



## wash sale arrangements .....

In April 2008 the ATO issued Taxpayer Ruling TR 2008/7 to warn taxpayers on certain wash sale arrangements used to reduce capital gains or claim deductions.

The important point is that the general anti-avoidance provision known as 'Part IVA' sometimes stops you claiming capital losses.

### **What is a wash sale arrangement?**

Wash sale arrangements dispose of an asset, generally shares, with the intention to generate a capital loss. Subsequently, an asset that is the same asset or substantially the same asset is acquired.

### **What are the rules surrounding this type of arrangement?**

The ATO says that Part IVA stops you claiming a capital loss when there has been a sale but there has been "no significant change in the taxpayer's economic exposure" to the investment. This may occur where the interest in the asset is in some way reinstated by the taxpayer, in order to apply a resulting capital gain or loss or allowable deduction against a capital gain or assessable income already derived or expected to be derived.

Reinstatement of the taxpayer's interest is commonly achieved by a taxpayer selling a capital gains tax (CGT) asset and creating a trust over the asset or transferring an asset to a trust.

There is an exception to this if the person had a dominant reason for the sale other than generating the capital loss.

### **What type of wash sale arrangements cause concern?**

The ATO considers that wash sale arrangements of the type described above may give rise to taxation issues including whether:

- the general anti-avoidance provisions in Part IVA of the Income Tax Assessment Act 1936 should be applied to cancel all or part of a relevant capital loss or allowable deduction from the wash sale arrangement where the taxpayer disposes of the assets with every intention of acquiring the same or substantially the same assets, or otherwise continues to benefit from the asset, and
- 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.

### **When does Part IVA apply?**

Whether Part IVA applies will always depend on the exact factual situation and the ATO's judgment of the main purpose for the sale.

### **What happens if Part IVA applies to a wash sale arrangement?**

If Part IVA applies to a wash sale, the ATO may make a determination to cancel tax benefits obtained in connection with the transaction. The application of Part IVA to any particular arrangement depends on an assessment of all of the circumstances of the arrangement and the relative weight that should be attached to each of those circumstances.

## Examples

The examples in the appendix merely demonstrate the application of the rules to simple situations.

Examples where Part IVA stops you claiming a capital loss	Examples where Part IVA does not stop you claiming a capital loss
A wife transfers an investment to her husband, the main reason being to generate the capital loss.	A wife transfers an investment to her husband, the main reason being the division of assets in a divorce settlement.
A person transfers an investment to their SMSF, the main reason being to generate the capital loss.	A person transfers an investment to their SMSF, the main reason being that it was part of their financial plan to make a contribution to the SMSF at this time.
A person transfers worthless shares to their family company. There is no value to the company in this transaction so it must have been done to generate the capital loss.	
A person transfers their shares to their stockbroker with the stockbroker agreeing that they will transfer the shares back a few days later at the same price.	A person sells their shares on market with an expectation that when they receive the proceeds they will acquire more shares, possibly in the same company. <sup>1</sup>
A husband and wife transfer their investments to a trust of which they are the two beneficiaries.	A husband and wife transfer their investments to a trust of which their children are the beneficiaries. The trustee genuinely applies the money for the benefit of the children.

## Where can I obtain more information?

Taxation Ruling TR 2008/1 is available via the ATO website.

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<sup>1</sup> This is the most extreme of the examples if the person does acquire shares in the same company. It is always better to buy shares in a different company and the longer the gap between the sale and the purchase the better. These are factors that mitigate against the problem of an aggressive ATO auditor causing trouble.