certain structures containing both company and trusts may be attempting to fragment integrated trading businesses in order to re-characterise a portion of the income as passive income. The structure usually involves a trust holding the passive assets of the business (commonly land, equipment, intellectual property etc.), which charges a fee or rent for the use of the assets to an operating company.

The ATO's Concern

The ATO's concern is that instead of the business income being taxed at the normal corporate rate (currently 30%), the passive income distributed by the trust is subject to tax at lower rates. This is particularly the case where the unitholders in the trust are non-residents who may be able to benefit from concessional tax rates for Managed Investment Trust (MIT) income of 15%, or from the limitation of tax on various items of passive income under relevant tax treaties (e.g. 5% for certain royalties, 10% for interest).

Not Limited to Stapled Structures

These arrangements may involve stapled structures where the units in the trust are "stapled" to shares in the company, but the ATO has stressed that their concerns are not limited to stapled structures and may apply to any trust and company where a business is separated in a "contrived way".

The ATO has indicated that Australian real estate investment trusts (A-REIT), which primarily derive their income from unrelated third-party tenants, are not intended to be caught by the alert. However, any structure which contains a trust and a company with significant inter-entity transactions between them can potentially be caught.

Industries Targeted

The types of industries in which such structures are common include hotels and serviced apartments, agribusiness, infrastructure etc. Unfortunately, the alert does not clearly identify the industries intended to be caught. However, there is acknowledgement that businesses involving "third-party use of building" may be allowable (such as serviced apartments and perhaps hotels) where it is common for those buildings to be leased to third-party operators. In these circumstances, taxpayers are encouraged to engage with the ATO to ensure the operating entity retains a sufficient share of the profits.

What Should You Do?

The ATO have indicated that they will be considering the issues further to develop their technical position and will issue further guidance, including guidance on the inter-entity transactions allowable. If you are considering a structure that involves transactions between a company and a trust, you should seek professional advice immediately to determine whether the arrangement could potentially be caught. For existing structures, we recommend the trustee, manager and investors should consider their position to determine the potential impact of the ATO's position and to determine whether any changes should be made to the arrangements.

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